THE

U-TO-DATE

READY REFERENCE

(Ci-l & Revenue)

BY

BASANTA KUMAR PAL,
PLEADER,

Author of The Up-to-Date Criminal Reference, Estates Partition & Survey Acts, &c, &c.

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Preface to the Fifth Edition.

In bringing out the Fifth Edition of this book I beg to convey my heartfelt thanks to the members of the Bench and the Bar.

In this Edition also the book has been thoroughly revised and materially improved and has been enlarged by about 500 pages composed of solid matter but its price has been increased by As. 8 only while the small types, solid compose and rigorous compression and the singularity of volume and index of the book have retained the portability and facility of reference which are its special features.

Case-law from all the Reports, including I. C. and A. I. R., up to the very end of 1929, have been fully incorporated and the recent amendments in the B. T. Act and T. P. Act have been carefully considered.

Successive editions of this book within a short period have prompted some persons to make attempts to publish digests on similar lines but as the most intelligent class of people like those of the legal branch are not to be duped by mere alluring advertisements, their books have not seen Second Editions and even the reduction of the price to half in one case and the declaration that the book (which was printed three years back) contains cases up to the "present day" have proved to be futile.

Any intimation as to any error detected in this book will be very thankfully received.

NARAYANGANJ,
1st March, 1930

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——an account stated does not extinguish the original debts on which the account is based. It is open to the creditor to sue according to the account stated or on the original contract. 63 I. C. 280.

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shebait

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and
C. V
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agent in answer to the demand
his conduct cannot be deemed to
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——[illegible] n or running account between two [illegible] hich contains items between the [illegible] lue can be ascertained, 6 C. L. J. [illegible]

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was that there was dissolu-
as barred under Art 106 L
M 185. P. C.

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——suit against the agent must be for all transactions. 17 C W N. 67 : 40 C. 335 17 C. L. J. 636.

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[illegible] the duty of account- [illegible] t of written accounts [illegible] t producing vouchers [illegible] rted. 52 C 766 1925 [illegible] 248) *fol* 13 C. W N

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[illegible] be exercised with cau- [illegible] ill be re-opened without

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——the question as to whether settled accounts can be re-opened and whether accounts included in another suit by plaintiff are not to be included in a suit for accounts are legal questions which must be decided by the court and not by the commissioner. 1 Lah. L. J. 220.

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ACCRETION.

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——tenant encroaches upon the land of others for the benefit of the landlord 10 C 820. 35 M. 618, 22 W. R. 246.

——an occupancy raiyat acquires the same right in accreted land 21 C 233 F. B but not so if he is an yearly raiyat of *ckur* or *dearah* land 33 C. 444

——when the terms of the kabulyat were "I shall not be entitled to keep in my possession any land which is in excess of land settled without fresh settlement from you (landlord)" and the tenant did not apply for fresh settlement, held that he was not entitled to retain

Accretion, general—*contd*

possession of lands which might be accretion to the tenancy. 31 C. W. N. 750 · 101 I. C 547 1927 Cal. 565

——a suit for assessment of rent of the encroached portion only is not suit under sec 52 and sec 188 B T. Act, does not apply. 4 C W N. 508, 14 C 201, 233, 15 C 47.

——gradual accretion enures to the land which attracts it 3 C W N. 777 P. C 26 I A 107

——but a tenant who has encroached upon land belonging to a stranger contiguous to the landlord's land in his occupation, is not liable to pay rent to the landlord even though he had agreed to pay rent for the land actually in his occupation, 105 I. C 737 : 1928 cal 142, but the Punjab H C. has held that the presumption in such cases is that such encroachment enures to the benefit of the landlord unless the presumption is rebutted by proof that at the time of encroachment the tenant intended it for his own exclusive benefit. 107 I. C. 356 1928 Lah 351.

——the principle of English law is that an accretion must be formed by gradual slow and imperceptible degrees The words 'slow' and "imperceptible' are only qualifications of the word gradual and the test laid down is relative to the conditions to which it is applied The actual rate of progress necessary to satisfy the rule when used in connection with English rivers is not necessarily the same when applied to the rivers of India on account of the different conditions in India and in England. 45 M 207 ; 26 C. W. N. 348 35 C L. J 463 67 I C 1 P C

——an occupancy raiyat can claim accretion. 13 C W. N. 269: 8 C. L. J. 537, 4 C. L. J 63 : 38 C 444, 14 C W N 681.

——a non-occupancy raiyat can claim benefit of sec. 4 of Reg. XI of 1825 and is entitled to claim accretion 13 C. W N. 269.

——occupancy rights in an alluvial accretion to a non-occupancy holding airse only by 12 years' continuous cultivation of that accretion 29 I. C. 37

——an auction-puchaser at revenue sale is entitled to accretion by alluvion 8 C W N. 676

——accretion in non-tidal and non-navigable rivers in India belong to the riparian landlords It is part of the Common Law of India that the ownership of river beds is presumed to vest in the riparian owners. 55 I. C 770 (M).

——where the lands emerge from a *bhil* the possession of the owner is presumed to continue, until the contray is shown, when such lands remain *patit* or waste, whether it be culturable or unculturable. 24 C. 256 : 1 C W. N. 304. (9 C. 744, 19 C. 660) *ref.*

——the bed of pubic navigable river is the property of the Govt. if there be slow accretion on either side by private owners it is their accretion. If private property is submerged and again left bare it belongs to original owner. 26 C. L. J. 590 20 Bom. L. R. 49 : 22 M. L. T. 438 : 43 I. C 361 P. C., 25 C. L. J. 69 : 20 C. W. N. 1311 : 39 M. 1311 : 18 Bom. L. R. 1007 : 14 A. L J. 1114 : 35 I. C. 902 P. C. 24 C. W. N. 809.

Accretion general—*contd.*

...the property of the neigh-
and the proprietors on each
e of the stream. 22 C W. N.
F B, 55 I. C 770, 58 I.
C. 689.

——what is navigable river. 22 C. W. N. 872, 24 C. W N. 809, 17 C. W. N. 1108.

——land accreted to rent-free holding is liable for rent 18 C W. N. 1206. 19 C. L. J. 595

——with respect to accreted land the landlord can treat him as tenant or as trespasser. 16 C. W N 634, 2 C. L J 125, 25 C 302 But after treating him as tenant the landlord cannot change position. 4 C. W. N. 508. 13 C W. N. 635

(2) Accretion to mortgaged property.

——a mortgagor's right to the accession under S. 63 T P. Act does depend upon whether the mortgagee had any special advantage by reason of his position as mortgagee in making the acquisition Every acquisition by mortgagee of the sub-tenure does not enure to the benefit of the mortgagor, 17 C. W N 586, 5 C. 198 5 C L R. 213 P. C. *Ref*

——in the case of jote also the benefit of mortgagee enures to the benefit of the mortgagor 6 C W N. 372

——upon redemption a mortgagor is entitled to take over the accession to the mortgaged property on payment of the cost of the acquisition. The mortgagor is not obliged to take them. 42 I. C. 468 : 163 P. W. R. 1917.

——ss 63 and 70 must be read together and the accession must be received during the continuance of mortgage. Accessions after the decree for sale does not pass to the auction-purchaser but belongs to the mortgagor as the mortgage interest had ceased to exist at the time of accession. 70 I C. 367: 41 M. L. J. 490: 1921 M. W N. 510

——question considered whether the accretion to mortgaged shares by the issue of fresh capital can be treated as belonging to the corpus. 46 B. 529.

——where one of several mortgagees acquires tenancies while in possession and claims the cost of such acquisition upon redemption, no merger under S. 63 T. P. Act takes place. 56 I. C. 193.

Accretion to mortgaged property—*contd.*

——when a mortgagee of a plot of land plants trees on the same, the trees are to be considered as an accession. But as they are capable of separate possession or enjoyment without detriment to the principal property, *e g*, by being cut down and removed, the mortgagor cannot get them unless he pays for it. 86 I. C. 929: 1925 All 748, 85 I. C 690 1925 All 794. *But see below.*

——a grove of mango trees planted by the mortgagee is an accession within sec. 63, T. P. Act and on redemption the mortgagor is entitled *to it without paying any compensation when they were* planted without his consent and the mortgagee cannot claim them after cutting since the land would not be restored to its former condition. 88 I C. 908. 23 A L J. 915 1926 A 67.

——tenancy lands are accessions when the tenant is ejected by the mortgagee and become the property of the mortgagor after redemption, provided he pays to the mortgagee the expenses of acquiring them. 78 I C 466 1925 Pat. 336.

(3) Adverse possession in accreted land.

...nant must possess as ... 698, 31 C 397, 2 C. L. J. ... J 133.

...d upon can commence to be adverse only when adverse title is asserted or the landlord ... ial to enable the adverse possession

... be adverse when ... C. 397, 13 C. W. N. 698

——if for more than 12 years the tenant has denied the landlord's right to any separate rent from him, the landlord, apart from sec. 52, cannot recover additional rent for the accretion. 16 C. W N. 634

——a tenant who has been occupying land other than that ... than 12 years claiming ... re acquired a limited ... I. C. 184 (c) ... land. 2 C L .J. 125,

... enures to the benefit

——while a tenant is *bound* to treat the encroachment on his landlord's land as held by him under his landlord, the latter is *not bound* to treat the land on which his tenant encroaches as held under a tenancy. But the landlord's right to recover possession of the land

Adverse possession in accreted land.—*contd.*

encroached upon may be lost by the tenant having adversely to the landlord asserted his title as tenant to the land for more than twelve years. 16 C. W. N 634.

——where a person is shown to have exercised acts of possession on land as it reformed and became capable of possession and all these acts of possession were all done in the assertion of claim to the land by virtue of settlements made by the Govt. the possession

(4) Reformation *in situ*.

——land which is reformation *in situ* after submergence is the land of the original owner and cannot be claimed by way of accretion by others. 24 C. W. N. 211 29 C. L. J 564: 52 I C. 673, 3 P L. J. 438: 47 I C. 102.

——when a land belonging to a proprietor is submerged and

—— when tenants brought a suit after diluvion and got a decree for proportionate abatement of rent, in the absence of any other act showing an intention to relinquish those lands, it cannot be said that the tenants consented to relinquish their rights in the diluviated lands for all time to come So when the lands are reformed the tenants are entitled to them. 100 I. C. 687: 1927 Cal. 921

——it is difficult to see on what principle the proprietor of a certain defined estate who loses the use of a portion of it owing to its temporary submergence under water and obtains in consequence from Govt. under S 5 of the Act of 1847 proportionate reduction of *Sadar jama*, is thereby deprived of all rights in such portion so as to be unable to recover it as *reformation on its old site* on its re-appearing above water. 41 C. L. J. 73, 3 W. R. 51 *fol.*

——lands washed away and afterwards reformed *in situ* are not lands gained by increment within sec. 4 of Beng. Reg. XI of 1825 and connot be claimed as accretions either by the landlord or tenant. A *chur* which was a reformation *in situ* formed part of the *putni* tenure and the zemindar was not entitled to khas possession of them 41 C 683 : 18 C. W. N 369 : 19 C. L. J. 272 : 16 Bom. L. R. 323 P. C.

Delay in bringing suit—*contd.*

owner is not excusable in the case of Govt. and would not create an equity in the private owner. 63 P. R. 1913 : 18 I. C 799 : 113 P. L. R. 1913.

(4) Proof of acquiescence.

——it is a question of legal inference from facts found. 3 C. W. N. 502 · 26 1 A. 58 21 A. 496 P. C.

——the burden of proof is on the person who relies on it. 11 C. W. N. 848, 82 I C. 309 (c) : 1925 Cal 288

Actionable claim, see, *T. P. Act s. 3*

ADJOURNMENT *see C P C. Or. 17, rr 1-3*

ADJUSTMENT *see 'Account' and C. P C. Or. 23 rr. 1 to 4.*

ADMISSIBILITY.

Sub-headings of notes.

(1) **Admissibility of documents** *(general)*
(2) **Admissibility of** *various classes of* **documents.**
(3) **Admissibility of evidence.**
(4) **Admissibility of statement.**
(5) **Objection to admissibility** *of evidence and statement.*

(1) Admissibility of documents, *(general)*

——the court cannot look at any document not on the record without giving other side opportunity of being heard. 47 I. C. 871 : 1923 Cal. 194.

——thak and survey maps are not conclusive as to whether lands which formed part of the bed of a river were included in the Permanent Settlement of 1793 · 36 C. L. J 336 · 1923 Cal. 247 : 71 I C. 849 but they are good evidence of possession 4 Pat L. T. 487 1923 P. 558 : 72 I. C. 648.

——recitals of boundaries in the document of a third person are not admissible. 35 C. L. J. 91 : 1922 Cal. 251, 29 C. W. N. 469.

——the absence of an entry in a document is distinct from the question whether the contents are binding on persons not parties to it. [illegible]

[illegible] in 1792 and 1797 : [illegible] *of tenures* 36 C. [illegible]

——where a judgment is admitted to prove that there was litiga- [illegible]

——a statement made to an S. I. just before death is not evidence. 3 Pat. L. T. 398 : 1922 P. 40 : 65 I. C. 1002.

——the production of a judgment in a previous case only establishes the fact that there has been a judgment but it does not prove its correctness. 36 C. L. J. 9 : 1923 Cal. 240 : 70 I. C. 194.

[Adm]issibility of documents—*contd.*

——a decree between a co-sharer and the Government is ad[mis]sible. 50 C. 446 : 45 M. L. J. 444 : 1923 M. W. N 511 : 32 M. L. T. P. C.

——the court should not rest its decision merely on suspicion [s]upported by legal testimony 36 C L. J 396 : 27 C. W. N. 305 : [3]3 Cal. 220 25 C. W. N. 409.

——substance of pleadings contained in the judgments may [fur]nish evidence of the allegation made by the parties on that [occ]asion. 36 C. L. J 434 : 1923 Cal. 18 : 71 I. C. 680, 18 M. 73, 9 C. 586, . L J. 521 15 M 19, 15 M. 378.

——recitals in a will are not evidence to prove the truth of the [fac]t stated therein but they can be looked at for seeing whether it [is c]onsistent with the assertions made by the testator in his life[tim]e. 27 C. W. N. 722.

——in construing admission in a pleading a court ought to look [at] the plaint and the pleadings as a whole. The rule is that if a [par]ty makes a qualified statement, it cannot be used against him [apa]rt from the qual fication. 20 N L R. 63 : 78 I. C. 542 : 1924 [Na]g 129.

— [illegible] 49 C. 573 :

conclusion
[e]vidence of
. 1923 Cal

——former statements of a witness can be used to contradict [or] corroborate them but they cannot be used as substantive evidence. C L. J. 109.

——any particular answer given by a witness may after it is [gi]ven, be ruled out as irrelevant, but the court cannot say before[ha]nd that all the evidence not yet taken is going to be irrelevant. [19]23 Nag. 58.

——a kabulyat executed between the plff.'s tenure-holders and [hi]s superior landlord cannot affect the deft.'s status in any way that [ex]isted before the date of the kabulyat. 1923 Cal 375.

——much weight cannot be attached to a partition paper in the [ab]sence of detailed information. 36 C L. J. 389 · 1923 Cal. 261.

——partition deed of property of Rs 100 or upwards must be [re]gistered. 15 C. W N. 375, 1923 Rang 57, 74 I. C. 47, 12 C. L. J. 25, 3 M. 581, 2 Bom L. R. 800, 12 Bom L. R. 635) Expl. *contra* it need [n]ot be in writing. 25 C 210.

——an unregistered document of partition is inadmissible and [or]al evidence as to partition is also inadmissible, but if the arrange[m]ent has been acted upon and there is part performance by the [p]arty seeking relief proof of the arrangement can be let in. Pat. L T. (657. 1923 Rang. 57 : 74 I. C. 47, 20 A. L. J. 777 : [1]922 A. 493

——fact of partition may be proved by oral evidence though the [d]ocument is inadmissible. 1923 Lah. 392, 25 C 210.

Admissibility of documents—*contd.*

——when an instrument is once admitted in any proceeding either under s 35 or 36 of the Stamp Act it is available in that proceeding for all purposes as if it had been properly stamped at the outset 27 C. W. N. 513.

(2) Admissibility of various classes of documents.

Amalnama, see *Registration Act, ss. 17 and 18*

Award, see *C. P C., "Arbitration"*

Batwara paper.—see *Partition paper (below)*

Certificate—of doctor, as regards age is not admissible. 21 C. W N 257 **P. C.**

——of manager, cannot go in evidence unless it is proved by himself. 19 C. W N 1148.

——a certificate of guardianship does not prove the age of a minor 38 C L J. 186 : 71 I. C 336.

Cess return., see " *Cess Act, Sub-heading (N)*"

Chittas, kabulyats, accounts and receipts—are valueless without proper oral evidence regarding them. 29 C, 187 6 C. W. N. 386 . 29 I. A, 24, **P C**

——*Chittas* prepared by zeminders in the absence of tenants are admissible in evidence in rent suits but their evidentiary value will depend on circumstances of each case. 88 I. C. 548 · 1925 Cal. 1104.

Chittas of Govt.—chittas prepared by Govt when interested as proprietor of the estate cannot be said to be a public document. 17 C. W. N 151, 19 C. W N. 1015 P 1016

——made for revenue purpose is public document 19 C. W. N. 1015 p. 1016, 19 C. W. N 1038.

——chittas prepared for the purpose of distributing the public revenue on a partition of an estate is a public document and is evidence of the state or affairs existing 15 C. W. N. 515.

Compromise decree—in title suit is admissible in rent-suit to prove rent stated therein *i.e.* as admission. 13 C. W. N. 217.

——in contravention of sec. 29 B T. Act. is nullity. 17 C. W. N. 496, 71 I C. 143 . 4 Pat. L. T. 30, 72 I. C. 40.

For other cases see Or. 23, C. P. C.

——is admissible without registration. 38 B. 576.

see compromise petition, below.

Compromise petition—to lease is admissible. 17 C. W. N. 347, 19 C. W. N. 347.

——relating properties other than in suit is not admissible. 36 M. 46. *Contra.* is evidence of title. 1917 Pat. 161, *proves party's admission*, 1917 Pat. 181.

——a consent decree relating to properties other than in suit is [illegible] C. L. J. 388, 36 C. 193 : 5 C. L. J. [illegible] cree is passed may be admissible [illegible] agreement to grant a lease. 16 [illegible] L. J. 543

Admissibility of various classes of documents—*contd.*

——where an agreement to grant permanent lease of property, not the subject of suit, was embodied in a petition of compromise, such document can be proved in a suit for specific performance of the agreement to grant the lease. 19 C W. N. 347, (17 Mad. L J. 218, 14 C. W. N. 65, 39 C. 663) *fol*, (9 B. 63, 10 B 101) *not fol.*

——when it forms part of the cosideration, it is admissible. 35 C. 837 : 12 C W N. 849 : 7 C. L J. 492 5 C. W N. 485, 24 I C. 135, 34 C. 456

[illegible] oveable

19 C.

t lease.

——filed after decree in a mortgage suit as regards interest and adjustment which the court accepts, is admissible. 17 C W. N. 565

——filed in criminal court as regards increment of rent but [illegible] 12 C. W. N. 854.

l as evidence when 265 P C

perties other than of

—alternative terms in, must be given effect to. 23 C. L J. 483.

As to the topic of necessity of registration, see, *Registration Act, ss, 17 and 18.*

Decree obtained by co-sharer.

——decree for rent obtained by a co-sharer is admissible to prove rent. 22 C W N. 304.

——decree for rent obtained by co-sharer making others *pro-forma* defendant is admissible to prove rent in a suit brought by a *proforma* defendant, 17 C. W. N. 1016, 22 C. 533, 10 C. W. N. 1084, 25 C. 522.

See **Judgment below.**

Horoscope is not admissible to prove age. 17 C 849, 9 C 613 *Contra.* It is admissible 17 M. 134

Hukumnama, see *Amalnama, above.*

Jama wasil baki papers

——Jama wasil Baki papers are only corroborative evidence. 10. [illegible] independent evidence 10. C.

[illegible] ot outweigh the value of *Dakhilas* (rent receipts). 101 I. C. 347 : 1927 Cal. 493.

——jamawasil baki papers and jamabandi papers can be admitted in evidence under s 32 (2) but it must be clear that the person who made them, are dead and that the papers were made in the ordinary course of business. 90 I. C 564 (c)

Admissibility of various classes of documents.—*contd.*

Judgment, order, decreee etc. see *ss. 40—44 Evi Act.*

Land revenue reports not admissible. 20 C. L. J. 516.

Partition deed see. *"Registration Act. ss 17 and 18"*

Petition—verified, is admissible to prove admission, 14 W. R. 484, 21 W R 34

For **Petition of compromise** see *compromise petition under Or. 23 C P. C.*

Plaint——rough draft of, previously filed, is admissible 15 M. 19.

——copy of verified plaint is admissible. 15 W. R. 437, 14 B. L. R. Ap 31

——unless the condition of sec. 32 of the Evi Act. exists a plaint cannot be admissible to prove a statement made by the superior landlord 39 C L. J 90.

Rent receipt—may go in evidence without proof of writing. 24 C. 251, 7 W R 15, 12 W. R. 34, 20 W R 264

——when the genuineness of a rent receipt is sworn to by the tenant by whom the rent had been paid it was legally sufficient to prove the receipt, notwithstanding that the person whose signature it bore had not been examined 82 I. C 974 (C)

——rent receipt stating tenant to be tenant-at-will is no proof against him unless his consent to it is proved. 24 C. W. N. 1 **P. C.** 25 C. W. N 378.

——where a tenancy was transfered and the landlord's *gomasta* granted a rent receipt to the transferee without stating that he was in possession, the landlord was not held to have recognised the transfer 1926 Cal 264

Thak map and survey map—are public documents and evidence of possession and as such of title 18 C W N 1281 **P.C** 19 C W. N 1280, 25 C L J 425 **P C.** 13 C L. J 293, 625, 28 C L. J. 223, 21 C W N, 291 **P.C** , 30 C. 291 : 7 C W N. 193 **P. C.**, 7 C. W. N. 849.

——in case of boundary dispute Topographical survey maps of 1869 are admissible in evidence under sec 36 Evi. Act. 11 C. W. N. 230 : 30 C. 291 7 C W N. 193.

——an entry in the thak map that it was *prepared in* the presence of its representative of certain parties is admissible in evidence. 10 C. L. J. 527, 7 C. W. N. 849 *fol.*

——the presence at the preparation and the signing by the parties or their agent of a thakbust map, may fairly be *taken to* be an admission by the parties of the boundary lines between adjoining villages 35 C. 621.

For other cases, see, cases under "Bengal Estate Partition Act, s. 49."

Unregistered document—agreement between mortgagor and mortgagee varying the term of the mortgage-deed is not admissible 17 C. W. N. 233 **P. C.**

——an agreement for *partition need* not be *registered.* 37 C. L. J. 435.

Admissibility of various classes of documents—*contd.*

——an unregistered deed of gift executed in 1882 is admissible for collateral purpose. 34 C. L. J. 432 : 26 C. W. N. 65.

——an unregistered deed of gift, though inadmissible to prove conveyance, is admissible to show the nature of interest acquired by the donee. 82 I C 67 : 1924 Mad. 800 : 1924 Pt. W. N. 571.

——an uuregistered partition deed is admissible to prove fact of division in status. 61 I. C. 399.

——document varying the terms of a registered document is not admissible. 39 C. 284 : 16 C. W. N. 55 F. B, 7 C. 293 *appl.* 17 C. L. J. 312.

——document varying the rent of lease is not admissible. 27 C. L. J 107, 30 C. 284 : 14 C. L. J. 411, 35 C. 1010 8 C. L J. 90.

——deed of family arrangement is admissible. 35 A. 502

——deed of transfer of mortgage-decree is admissible 22 C. W N. 641, 23 C W. N 51n.

——composition deed is admissible. 19 C. W. N. 91n. 38 B. 576.

——document which is compulsorily registrable is not admissible 4 C 80. But it is admissible as acknowledgment. 5 C. 215, 26 C. 334, as liability to debt 5 C. 611, as personal liability, 9 C 523, in a case of specific performance. 12 C. L. J. 548.

For other cases see ss 17 and 18 of the Registration Act.

Written statement—is admissible to prove admission. 22 W. R 303.

(3) Admissibility of evidence.

(How admissibility is to be determined.)

——admissibility of evidence must be determined with reference to the provisions of the Indian Evidence Act. 24 C. W. N. 501 F. B. (5 C. 744 : 7 I. A. 63, P. C. 4 C. 483, F. B. 7 A 385, F. B., 10 A. 289, *fol.* 12 A. 1, F. B. 2 Bom. 61) *Ref.*

(Evidence in previous proceeding)

——evidence in previous proceeding is admissible with the consent of both parties. 38 M. 160

——in the absence of proving circumstances specified in s. 33 of the [illegible] ...uit of deposition [illegible] C W N. 729 P.C. [illegible] suit as witness is [illegible] under s 33 Evi.

——evidence given in previous deposition is not admissible unless it is put to the witness. 21 C. W. N. 175, and opportunity is given to tender explanation or to clear up particular points of ambiguity or dispute 19 C. W N. 729 P. C.

——evidence given in previous deposition is not admissible without proving identity of the person 13 C. W. N. 409.

(Evidence as to the real nature of a document.)

——evidence may be given to show that a deed of sale is a deed of gift. 13 C. L. J. 510 P. C.

Admissibility of evidence—*contd.*

see, *Evi. Act ss. 31 to 106.*

document

(*Entry in the heading of deposition*).

——description of witness in the heading of the deposition recorded, is no evidence 8 C W N 241, 26 A. 108 P. C.

——statement of age of a witness, at the heading of the deposition is not evidence 28 C W N. 1033 · 80 I C. 357 · 39 C. L J. 90, 8 C W N 241 26 A 108 P. C.

(*Absence of entry*)

——absence of entry in a document is relevant · its effect is to be determined on the light of the general evidence in the case. 36 C. L. J 389

(*Witness dying before cross-examination*).

——evidence of a witness dying before cross-examination is not admissible. 17 C W N 230

(*Evidence of plff, after deft has closed his case*).

——evidence of plaintiff to contradict the defendant's document after defendant has closed his case is not admissible, 37 B 582.

(4) Admissibility of statement.

(*Previous statement*)

——statement of one-self in a previous deposition to prove pedegree is admissible if that was made at a time when there was no controversy. 12 C W N. 266.

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——previous statement may be proved to be mistake or untrue unless another person has been induced thereby to change, his position. 11 C W. N 321 p 329 P. C.

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e is admissible. [illegible] P. C.

Admissibility of statement—*contd.*

(Statement of Presiding Judge as to what happened before him.)

——statement of Presiding Judge as to what happened before him is conclusive evidence 21 C. W. N. 33 F. B.

(5) Objection to admissibility of evidence and statement.

(When objection is to be taken)

——objection to admissibility may be taken at any time but the method of proving must be questioned before proof 9 C W. N. 111

——objection to admissibility of document should be taken at the first instance and cannot be taken in appeal. 6 C. L. J 22, 34 C. 1059 : 6 C. L. J 678 P. C.

——an objection as to the mode of proof not taken in the trial court cannot be taken for the first time in second appeal. 36 C L. J. 186 64 I C. 266, 72 I C. 748

——the proper time to object to the competence of a witness is when he is tendered but failure to do that does not estop to take objection during argument, 45 A. 226.

(There is distinction between document and evidence)

[illegible] evidence without objection [illegible] but where an evidence is [illegible] bjected to afterwards. 35 [illegible]

(Effect of erroneous omission to object.)

——an erroneous omission to object to that which is not evidence does not make it admissible 23 I. A. 106, 29 A 76 P. C.

——where a certain piece of evidence is not legally admissible the omission to object to it does not make it admissible. 40 C L. J. 39 78 I C. 219 1924 Cal. 1042.

——when evidence is received without objection in direct contravention of an imperative provision of the law, the principle on which unobjected evidence is admitted, be it acquiescence, waiver or estoppel, none of which is available against a positive legislative enactment, does not apply. 27 C. W. N 134

——a document required to be attested cannot be admitted even for collateral purpose without being properly proved and its admissibility without objection may be challanged at a subsequent stage. 35 C. L J. 473 27 C. W. N. 134 : 1922 Cal 160 · 68 I C 86.

(Consenting party connot subsequently object.)

——if a party consents to the recital in prior judgment being taken as proof of a will, he cannot object to their admissibility in appeal, 43 M. L. J. 448 1922 M. W N. 464 . 31 M. L. T. 125 : 69 I. C. 15.

(When the court is to decide admissibility.)

——the court may at the time when the evidence is decide admissibility. 17 C. 173, 9 W. R. 587, 1 A. L J. 224 n

Admission *see Evi Act. Ss. 18-21.*

ADVERSE POSSESSION.

Sub-headings of notes.

(1) Adverse possession, (general.)

(a) *Acquisition of limited interest by adverse possession*
(b) *Acquisition or creation of title by adverse possession*
(c) *Adverse possession determines title*
(d) *Adverse possession is an incumbrance.*
(e) *Distinction between adverse possession and dispossession.*
(f) *Effect of possession under invalid title-deed.*
(g) *Intention to possess adversely is necessary*
(h) *Interruption to adverse possession*
(i) *Nature of possession necessary to constitute adverse possession.*
(j) *Owner must have knowledge of adverse possession.*
(k) *Owner must have right to demand possesion.*
(l) *Pleading and proof of adverse possession.*
(m) *Possession referable to lawful title.*
(n) *Possession when follows title.*
(o) *Position of a person acquiring title by adverse possession*

(2) Tacking on previous possession.
(3) Adverse possession to waste jungly and sub-merged lands and sub-soils.
(4) Adverse possession in accreted lands.
(5) Adverse possession by or against co-sharers.
(6) Adverse possession by tenant.
(7) Adverse possession by purchaser of non-transferable occupancy holding.
(8) Adverse possession by or against mortgagor and mortgagee,
(9) Adverse possession by or against widow or reversioner
(10) Adverse possession relating to shebait and trustee.
(11) Adverse possession against lessee or lessor.
(12) Adverse possession against licensee.
(13) Adverse possession by or against Municipality or Government.
(14) Adverse possession by or against community
(15) Adverse possession by mistake of fact.

(1) Adverse possession, (general)—

(a) *Acquisition of limited interest by adverse possession.*

——a limited interest such as that of a tenant can be acquired by adverse possession. 35 C. L. J. 185, 35 C. L. J. 182, 50 C. 487, 16 C. W. N. 634.

——possession in the limited interest such as an intermediate tenure may be just as much adverse as is adverse possession of a complete interest in the property, 42 C. L. J. 14: 89 I. C. 747: 1925 Cal. 1189.

——but where a tenant is entitled to be in possession as of right, the mere additional fact that a claim was asserted to have

Adverse possession—*contd.*

an unlimited number of years in which his right to the lands would subsist is not a circumstance to enable him to prescribe a permanent tenancy as against the landlords. 31 C. W. N. 1099: 104 I C. 812.

——but it has held by the Bombay H. C. that the right of permanent tenany can be acquired by adverse possession. 96 I. C. 827: 1926. Bom. 384: 28 Bom. L. R. 748.

——a limited interest in property can be acquired by adverse possession 35 C L J 182, 185, 50 C. 487, 60 I. C. 717, 41 M. L. J. 194: 1921 M W. N. 385: 13 L W, 685 44 M. 946 12 C. W N. 636: 35 C. 470, 2 C. L J 125. 16 C W. N. 634, 21 C W. N. 642 25 C L. J. 487: 40 I C. 337 P.C., 44 C. 425: 21 C W N. 177, 79 I. C. 117: 1924 Nag. 222, 19 C. L. J. 77, 18 C W. N. 654.

——the quality and extent of the right acquired by adverse possession depends upon the claim accompanying it and upon the nature of the *animus possidendi* 86 I. C. 433.

——the deft. in a suit for possession can set up the plea of adverse title to a limited interest such as an occupancy right or *perpetual tenure.* 4 Pat 139: 84 I. C. 586: 6 P. L. T. 12, 1925 Pat 216.

——in a suit for khas possession if the deft. proves only the question of a limited interest *i.e.*, that of a tenant when he had set up the plea of adverse possession, the plff. is entitled to a decree 38 I C 459 (c).

(*b*) *Acquisition or creation of title by adverse possession.*

——trespasser for 12 years acquires the title of a proprietor and becomes liable to pay revenue and his title passes by revenue-sale. 12 C W. N. 528

——adverse possession creates title 18 C. W. N. 904, 20 C. W N. 773, 23 C. L J. 151.

——possession on the assertion of a title different from that declared in a decree cannot be overthrown even inspite of the decree, 37 C L, J. 219: 32 M L T 109· 71 I C 641 P C.

——fishing rights can be established in a public navigable river if exclusive acts of possession are shown for the statutory period. 31 C. W. N. 473: 103 I C 13: 46 Cal. 322: 1927 Cal. 403.

(*c*) *Adverse possession determines title*

——adverse possession determines title. 18 C. W. N. 654, 35 C. 470. 12 C. W N. 636, 16 C W N. 634.

——right of a mortgagor as well as of mortgagee is extinguished by adverse possession. 36 M. 97, (7 M. I. A 323 p. 355 P C., 5 A. 1 P. C., 2 M 226 p 229 P. C., 1 W. R 375, 2 N. W. P. H. C. R 223) *fol.* 33 C 1015 *not fol.*

——possession of mortgaged property by a person claiming under a purchaser of the property at a sale in execution of a decree against the mortgagor for rent due in respect thereof cannot be treated as adverse to the mortgagee. 33 C. 1015.

Adverse possession—*contd*

(d) *Adverse possession is an incumbrance*

——adverse possession is an incumbrance under ss. 159 and 161 of the B. T. Act 14 C L J 136, 16 C. L. J. 539, 23 C. L. J 485

——an adverse possession is an incumbrance within the meaning of s. 37 of Act XI of 1859 13 C L. J. 293, 25 C. 167. (*wherein earlier authorities have been revised.*)

——the purchaser at revenue sale gets the property free from adverse possession 23 C L J 151 34 I C 946.

(e) *Distinction between adverse possession and dispossession*

——distinction between adverse possession and dispossession—entry into land with permission and then claiming title is adverse possession and not dispossession, 10 C L J. 91, 92 I C. 556.

——dispossession implies the coming in of a person and his driving out another from possession Discontinuance of possession implies the going out of the person in possession and his being followed into possession by another. 36 C. L. J 35

(f) *Effect of possession under invalid title deed.*

——where for some reason or other a conveyance is void *ab initio* but possession passes under it, the transferee can acquire title by adverse possession 79 I C. 117· 1924 Nag 222 *contra* 42 I. C 908.

——the possession of the vendee, from the date of sale becomes adverse to the vendor 48 M. L. J 264· 1925 Mad 566 21 L. W 327.

——adverse possession does not begin under a transfer which is voidable 42 I. C 908, 19 Bom L. R 855

——a sale of a limited interest such as lease for a long time being invalid, the transferee does not acquire any better title than the transferor 24 Bom. L. R 1315 1923 B. 146

——where shebait creates permanent lease without legal necessity, lessee does not acquire title by adverse possession when the lease is found to be void 12 C W N. 63. 16 C L. J. 349 *contra.* 13 C. W. N. 805.

[illegible] le property [illegible] ossession as [illegible] 346 38 M. [illegible] 227.

(h) *Interruption to adverse possession.*

——a series of isolated acts of trespass with no continuity of possession would fall short of the requisite and if in fact there has been interruption possession during such interruption must be deemed to be with the person having the lawful right, 85 I. C. 594 : 1925 Cal. 981.

——occassional staying as guest does not interrupt adverse possession. 1923 M. 633 : 17 L. W. 629 : 72 I. C. 635.

——delivery of symbolical possession is sufficient to interrupt adverse possession against Jt. Dr. 22 C. W. N. 330 : 27 C. L. J. 191 : 34 M. L. J. 97 : 20 Bom. L. R. 502 : 43 I. C. 268 P. C., 37 C. L. J. 515,

Adverse possession—*contd.*
27 C. W. N. 673, 1923 Cal 313, 17 C. L. J. 19, 79 I. C. 1047 : 1924 All. 844, 84 I. C 952 ; 1925 Lah. 61, 46 B. 710 44 B. 934, 1922 Cal 313, 69 I. C 521 : 1923 Nag. 30, 49 M. L. J. 656 : 22 L. W. 274, 84 I. C 952 1925 Lah 61.

——but not against third person trespasser. 46 B. 932, 68 I. C 91, 36 C L J. 472 : 1923 Cal. 82, 22 C.W.N. 807, 1923 Lah. 534, 21 I C. 765, (M), 9 M L T 359 ; 9 I C. 271, 49 M.L J. 656 : 22 L W 274.

——a mere attachment under which possession is in no way disturbed cannot affect continuity of adverse possession. 49 M L J. 656 : 22 L. W. 274 : 90 I C. 1037 : 1926 Mad. 42.

——a mere judgment or decree declaring the title of a person in respect of property does not *per se* stop the running of limitation so long as the deft. continues in possession. 46 M. 525 : 70 I. C. 994 : 31 M. L T. 298 : 43 M. L. J. 737 1922 M. W. N. 676, 9 M. L. T 420 : 9 I. C. 795.

——the appointment of a receiver does not interrupt adverse possession which had commenced against the proprietor before the appointment of the receiver. 38 C. L. J. 220 : 76 I C. 511

(i). *Nature of possession necessary to constitue adverse possession*

——adverse possession is a mixed question of law and fact, 26 C W N. 890, 33 C. L. J. 344

——adverse possession to be effective must be adequate in continuity, publicity, extent of area and also actual, visible, exclusive and hostile 85 I. C 594 . 1925 Cal. 981.

——a series of isolated acts of trespass with no continuity or possession does not constitute adverse possession. 85 I. C. 594 : 1925 Cal. 981.

——the doctrine of constructive possession cannot apply to adverse possession. 13 C. L. J 30, 625, 15 C L J 281, 12 C W. N. 127, 19 C. W. N 565, 159n, 34 C. L J 465, 1 P L. T 474 : 1921 Pat 49 : 5 P L. J. 563 : 57 I. C 786, 44 C. 858 ; 21 C. W N. 642 · 25 C L. J. 487 P. C. 22 C. W. N. 721 : 28 C L. J. 293 : 47 I. C. 315, 85 I. C. 594 : 1925 Cal. 981.

[illegible]

——but in case of submerged land it may be otherwise. 51 C. 669 28 C. W. N. 637 : 78 I C. 679.

——possession to be adverse must be *nec-vine claim nec precaris* 50 I. C. 649 (C)

——symbolical possession by fixing bamboo with beat of drum does not [illegible] 50 I C. 45.

[illegible] disposses- [illegible] ith all the [illegible] L. J. 104.

——the mere fact of consent or acquiescence does not prevent possession being adverse. The test is whether the person setting up adverse possession held for himself, 17 C W. N. 595.

Adverse possession—*contd.*

——a licensee cannot claim title only from possession however long unless it is proved that the possession was adverse to that of the licensor, to his knowledge and with his acquiescence, 47 M. 572 : 47 M L J. 35 · 26 Bom. L. R 639 80 I. C. 835 P C. 54 I. C. 261 : 1 P L. R 60, 34 I C. 471 · 12 N. L R. 75.

——permissive possession may be converted to adverse possession. 12 Bom. L. R 956, 35 B. 79 . 8 I. C. 639, 8 M. L. L 280 : 7 I. C. 252

——intermetent user ef a pond accompanied by no assertion of right is a very common phenomenon in India and often arouses opposition. The pond is not susceptible of actual physical possession by the legal owner and possessisn follows title unless the usurper can prove long and continuous exclusion of the rightful owner. 4 Lah. L. J 461 1922 Lah 59.

——acts done on parts of a tract of land will be evidence of the whole only when the boundaries are clearly defined. 34 M. 353 . 9 I. C 9

——adverse possession does not extend to subsoil 6 Pat. L. J 563 57 I. C 786 1 Pat L. T 474, 1 P L T 84 : 55 I C. 113

——acts such as tethering of cattle and throwing cowdung would not amount to adverse possession. 27 C L J. 583, 69 I. C. 573 : (L) *conta*, L R 4 A. 378.

——the evidence of fisherman going into a tank, catching some fish and giving a share to a person does not amount to proof of adverse possession 86 I C. 767

——adverse possession of fishery-right can be established in a public navigable river if exclusive acts of possessions for the statutary period. 31 C.W.N 473 1927 Cal. 403 103 I. C 13 : 46 C L. J 322.

——the registration of the name of a person under the Bengal [illegible] the weight [illegible] cumstances [illegible] 465, 9 C.

——enclosure is the strongest possible proof of adverse possession 38 M 280 · 29 I C. 355, 211 C 765 (M)

——where the usufruct of the trees are the only profit to be derived from the land the enjoyment of the trees cannot be separated from the enjoyment of the sites on which the trees stand 28 I. C. 266 . 2 L W. 257.

——the same characteristics are necessary whether enjoyment is set up as the basis of title by prescription or as raising presumption of lost grant. 34 M. 353 : 9 M. L. T. 181 · 8 I. C. 9.

——attachment under S 146 C P. C. operates in the same way as *vismajor* of the floods and constructive possession of the land thereafter is in the true owner. In the eye of law attachment [illegible] d revives the

[illegible] cannot plead

Adverse possession—*contd.*

——where a person opens shutters of his windows outside and maintains his weather-frames projecting over them for more than 12 years, on the deft's land, he acquires a right thereto by adverse possession of the column of air on the deft's property on which the shutters open and the weather-frames project and is entitled to an injunction against the defts. interfering with his rights. 27 Bom. L. R. 536.

——when a decree for possession is not executed the deft. does not hold adversely to the plff and the plff's taking possession out of court will hold good. 45 B. 943 : 23 Bom. L. R. 310 : 61 I C. 414.

——in a suit by purchaser of an estate at revenue-sale or of a putni taluk at rent-sale against person claiming adverse possession time begins to run from the date of purchase. 18 C. W. N 1281 P. C, 19 C. W. N 18.

——a receiver *pendente lite* cannot claim title by adverse possession. 49 I C 89 : 24 M. L. T. 424. 1918 M. W. N 683.

——the acts of the District Magistrate in maintaining a ferry over the property of the plffs did not constitute adverse possession as there was intention to dispossess. 5 Pat. L J. 500 57 I. C. 516. 1 Pat L. T. 395

——possession of male member of the *propositus'* family where ... property of the father governed ... presumed to be on behalf of the ... could be presumed until ouster

——trustee or agent cannot claim by adverse possession. 15 C W. N. 741, 14 C. L. J 64, 38 B. 253, 37 M. 373. But the adverse possession against trustee is against beneficiary, 41 M. 124 · 42 I. C 368, against shebait is against idol. 51 C. 953.

——a Hindu widow may acquire absolute title to her husband's property by adverse possession and when the adverse possession commenced on the death of her husband while the property legally vested in the next surviving male co-parcener, the death of such survivor does not interrupt the running of adverse possession. 46 A. 769, 22 A L. J. 725, 1924 A. 740, 41 A. 729, 22 C. 445, 42 A. 152 *Ref*, 22 A. L. J. 304 *Dist*.

(*j*) *Owner must have knowledge of adverse possession.*

——knowledge of the owner is necessary. 18 C. L. J, 23.

(*k*) *Owner must have right to demand possession.*

——adverse possession against a person affects only the interest of a person entitled to demand possession at the time of the commencement of the adverse possession. 44 C. 425 · 21 C. W N. 177 : 27 C. L J. 212 ; 37 I C. 277.

——the possession of trespasser during the continuance of a lease does not become adverse against the lessor. The position may be different where there are successive leases for terms. 35 C. L. J. 292.

Adverse possession—*contd.*

(*l*) *Pleading and proof of adverse possession.*

——when there is no case of adverse possession in the plaint or [illegible] possession. 15 C. W. N. [illegible] 5 C. L J. 621, 20 C. W. N. [illegible] when it is a question of [illegible] 621.

——plea of adverse possession cannot be raised for the first time in second appeal 28 C. W N 46. 1924 C. 245.

——where the question is whether from facts found, inference can be drawn that the possession is adverse, it is a question of law and the court can investigate it through, in general it is a mixed question of law and fact, 33 C. L. J. 344 : 24 C W. N. 1057 : 60 I. C. 295

——the plea of adverse possession being one of limitation can be raised *suo motu* by the court. 80 I C 582

——the person setting up adverse possession must prove it. 35 C L. J 192 60 I C 753, 45 B 789 61 I C 449.

——but he need not prove that the claimant protested against the violation of his right and that possession went on inspite of such protest 24 C. W N. 249 · 43 M. 253 37 M. L. J. 460 : 53 I. C. 288 P. C

——there is no presumption of adverse possession 19 C. W. N. 565.

——but long continued exclusive possession gives rise to the [illegible] 87 I. C. 1000.

[illegible] not be adverse. [illegible] M. L. T. 196 : 25 I. C 573

——possession of a person having valid title cannot be adverse possession. 1913 M. W. N. 35 : 16 I C 27, 12 M. L. T. 218 : 16 I. C. 53 42 I C 634.

(*n*) *Possession when follows title.*

——possession follows title until dispossessed. 24 Bom L. R. 1304, 76 I C. 145

——when the evidence of possession is equal on either side possession goes with title, 27 C. W. N 305 : 36 C. L. J 396 : 70 I C. 555, 13 C. L. J. 625, 20 C. 834 P. C., 15 C. L. J. 1, 1 P. L. J. 146, 4 P. L. J. 463 : 51 I. C. 801.

(*o*) *Position of a person acquiring title by adverse possession*

——a trespasser acquiring title by adverse possession does in no sense stand in the shoes of the original owner and is not bound by all the obligations which rested upon the owner in respect of the property. 39 M. 959 : 30 M. L. J 331 : 33 I. C. 326.

(2) Tacking on previous possession.

——when independent trespassers continually and successively possess an immoveable property for over 12 years the rightful owners' claim is barred under Art. 142 L. Act. 45 M. 370 : 42 M. L. J. 319 : 1922 M. W. N. 132, but the possession of one trespasser

Tacking on previous possession—*contd.*

cannot be added to that of the other to complete title by adverse possession. 2 C. W. N 315, 45 B. 570 : 22 Bom. L. R 145 : 59 I. C. *386, 36 C. L. J. 140 : 21 C. W. N. 642 : 25 C. L. J. 487 : 40 I. C. 337,* P. C., 33 A. 224, 37 M 440 : 16 I. C. 43, 17 C W. N. 748, 44 C. 858 : 25 C. L. J. 487 : 21 C. W. N. 642 : 32 M L. J 398 : 19 Bom. L. R. 480 P. C., 47 I. C. 189 : 153 P. W. R. 1918, 43 I. C. 943 : 14 N. L. R. 82.

——two independent trespassers cannot tack their periods of possession against the true owner. 2 P. L. W. 143. 41 I. C. 114 : 2 Pat L. J 506

——adverse possession must be of the defendant himself. 17 C. W. N. 748 but see 24 C. W N. 346 P C., and 75 I. C 31.

——but when one trespasser claims through another and the possession is continuous it may be tacked 9 C. W. N. 111, 49 I C. 767, 1924 A. 738 : 80 I. C. 12, 119 P. L. R 1914 22 I. C. 855 : 72 P. W. R. 1914, 49 I. C 767 (Pat), 91 I C. 556, the tacking of the periods of possession by two successive trespassers is permissible where one *derives title from the other. 43 A. 164, 3 A. L J. 424, 1926 All.* 697 : 96 J. C. 687.

——a person *found to have no title* cannot tack on the possession of another when the former has not entered into possession as the latter's heir 37 M. 440 : 16 I. C. 43

——a mortgagee in possession from a mortgagor who is a trespasser completes his title by adverse possession by tacking his possession as to that of the mortgagor against the true owner if they are in possession for more than 12 years 10 I. C. 545 (A)

——it is not open to persons who come into possession of property independently of any title derived from previous possessor to tack on their predecessor's possession to their own, 49 I. C. 751 (c)

——possession of an estate [illegible]
cannot be continuing possession
adding it to his prior possession,
verse possession *for the statutory* [illegible]

——adverse possession against the defaulter of a revenue paying estate cannot be tacked on against the purchaser at Revenue sale. 16 C. W N. 587 : 15 C L. J 436 : 14 I. C. 219.

——a deft can supplement his own adverse possession by the previous adverse possession of another person only if he derives his liability to be sued from or through that other person. 17 C. W. N. 748 : 19 I C 367.

——a lessee for less than 12 years cannot add to his period of adverse possession the period of his lessor's adverse possession prior to the grant of the lease. *above case.*

(3) Adverse possession in waste, jungly and sub-merged land and sub-soil.

(Possession of waste and jungly land when adverse)

——there can be no continuance of adverse possession when the land *is not capable of use and enjoyment by the rightful owner.* 34 C. L. J. 302, 16 I. C. 39(c).

Adverse possession in waste, jungly and sub-merged land a sub-soil—*contd.*

——the mere fact that a stranger grazes his cattle during fallow season would not interrupt the operation of adverse possess 20 A. L. J. 320 · 27 I. C. 412.

——continuity, publicity and extent is requisite for start adverse possession in waste land. 44 M. 883, 34 C. L. J. 141.

——in case of vacant sites of which no effective possessio feasible, possession follows title. 79 I. C. 1011 : 1924 M. 676 : 46 L. J. 560, 79 I. C. 692, 35 I C. 120 : 134 P. L. R. 1916.

——in case of vacant site possession follows title and tr owner's rights are not defeated by a person obtaining formal deliv of possession in execution of a decree against a person having right to the same 79 I. C. 692

——where land consists of a vacant site desultory acts of p session such as storing cowdung cakes and tying cattle insufficient to constitute adverse possession. 69 I. C. 573 (L). 2 L. J 583

——the mere fact that the tenants have been enclosing waste land of the owner and tying their cattle upon it would constitute adverse possession so as to deprive the owner of ownership. Such temporary user which might be unnoticed or p -mitted would not amount to adverse possession 1923 A. 3 71 I. C. 265

——temporary user such as tethering of cattle and storing fodder is insufficient to establish title by adverse possession. 4 L L. J 467 : 69 I. C. 4, 42 I. C. 412 . 161 P. W. R. 1917.

——cutting leaves for manure is worthless as evidence of a proprietary title in the land 42. I. C 290 (M).

——depositing earth on another's land while digging a tank one's own land and planting trees of more value on it amount adverse possession. 60 I. C. 386 (c).

——acts of possession exercised at intervals over differ

N. 317.

——in a suit for ejectment the plff. is to show possess within 12 years, but if he shows that the time when the righ possession was with him it was jungle land and no one else wa possession of it or interfering with it any way contrary to right then he has done what is necessary to show that in eye of law he was in possession at the time. In such a case, is possession and not user that has to be seen. 3 I. C. W. 806 : 105 I. C. 369.

——possession of vacant site belonging to a neighbour a convenient adjunct cannot be regarded as an indication of assertion of title to the land ; such user for any length of time d not amount to adverse possession. 51 I. C. 575 : 38 P. L. R. 1919

Adverse possession in waste, jungly and sub-merged land and sub-soil—*contd.*

——possession of open sites would naturally go with the possession of the building which they adjoin. 24 Bom. L. R. 373 : 65 I. C. 764 : 1922 Bom. 243.

——use of vacant site by the Municipality by the deposit of refuse did not amount to adverse possession. 74 I. C 251 · 1923 A. 557.

——intermetent user of a pond accompanied by no assertion of right is a very common phenomenon in India and often arouses no opposition The pond is not susceptible of actual physical possession by the legal owner and possession follows title unless the usurper can prove long and continuous exclusion of the rightful owner. 4 Lah L J 461 : 1922 Lah 59.

(*Possession of sub-merged land when adverse*)

——adverse possession to sub-merged land is not possible. 21 C. W. N. 642 **P. C**, 34 C. L J 465, 44 C. 868, 29 C 512, 34 C L J 133, 141, 18 I C 613 : 11 A L. J 68.

——when the land is sub-merged it will be considered to be in the possession of the rightful owner. 29 C. 518 6 C. W. N 617, **P C**, 42 C 858 · 25 C L J. 487 21 C. W. N 642 . 1917 M. W N. 482 : 40 I. C. 337 **P. C**, 29 C. L J 259 51 I. C. 70, 19 C. W. N 565 ; 29 I C 156, 20 A L J. 756 . 69 I. C 912, 34 C L. J. 133, 141, 465, 28 I C. 426 (c), 16 I. C. 17(c).

——where a person is shown to have exercised acts of possession on land as it reformed and became capable of possession and all these acts of possession were all done in the assertion of a claim to the land by virtue of settlements made by the Govt the possession extends to the whole of the property. 51 C. 669 · 28 C. W. N. 637 . 1924 Cal. 855 78 I C. 679

For other cases, see, *Reformation* in situ *under* "*Accretion*"

(*Possession of subsoil when adverse*)

——leases purporting to grant sub-soil rights will not give a title by adverse possession to adjacent mines for which actual working must be established. 5 P L J. 273 : 1 Pat. L T. 760 · 56 I. C. 184 · 1920 Pat 146.

(4) **Adverse possession in accreted land**, see "*Accretion*", *Sub-heading* (3)

(5) Adverse possession of co-sharers

——possession of a co-sharer can be said to be adverse to the other only when there is an open denial of title 35 C. L. J. 554 43 M. 244 · 43 M. L J. 104 ; 20 A. L. J. 545 **P. C**, 34 C L. J. 133, 432, 40 C. L J 30 : 82 I C. 392 46 B 213, 1923 P. 183, or exclusion or ouster to the knowledge of the other. 26 C. W. N. 890, 26 C W. N. 65, 26 C W. N. 206, 33 C. L. J 592, 29 C L. J. 241, the ouster need not be violent or formally communicated. 21 C L J. 253 :20 C. W. N. 51, 94 I. C. 38 : 1926 Cal. 881

Adverse possession of co-sharers—*contd.*

——there must be evidence of an open assertion of a hostile title by co-sharer to the knowledge of other. Though the co-tenant enters in the first instance without claiming adversely his possession afterwards many become adverse. The action must justify the inference of knowledge on the part of the co-sharer sought to be ousted 26 C. W N. 65, 206, 890, 78 I. C. 159 : 1924 Lah. 682, 80 I. C 118.

——the *possession of one co-owner is the possession of all.* 26 C. W. N 890, 24 C. W. N 1057. 33 C. L J. 344, 24 C. L. J. 38 : 35 I. C. 26

——mere non-participation of rents and profits would not necessarily of itself, amount to exclusion, 16 C. W. N. 849, 91 I. C. 614 (c) but such non-participation or non-possession may, in the circumstances of particular case, amount to an adverse possession. 16 C W N 849

——a co-owner holds adversely to others if he acquires possession from an adverse claimant claiming his exclusive right and title and denying that of the other co-owners 24 C. L. J. 165 : 20 C. W. N. 1258 : 35 I C 36.

——possession of co-owner as a lessee under a third person may be adverse possession 35 C. L J. 164 : 64 I C. 553 24 C L J. 38 35 I C 36, 21 C L J 253, 24 C. L. J. 165 20 C W N. 1258.

——when a person in possession of the property under a hostile title *subsequently* becomes a co-owner and continues to assert his hostile title and exercise possession to the exclusion of the other co-sharers, his possession does not cease to be adverse merely because he is a co-owner. 38 C. L J. 220 : 76 I. C 511, 28 C. L. J 437 58 P W R. 1918. 64 P. R. 1918 : 24 M. L. T 389 : 20 Bom L R 1064; 1919 M. W. N. 1 : 47 I. C. 626, 33 C. L. J. 344 : 24 C W N 1057. 60 I. C. 298 *Ref*

——one of the proprietory body may claim a *rent free Brahmathar* right adverse to himself and his other co-sharers by virtue of purchase from the grandson of the grantee. 51 C. 135 : 39 C. L. J. 380 ; 81 I. C. 498. 1924 Cal. 693.

——a transferee from a co-sharer, if he claims by adverse possession, must prove exclusion or denial of title but in the event of his having neither actual nor constructive notice of the common character of the pr[illegible]
ordinary transferee.

——even where [illegible]
his rights to the othe[illegible]
off. 80 I. C. 619 : 11[illegible]

——where a person has been in possession of land adversely to two co-sharers each being owner of a moiety, and before the expiration of 12 years succeeds to one moiety upon the death of its owner, his possession continues to be adverse to the owner to the other moiety. 24 C. W. N. 346 : 38 C. L. J. 313 , 22 Bom. L. R. 441 ; 27 M. L. T. 6 P. C.

Adverse possession of co-sharers—*contd.*

——[illegible] be added to that of the other to [illegible] ession. 2 C. W. N. 315, 45 B. 5[illegible] 386, 37 C. L. J. 140, 21 C. W. [illegible] 337 P. C., 33 A 224: 8 1, C. 1095, 2 P. L. J. 5, 96: 41 I C 114, 37 M. 440. 16 I. C. 43, 17 C. W. N. 748.

——long silence and inaction on the part of the co-sharer does not constitute an adverse possession on the part of the other co-sharer who is in uninterrupted possession 5 Lah L J, 17.

——some co-sharer mortgaging the property and giving possession thereof to the mortgagee does not make the possession of the mortgagee adverse to the other co-sharer. 21 A. L. J 204: 1923 A. 291: L R 4. A 139. 71 I C. 640.

——possession under a decree against one co-sharer is adverse against the others also if the only possession relied on by the latter is that of the former 50 I. C 870, (c)

——ouster means dispossession of one co-sharer by another where hostile title is set up by the latter and the occupation of the latter is not consistent with joint ownership. Where a co-sharer was in sole occupation of the joint property but the title of the other co sharer was not denied, the latter could not sue for joint possession 47 C.L. J. 603 : 1928 Cal. 574.

——'exclusive possession' when used in connection with joint property, it has an equivocal meaning and does not exclude the rest and is not adverse possession 28 C. L J 437, 24 M L T. 389, P. C 19 C 253, 18 C. 10 P. C., 35 C 961 6 C. L J. 735, 80 I C. 118, 91 I C 614 (c).

——possession of a co-sharer may be adverse by the mistake of the fact as to which estate the property appertains. 17 C. W. N. 595

——co-sharer's possession is not adverse unless title has been repudiated for the statutory period. 35 C 961. 12 C W. N. 127 6 C. L. J 735, 31 C. 970 9 C W. N 32, 3 C W. N. 774, 20 C W. N 51, 1259, 20 C W. N 192n, 24 C L. J. 165, 37 C. 972, 33 C. L. J. 592, 16 C. W N. 849.

——the creation of substantial building on joint property cannot be conclusive evidence of ouster. 26 C. W. N. 65: 34 C. L. J. 432, 11 C. L. J. 189.

——a co-sharer should not be driven to seek for partition merely because his co-owner chooses to dispute the extent of his share. 33 C. L. J. 592

——when a co-owner alienates the whole property in denial of the rights of co-owner, there is a clear assertion of hostile title. 14 C. L. J. 646, 29 B. 300, 38 B. 317.

——when co-sharer's possession is adverse. 29 B. 300, 38 B. 317, 21 C. L. J. 192.

——receipt of property by one co-sharer is not equivalent to ouster of the other. 23 Bom. L. R. 967, 80 I. C. 118.

Adverse possession of co-sharers—*contd.*

——in case of suit between co-owner the plaintiff is not to prove possession within twelve years but the defendant is to prove facts which would amount to an ouster. 23 Bom. L. R. 1033.

——the possession of one co-owner is never adverse if it can be referred to a lawful title 24 C. W. N. 1057: 33 C. L. J. 344: 60 I C 298.

——execution of a conveyance by a co-owner in favour of his relative is not an act of such notoriety as to amount to adverse possession 24 C W. N 1057· 33 C. L J. 344: 60 I C. 298, 71 I C. 171.

——a co-mortgagor redeeming the property may acquire the right by adverse possession if he possesses it for 12 years with the knowledge of the co-mortgagor 63 I C 282.

——possession of property under claim of co-tenancy in Mitakshara family for statutory period may create title. 7 N. L J. 82 78 I C 840 1924 Nag. 73.

——the presumption of *Hindu law* that while a *Hindu family* remains joint all property including acquisitions made in the name of an individual member is joint property, does apply to the case of joint family governed by the Dayabhaga 4 C. L. J. 56, 31 C. 448. *Expl*

——under the Hindu Law of Dayabhaga school one co-sharer's possession for more than 12 years does not extinguish the title of the other co-sharer, the former is to prove that the exclusion from the joint family property became known to the latter more that twelve years before the suit. 4 C L. J. 56

——where after a partial partition of joint family property one member continues in possession of certain properties not divided, his possession still continues to be the possession of the other members of the family though they may be divided, till some event happens which renders his possession exclusive or hostile to the others 40 I C. 115 (Pat) 22 M. 191 *Ref.*

——a Hindu co-parcener's possession is not adverse to other *co-parceners unless they have notice of his so holding it* 16 M. L. T 196 1914 M W. N. 708: 27 M L. J. 600.

——possession of the husband of one sister on behalf of his wife is not adverse to the other sister. 72 I. C 33 (c)

——where one of the widows of two brothers remains in possession of the property to the exclusion of the other widow who became mendicant she might acquire title by adverse possession 64 I C. 773 (c).

——one member holding a portion of joint property after partial *partition of Hindu family*, does not hold adversely to other members. 45 M. L. J. 476 · 1923 M W N. 636: 74 I C 1018

——co-heirs under the Mahamedan Law are in the position [illegible] f such [illegible] entry [illegible] to be

Adverse possession of co-sharers—contd

entry and possession of all the tenants in common and this presumption will prevail in favour of all, until some notorious act of ouster or adverse possession by the party so entering is brought home to the knowledge or notice of the others. 85 I. C. 763 : 1925 Cal. 1176.

——the heirs of a deceased Mahomedan takes as tenants in common 13 P. W. R. 1921 ; 59 I C. 346.

——where several heirs of a Mahomedan succeed to the property, it has to be found whether an entry by one is an entry on behalf of himself or on behalf of others and it is a finding of fact. 40 C L. J. 57 77 I. C. 257.

——in Mahomedan family the possession of the brother is deemed to be the possession of the sister. 50 I. C. 694

——exclusive possession by brother for 35 years was held to be adverse to the sister although it was not shown that there was any demand by the plaintiff which was refused by the brother. 48 I. C. 692 (c).

——the heir of a deceased Mahomedan being co sharers the possession of one is not adverse to the others except where there is an express denial and repudiation of title and subsequent possession for more than 12 years 46 A. 377. 79 I C 174. 1924 All. 384 : 22 A. L. J. 307

(6) Adverse possession of tenant.

(It is a mixed question).

——adverse possession is a mixed question of law and fact. 26 C. W. N 890, 33 C. L J. 344.

(Tenant can plead adverse possession and tenancy)

a tenant can plead adverse possession and tenancy at the same time 2 C. L J. 125, 8 C. L. J 557, 7 C. W N. 294, 16 C. 806, 12 B L. R. 274 21 W. R. 70 F B, 7 B 96, 19 C L J 321 19 I. C 853, 90 I C. 617 : 1926 Cal 361 But possession as tenant however long cannot be adverse to the landlord and cannot be an incumbrance 25 C. W. N. 106, 61 I. C. 469 29 C. L J 1 · 22 C. W. N. 853 · 41 I. C. 378

(Tenant must give up possession before claiming adverse possession)

——s 116 of the Evi Act does not contain the whole law of estoppel. Thus the tenant's estoppel ... [illegible]

79 I. C 59

——the possession of trespasser during the continuance of a lease does not become adverse against the lessor. The position may be different where there are successive leases for terms, 35 C. L. J. 292.

Adverse possession of tenant—*contd.*

——a person holding under a lease from year to year or for a term of years cannot by setting up, however notoriously, during the continuance of the relation, any title adverse to the landlord inconsistent with the legal relation, acquire by limitation a title as owner or any other title inconsistent with that under which he was let into possession, 92 I. C 963 : 1926 Cal 634.

——if a tenant is in possession of land and the landlord has not the immediate right of re entry, any assertion by the tenant would not make time run against the landlord 90 I C 617 · 1926 Cal 364.

——the mere act of the tenant disclaiming the title of the landlord to his knowledge would not determine the tenancy and convert the tenant into a trespasser so as to cause the statute of limitation to run against the landlord Also mere non-payment of rent or discontinuance of payment of rent by itself does not create adverse possession. 32 C. W. N 720.

——the question of adverse possession is a question of fact and the claim can only arise when a party remained in possession against the party who had actually the right to possession. When the plff's predecessor was alleged to have been placed in possession under a kabulyat collusively entered into and the executant continued all along in possession by virtue of his title there was no question of adverse possession in favour of the plff 32 C. W. 863

(*To constitute adverse possession there must be clear and open disclaimer*),

——when a tenant wants to plead adverse possession there must be a clear, positive and continued disclaimer and disavowal of the landlord's title, the landlord must have actual notice of the claim or the acts of ownership must be open 38 C L J 266, 56 I C 811 (c), 43 I. C 344 (c).

——where a tenant [illegible] the landlord has [illegible] by the tenant [illegible] C. 617 [illegible] adverse to the [illegible] tenancy unless the [illegible] (L).

——where an invalid gift of the premises was made to a tenant the nature of the possession not being altered, the tenant's possession thereafter cannot be held to be adverse. 91 I. C. 97.

——where a person entered into possession as tenant, the onus is on him to prove when the relationship came to an end and his possession began to be adverse. 79 I. C. 59

(*When a limited interest may be acquired by tenant by adverse possession.*)

——a limited interest such as that of a tenant can be acquired by adverse possession. 50 C. 487, 35 C. L. J 185, 35 C. L. J. 182, but the facts necessary to prove such possession must be found. 86 I. C. 771 ; 3 Pat L. R. 50.

Adverse possession of tenant—*contd.*

——possession in the limited interest such as an intermediate tenure may be just as much adverse as is adverse possession of a complete interest in the property. 42 C L J. 14 : 89 I C. 747 : 1925 Cal. 1189.

——it is true that a limited interest can be acquired by adverse possession but the facts necessary to prove such possession must be found. 86 I C. 771 : 3 Pat. L R 50.

——when a tenant wishes to acquire permanent right by adverse possession he must give the landlord specific notice of the claim. 45 B. 508 : 22 Bom. L. R. 1413 : 59 I C 718

——where a tenant is entitled to be in possession as of right the mere additional fact that a claim was asserted to have an unlimited number of years in which his right to the lands would subsist, is not a circumstance to enable him to prescribe a permanent tenancy as against the landlord. 31 C W. N. 1099 : 104 I C 812

——long possession the origin of which is not traced to have begun in under-proprietary rights cannot create title by adverse possession 101. I C. 803 (M) 50 I. A 202 P. C. *fol.*

——in case of possession under limited interest, assertion of higher interest for the statutary period does not create such title. 28 C. W N 840 : 39 C L. J. 295 19 L. W. 283.

——setting up higher interest during the continuance of the tenancy does not affect the landlord 27 C. 157, 25 M 507, 28 C. W. N. 840 : 39 C L J. 295, *contra.* 9 C W N 292, 79 I. C. 59.

...s a service tenure-holder ...r title acquire such title ...n within 12 years of such

... for life that he claimed ... tenure does not make ...216 : 4 C. W N. 274 P C.

——claiming rent-free for 12 years amounts to. 15 C. L. J. 203, 22 C. L. J. 308 32 I. C 856, 104 I. C. 124 ; 8 Pat L T. 798.

(*Mere non-payment of rent does not constitute adverse possession.*)

... possession. ... 1 I C 984 ... C. L. J. 453. ... N 524, 19 ... 13 C L. J. ...8 a service tenure-holder cannot claim adverse possession simply because he does not render service. 1921 M. W. N. 378 : 62 I. C 771, 1 Pat. 292, 91 I C. 451 : 926 Cal 645.

——but long possession of tenant and no payment of rent by him and no receipt of rent by landlord furnish the elements required for a plea in bar by reason of adverse possession. 22 C. L. J. 119 ; 30 I C. 914.

Adverse possession of tenant—*contd.*

——payment of rent to third person does not amount to adverse possession unless the possession be in denial of the title of the real owner to his knowledge 22 I. C 796 (c)

——where the tenant continues to pay rent after the transfer of the holding, limitation does not begin to run against the landlord, as there is no abandonment and so the transferee cannot acquire right by adverse possession 91 I C 191 (c)

——in a case where an inn-keeper in an agricultural village has been using his house for purposes other than those of an ordinary agricultural village, paying no rent for the use of the site in *abadi*, his possession of the site is adverse to that of the zemindar. 33 A 757 11 I C 52 : 8 A. L. J 877,

(*Holding over without payment of rent when consitutes adverse possession*).

——the possession of a tenant after the execution of an ejectment decree against him is adverse to the landlord unless he proves his attornment. 85 I C. 678 1826 Cal. 193

——if the lessee holds over after expiry of the term of the lease and pays no rent his possession is adverse 44 A. 583 · 75 I. C. 54

——if the lessee holds over after the expiry of term of the lease [illegible]
454, [illegible]
18 M [illegible]
1915 [illegible]
3 I. C 566. *Dist*

——a tenant continuing in possession after the expiry of the lease cannot be said to be in adverse possesion unless he actually surrenders possession to his landlord 1914 M W. N 728 25 I. C. 109, 24 M L J 472 *fol* 31 M 163 33 M 260 *Dist*

——payment of rent on behalf of recorded tenent is not adverse possession 17 C W N, 1091

——a tenant who holds over after the expiry of the term of the lease cannot be said to be holding adversely to the landlord, so long as he is in possession he cannot deny that it was from the lessor that he got the land 85 I C 550 · 1925 A. 698 *contra*. In the absence of evidence of fresh tenancy time begins to run against the landlord from the expiration of the lease. 4 Pat 139 : 84 I C 586 : 6 P. L T. 12

(*Possession of trespasser under tenant when becomes adverse*)

——the possession of trespasser during the continuance of a lease does not become adverse against the lessor The possession may be differnt where there are successive leases for terms. 35 C. L. J. 292.

——to establish adverse possession by the transferee of a non-transferable occupancy holding, possession must be shown to be adequate in continuity, publicity and extent and with the knowledge of the landlord. 56 I. C. 811 (c)

Adverse possession of tenant—*contd.*

——the purchaser of a non-transferable occupancy holding paid rents to the landlord which were accepted. A purchaser from that purchaser did not pay rent, and the landlord sued in ejectment, held the adverse possession will be deemed to commence from the date of his purchase and not from the purchase of the first purchaser. 57 I. C 986 (c).

——the possession of an under-tenant of a tenant who had no power to transfer the demised land is not adverse to the landlord till the termination of the tenancy. 22 C. W. N. 853 : 29 C. L J. 1 : 41 I. C, 387, 13 C. 101, 29 A. 593 *fol.*

——the possession of an ex-proprietary tenant can never be adverse against the Zemindar. 60 I. C 261.

(Lease in excess of authority,—adverse possession by lessee)

——where the manager of a religious endowment grants permanent lease in excess of his authority, the possession of the lessee is not adverse to the endowment during the life-time of the head who grants the lease and the former does not acquire the status of a parmanent lessee by adverse possession for twelve years from the date of the lease, 27 C. W. N. 159, 48 I. A. 302 : 44 M. 831 : 26 C. W. N 537, P. C. *fol.*

(Mere assertion in a judicial proceeding does not constitute adverse possession)

——it is not correct as a general proposition of law that a person, who is, in fact, in possession of land under a tenancy or

[illegible]

[illegible] -us motives and their the adverse possession of title within S, 19

(7) Adverse possession by purchaser of non-transferable occupancy holding.

——purchaser of a non-transferable occupancy holding may acquire occupancy right by adverse possession. 14 C W. N. 68.

——but he must possess for the statutory period with the knowledge of the landlord. 56 I. C. 811 (c)

——when the original tenant continues to pay rent after transfer the transferee cannot acquire title by adverse possession. 91 I. C, 191 : 1926 Cal. 772.

——to establish adverse possession by the transferee of a non-transferable occupancy holding, possession must be shown to be

Adverse possession by purchaser of non-transferable occupancy holding—*contd.*

extent and with the knowledge

ansferable occupancy holding
re accepted. A purchaser from
the landlord sued in ejectment,
e deemed to commence from
the date of his purchase and not from the purchase of the first purchaser. 57 I C 986 (c)

——possession of the mortgagee becomes adverse on the date of the satisfaction of the debt. 25 I C 611 (A) 24 A. 44 F. B. 1926 All. 62 or the decision of the court by which the relationship comes to an end 42 M L. J. 144 . 70 I. C. 33.

(8) Adverse possession by or against mortgagor and mortgagee.

——so long as the right to redeem subsists, a mortgagee cannot deny the title of the mortgagor or his successor in interest or set up adverse possession 80 I C. 935 , 22 A L J 905 L R 5 A. 681 : 47 A. 73 · 1925 A. 133.

——a mortgagee in possession dealing with the mortgaged property as full owner may acquire absolute right by adverse possession. 43 A. 164, (29 A 471, 40 M 1040. 2 M 226. 18 B 51, 25 M 29, 9 A 97, 2 A L J. 234) *Ref* 3 A. L. J 423 *fol* see also, 23 C W. N 815 44 C 425 ; 21 C W. N 177 : 37 I. C 277, 33 C. 1015 · 10 C. W N 904, 31 I. C 678, 12 A. L. J 1233 27 I C 35, 33 A. 97, 38 A. 411, 71 I C 1030 (c) *contra*. 91 I C. 87

——the purchase of a portion of the mortgaged property by the mortgagee s separated heirs from a person who had no title to convey and enjoyment thereof for ever the statutory period confers a title by adverse possession on the purchaser. 16 C. W. N. 913 ; 15 C. L. J. 468 ; 34 A 289 · 15 I C. 196 P. C

——the possession of the mortgagee in pursuance of an unregistered deed of compromise between him and the mortgagor transferring the equity of redemption to the former is adverse to the mortgagor and his heirs. 39 A. 423 : 40 I. C. 121, 42 C. 801 *fol.*

——the right to redeem cannot be adversely possessed when the right and actual possession is in the hand of the mortgagee. 38 A. 411 - 34 I C. 171.

——possession of the mortgagee becomes adverse on the date of the satisfaction of the debt. 25 I. C 611 (A) 24 A 44 F. B. 1926 All. 62 or the decision of the court by which the relationship comes to an end. 42 M L J. 144 : 70 I. C. 38.

——an usufructuary mortgagee remaining in possession after the satisfaction of the mortgage by redemption is a trespasser

Adverse possession by or against mortgagor and mortgagee—*contd.*

and if he continues in such possession for the statutory period the mortgagor cannot recover. 48 A. 145 : 92 I C. 1414 : 1926 All 62.

——but possession of mortgagee continuing in possession after the satisfaction of the debt, is not necessarily adverse The question *is always a question of animus or intention of the parties concerned* 94 I C. 342 : 1926 Cal 910.

——by possession under a void mortgage for over 12 years a limited interest can be acquired but not any higher title than that of usufructuary mortgagee. 44 M. 946. 41 M L. J. 194 : 1921 M W. N. 385 · 64 I. C. 328.

——where possession which commenced under a mortgage is continued under a different capacity it will suffice to start adverse possession. 33 M L. J. 316. 42 I. C 438 6 L. W. 588

——trespasser in adverse possession of mortgaged property prior to the date of mortgage can acquire by adverse possession title to the equity of redemtion as against the mortgagor 39 M 959. 33 I. C. 326 : 30 M. L J. 331.

——where the mortgagor is entitled to immediate possession adverse possession of a trespasser against the mortgagee amounts to adverse possession against the mortgagor. 38 M. 903 15 M. L. T. 112 : 26 M. L. J 140 : 22 I C. 615 F B.

——where inspite of a provision in a mortgage deed the mortgagee does not take possession on default, the mortgagor's possession does not become adverse as against the mortgagee. 21 I C. 773 (M)

——where subsequent to a mortgage the mortgagee, under an agreement between the parties, agrees to give up some lands and retain others as full owner, his title to the land ripens into full ownership by prescription and the mortgagor cannot redeem after 12 years. 44 M. 253 : 40 M. L J. 105 · 62 I. C 603, 37 M. 545 23 M. L. J. 360; 16 I C. 694 *contra*, 37 M. 423. 15 I. C. 343 : 23 M. L. J. 339.

——a tenant put into possession by the mortgagee cannot claim by adverse possession until the mortgagor redeems the mortgage and becomes entitled to immediate possession. 45 B. 661, 27 B. 515 and 27 B. 509 *Dist*.

——right of the mortgagor is extinguished by adverse possession. 36 M. 97.

——when the possession of third person becomes adverse. 44 C. 425 : 27 C. L. J 212 : 21 C. W N. 177, 39 M 811 : 31 I. C. 412 F. B, 36 A. 557 F. B. 16 M. L. J. 210. 33 I. C. 326, 36 M 97, 38 M. 903.

——the possession of a mortgagee is not adverse to his mortgagor. But where there are rival mortgagors, the possession of their respective mortgagees must be held to be mutually adverse 80. I. C. 582.

——a mere mutation only of the mortgagee as proprietor cannot convert his possession as mortgagee into adverse possession. 80 I. C. 944; L. R. 5 A. 542.

Adverse possession by or against mortgagor and mortgagee—*contd.*

——where after the discharge of an usufructuary mortgage the mortgagee continues in possession his possession is not adverse to the mortgagor. 1924 A. 522 : L. R. 5 A 421.

——where the mortgage is an indivisible transaction according to its terms, any one of the co-mortgagees cannot obtain adverse possession of a particular share in it by lapse of time The mortgagor can redeem the mortgage only on payment of the whole of the mortgage-money irrespective of the shares of the co-mortgagees *inter se* 1923 Lah 366

——a co-mortgagor redeeming the property may acquire the right by adverse possession if he possesses it for 12 years with the knowledge of the co-mortgagor 63 I C 282, 33 A. 463, 9 I C. 572.

——a person cannot be in possession of an equity of redemption adversely to the true owner There may be possession adverse to the interest of a mortgagee which nevertheless is not adverse to the interest of the mortgagor 18 B. 51. Though a trespasser by holding possession against the mortgagor can bar the mortgagor's right to redeem, an equity of redemption cannot be acquired by adverse [illegible] in physical possession of the [illegible] a usufructuary mortgage a [illegible] mortgagee, but not to the [illegible] B 539 67 I C. 765 1925 Bom 465

——a co-mortgagor redeeming the property may acquire the right by adverse possession if he possessed it for 12 years with the knowledge of the co-mortgagor. 63 I C. 282 · 1922 Pat 129 : 6 Pat. L J 680.

——a mere entry in the Record of Rights of the possession of the redeeming mortgagor, is of no effect to prove adverse possession [illegible]

party has come into possession not only against the mortgagor but also against the mortgagee. 24 Bom L. R. 261 1922 B. 94 : 67 I C. 176.

——a person in possession of a property as a usufructuary mortgagee under a void mortgage for more than 12 years acquires by prescription the rights of a mortgagee. 44 M. 946 : 64 I C. 328, 1923 M. W. N. 134 : 16 I. C. 420.

(9) Adverse possession by or against widow and reversioner.

(Adverse possession by widow.

——in a joint Hindu family the possession taken by Hindu widow professing to claim but a limited estate of a widow does not extinguish the rights of the reversioner after the lapse of statutory period. 45 A. 729 : 74 I. C. 869 : 1924 A. 88.

Adverse possession by or against widow and reversioner—*contd.*

——when the possession of a Hindu woman is adverse, the question must be decided as to what was her *animus possidendi*. Did she assert an absolute title in herself or did she claim to hold as the heiress of any person? The latter would be the ordinary presumption 1912 M. W. N. 515 : 11 M. L. T 261 : 15 I. C. 403.

——acts that were public assertions by a widow of a right to exclusive possession and ownership make her title absolute 24 C. W. N 394 : *42 A 1521 22 Bom. L. R. 451 : 27 M. L. T. 200 55 I. C.* 486 **P. C.**, 45 A. 729 · 74 I C 869.

——when the widows of a Hindu obtained judgment in their favour regarding succession to his estate and remain in possession thereunder for 40 years, held that even if they were not entitled to the estate, their possession was adverse to those legally entitled and the rights of the latter were destroyed under s. 28 L Act. The property however does not become their *stridhan* but enures to the benefit of the reversioner. 28 C W. N 960 : 80 I C. 788 : 6 P. L T. 1. 22 A. L J. 304 : 1924 P C. 121 : 1924 M. W. N 442 : 26 Bom L. R. 1117, **P. C.**

——a Hindu widow is not a tenant for life but has a widow's estate in her deceased husband's property and if possessing as a widow she possesses adversely to any one as to some parcels, she does not acquire the parcels as *Stridhan* but makes them good to her husband's property. 6 Pat. L T. 363 1925 P. 460, 28 C. W. N 960 **P. C** *fol, contra.*

——where a Hindu widow is in possession of any property under adverse claim, the property becomes her separate *stridhan* property. 6 Pat L. T. 206 · 1925 P. H. C. C. 140, 13 I. C. 644 (A) *contra below*

——a Hindu widow who is in possession for more than 12 years of property to which she is not entitled, acquires title to it as a Hindu widow and on her death it goes to her husband's reversioner. 86 I. C 445 ; L. R. 6 A. 117, 100 I C. 446 : 1927 Nag 104 22 N. L. R. 175

——but a Hindu widow who was not entitled to possession as such at the time she entered into possession, could acquire absolute title in the property by twelve years' adverse possession as against her husband's reversioners, 49 A. 713 · 102 I. C. 175. 25 A. L. J. 580, 28 C. W. N. 960 *explained* and 22 A. L. J. 725 and 43 M. 244 *Ref.*

——where a Hindu widow who is not entitled to succeed to a certain person takes possession of her property after her death, she does it in her own right and her possession is adverse to the real heirs. 90 I. C. 825.

——a Hindu widow may acquire absolute title to her husband's property by adverse possession and when the adverse possession commenced on the death of her husband while the property legally vested in the next surviving male co-parceners, the death of such survivor does not interrupt the running of adverse possession.

Adverse possession by or against widow and reversioner—*contd.*

46 A. 769 22 A. L. J. 725 : 1924 A. 740. 41 A. 729, 22 C 445, 42 A. 152 *Ref.* 22 A. L. J. 304 *Dist.*

——where a Hindu widow is in possession of properties belonging to Hindu joint family in lieu of maintenance she cannot acquire title by adverse possession as her possession is not adverse. 29 C. W N. 1037 . 88 I. C. 385 : 1925 **P. C** 132 : 41 C. L. J. 591 : 23 A. L. J. 589 . 1925 M. W. N. 421 88 I. C. 385 **P. C.**

(*Adverse possession against reversioner*)

——adverse possession against the widow extinguished the title of the reversioner also before Act IX of 1871. 19 C. W. N. 1280 : 21 C. L. J. 157 : 27 I. C. 954.

——adverse possession cannot run against Hindu reversioners until after the death of the widow. 75 I. C. 614 . 1923 A. 448, 9 M. L. A. 543 **P. C.** *Expl*, 46 I. C. 565 : 131 P. W. R 1918, 18 I. C 959 (A). 18 I. C 948 (A), 68 I. C. 299 (L), 37 I. C. 733 : 20 M L. T 526, 41 A. 154, 17 N. L. R. 18, 95 I. C 18 But see the **P. C.** case below.

——adverse possession against the widow cannot affect the right of the adopted son 48 I. C. 230

——an adverse possession for any length of time against a tenant for life is similarly ineffectual against the reversioner or remainderman whose right to possession only accrues on the death of the tenent for life 23 A. L. J. 691 : 1925 A. 707 : 92 I. C. 63, but see below

——But it has been held by the **P. C.** that an adverse possession against widow is adverse possession against reversioner too. 30 C W. N. 313 . 92 I. C. 85: 28 Bom. L. R 173 1926 M. W. N. 11 1925 **P. C.** 249 **P. C.**

——it has also been recently held by the Calcutta H. C that adverse possession against a Hindu widow bars the rights of the reversioners as well and a suit by them to recover the property is governed by Art 120 of the L Act in the case of moveables and Act 141 in the case of immovable. 32 C W. N. 913 . 55 C. 903.

——an adopted son cannot have adverse possession during [illegible]

[illegible] of her share in [illegible] no is the heir-at- [illegible] part of the co-widow as against the reversioners of her husband, when there is no proof of notice of assertion by her of a title other than by inheritance 1 P. L. W. 375: 39 I. C. 755.

[illegible] the death [illegible] him from [illegible] the posse- [illegible] *ch he had*

[illegible] f her pre-deceased son gets into possession, her possession is adverse to the

Adverse possession by or against widow and reversioner—*contd.*

takes possession of the property claiming under a deed of gift and afterwards obtains an ekrarnama from the widow, admitting the gift, his possession is not adverse to the widows. 63 I. C. 887 (c)

———where by a will a Hindu widow disposed of her woman's estate and the legatee was in possession till her death, it was held that her possession was not adverse to the son's son of the testator where the legatee set up no other title than under the will. 44 C. 145 : 39 I, C. 223

——where properties came under the possession of the defendant's ancestors under an invalid transfer by a Hindu widow and have been in their possession for more than half a century, the defendants had acquired title by adverse possession when the plaintiff failed to prove that the possession of the defendants had been only permissive. 23 I. C, 931 (c).

(10) Adverse possession relating to shebait and trustee.

——trustee or agent cannot claim by adverse possession. 15 C. W. N 741, 14 C. L. J. 64, 38 B. 253, 37 M. 373: 14 I. C. 168 : 1912 M. W. N. 445.

——but the adverse possession against trustee is against beneficiary. 41 M, 124 . 42 I C. 368.

——an adverse possession against shebait is against idol. 51 I. C. 953.

—— ... est of the idol ... ght to sue for ... shebait and not ... is permissible ... The court may appoint a person to act as agent for the idol pending the suit. 51 C. 953 : 1925 Cal 140.

——possession obtained from a manager of endowed property becomes adverse to the idol as represented by the succeeding manager. 36 B. 135: 12 I. C, 926.

——a permanent lease of debuttar properties not impeached for 60 years becomes indefeasible whatever the true character of the original grants may be. 42 C 536 : 20 C. L. J. 312 : 19 C. W. N. 542.

——where the ... ligious endowment grants perma- ... , the possession of the lessee is ... ng the life-time of the head who ... oes not acquire the status of a ... ssion for twelve years from the date of the lease. 27 C. W. N. 159, 48 I. A. 302 : 44 M. 831 : 26 C. W. N. 537, P. C. *fol.*

Adverse possession relating to shebait and trustee—*contd*,

——where a title to an office has been acquired by prescription, the title of the true owner is not revived by re-entry 32 C. L. J. 151: 60 I. C. 165.

——a limited right of management of an endowment can be prescribed as well as any other limited right 1915 M. W. N. 78: 28 M. L. J 217 26 I. C. 841 43 M 665 39 M L. J 50: 56 I. C. 730: 18 A. L. J 594 P. C.

——the possession of a *Mahant* does not become adverse to the founder unless he does some overt act repudiating the founder's title for over 12 years 281 P L R 1914 26 I C. 345

——the possession or enjoyment of a pujori for the time being is not adverse to the worshipper. 23 M L J 348. 17 I C 589

——where the Mohant alienates property not entrusted to him Art 134 L A does not apply 3 P L T 352 67 I C 401.

——mere receipt of profits without possession of office does not amount to adverse possession Every fresh receipt of profits is a fresh wrong, but such receipt does not make the deft a shebait or office holder 42 C 244 18 C W N 1029 27 M. L. J 100: 20 C. L. J 360. 26 Bom. L. R 845. 24 I C 501 P. C.

——a right to perform a worship in a temple can be acquired by prescription where the worship is divisible 18 I C 475 (M).

——where leading disciples of *Mutt* manage the *Mutt* properties without any interference from the head of the Mutt, for over the statutory period, they acquire a right to trusteeship by adverse possession. It is not necessary to prove that the head of the *Mutt* protested against the violation of his right and the possession went on despite such protest 43 M 253. 24 C W. N. 249 22 Bom L R 457, 17 A. L. J 1097 P. C., 1915 M W. N. 650. 33 I C 216 *overruled*.

——it cannot be said that a right of joint management cannot be acquired by adverse possession. 1915 M. W N. 650. 33 I C. 216

——as long as the office of the trustee is vacant there can be no adverse possession of her trust property in as much as there is then no person capable of taking proceedings to protect the trust property. 1916 M. W. N. 87 34 I. C 945. 18 I C 373 (M)

——on a sale of endowed property, the possession of the vendee becomes adverse to a worshipper or the representative of the founder from the date of sale 17 I. C. 589: 23 M. L. J 348

(ii) Adverse possession against lessee and lessor.

——the possession of a trespasser during the continuance of the lease, does not become adverse to the lessor so long as the payment of rent is not intercepted by the trespasser 35 C. L J 292: 49 C. 948, *see also*, 25 C. L J. 635. 21 C W N 1001, 22 C W. N. 853. 44 I. C. 378, 24 C. W. N. 116 (note), 26 C. 460, 20 C. W. N. 773. 46 I. C 587, 52 I. C. 936, 34 C. L. J. 133, 57 I. C. 994 (c), 63 I. C. 717: 3 Lah. L J. 215.

——but this rule does not apply to a case where the tenant holds over and the dispossession of the tenant is brought to the

Adverse possession against lessee and lessor—*contd*

knowledge of the landlord. In such case, the possession of the trespasser becomes adverse to the landlord's interest 52 I. C. 936, (c) 10 C W. N 343 *fol.*

——lessee acquires no right by adverse possession if the lessor's right or the lease itself is invalid. 12 C. W. N. 63 *contra* 13 C. W. N. 805, 16 C. L. J. 349

——the possession of trespasser during the continuance of a lease does not become adverse against the lessor. The position may be different where there are successive leases for terms. 35 C. L. J. 292

(12) Adverse possession by licensee.

——a licensee cannot claim title only from possession however long, [illegible] that of the [illegible] 47 M. 572 : [illegible] 4 I. C. 261 : [illegible]

—[illegible] cense is only permissive and not adverse. 91 I. C. 365 22 L. W. 465 : 1925 M, 1279 :

——long possession as licensee does not create title. 29 C. W. N. 365, 1924 P. C. 150.

——but permissive possession may be converted to adverse possession. 12 Bom L. R. 956, 35 B. 79 : 8 I. C 639, 8 M L. T 280 . 7 I. C. 252

(13) Adverse possession by or against Municipality or Government.

——to acquire right to drains by adverse possession it must be shown that the Municipality was prevented openly from using the drains as drains. 38 M. 6 17 I. C. 158, 38 M . L J. 222 : 55 I. C. 493.

——a Municipal Council cannot acquire title by adverse possession against the true owner by occasional acts of sweeping the land 92 I. C. 18 ; 1926 Mad. 235 . 22 L. W. 671.

——Govt. can have adverse possession against Court of Wards representing private person In recovery of *chur* land from trespassers which began to form before 12 years plaintiff is to prove which portion has formed within 12 years. 14 C W. N. 317 : 11 C. L. J. 373.

——adverse possession for whole period of 60 years against the Govt. must clearly be proved. 20 C W N. 1311 25 C. L J. 69 : 35 I. C 902 · 39 M. 617 ; 14 A L. J. 1111 P C., 48 M. 570 : 1925 M. W. N. 218 : 48 M. L. J. 470.

(14) Adverse possession by or against community.

——the public as such cannot acquire ownership of land or a right of easement over it by prescription. But the user by the public may be evidence of dedication or grant in favour of the public. 44 M. L J. 638 ; 1923 M. W. N. 315 : 74 I. C. 25.

Adverse possession by or against community—*contd.*

——If a trustee of a community gives possession of land of the community to a third person his possession is only permissive and not adverse to the community. 29 M. L. J. 574 : 18 M. L. T. 327 30 I C 669.

(15) Adverse possession by mistake of fact.

——the possession of a co-sharer may be adverse by mistake of the fact as to which estate the property appertains. 17 C. W. N. 595.

——possession of the plaintiff's land taken by an adjoining land-owner under mistaken knowledge on the part of both the parties as to the true boundary, is adverse to the plaintiff. 83 I. C, 132 . 1925 Rang. 111. 75 I C. 217 . 2 R L. J. 39 : 1923 Rang. 246.

AFFIDAVIT, *See C. P. C.—Or. 10 rr. 1-3*
AGENT, *See Contract Act. Principal and agent.*
ALTERNATIVE—*See. C. P. C Pleadings.*

ALLUVION AND DILUVION.

——the bed of a public navigable river is the property of the Govt though the banks may be the subject of private ownership If there be slow accretion to the land on either side due to the gradual accumulation of the silt, this forms part of the estate of the riparian owner to whose bank the accretion has been made. If [illegible] sequently again left bare by [illegible] owner 26 C L. J 590 : 22 M. [illegible] P C, 25 C L J 69 : 20 C. [illegible] R 1007 14 A L. J. 1114 : 35 [illegible]

——land which is reformation *in situ* after submergence is the land of the original owner and cannot be claimed by way of accretion by others 24 C W. N. 211 · 29 C L J. 564 : 52 I. C 673, 3 P. L J. 438 . 47 I C. 102.

——where a land belonging to a proprietor is submerged and subsequently re appears it is restored to the owner. It does not become an accretion to the adjoining tenure unless there is a contract to that effect Such reformation *in situ* does not form land 'gained' from a river within s. 4 Bengal Alluvion and Diluvion Reg 31 C. W. N. 750: 104 I. C. 547 : 1927 Cal. 565

[illegible] *in situ* are not [illegible] Reg XI of 1825 [illegible] he landlord or [illegible] med part of the [illegible] khas possession [illegible] : 16 Bom. L. R. 323 P. C.

——if lands are reformations *in situ* the question whether the accretion was slow and imperceptible does not arise 26 C. W. N. 913 : 35 C. L. J. 580 . 69 I. C. 74, 10 I. C. 311 (A)

——it is difficult to see on what principle the proprietor of a certain defined estate who loses the use of a portion of it owing to

Alluvion and diluvion—*contd.*

ut it may be so completely abandoned as to merge again like any ther derelict land, into the public domain, in which case the rivate owner will not be entitled to recover the property, 95 I. C 50 . 28 Bom. L. R. 641 : 1926 Bom 467.

——where a newly formed land may be identified as the land which elonged to a certain person before it disappeared, the ownership of it s in the original owner and not in the adjacent landlord 105 I C. 48.

——where the land is washed away gradually but is restored y sudden change it becomes the property of the original owner 49 A. 328 : 1927 All, 243 : 100 I. C. 9 : 25 A. L J. 222.

...held under raiyati tenure does ... holder. If he wishes to retain ... the off-chance of their being ... he must continue to pay year by year the assessment or rent which is due to Govt 49 M. 249 : 43 C. L J. 378 : 94 I C. 501 1925 P. C. 18 : 28 Bom L R 865 P C.

——where the tenants brought a suit after diluvion and got a decree for proportionate abatement of rent, in the absence of any overt act showing an intention to relinquish those land, it cannot be said that the tenants consented to relinquish their rights in the diluviated lands for all times to come ; so when the lands are reformed the tenants are entitled to them : 100 I C. 687 · 1927 Cal. 921.

——where a *dar-mourasi* lease contained stipulation against ...

——the principle of English Law is that an accretion must be formed by ... "slow" ar... "gradual" ... it is applie... when ...

... the different ... W. N. 348 ... 405 : 07 I. C. 1 P. C.

Alluvion and diluvion—*contd.*

——in applying the law of accretion different standards of what is "gradual" may have to be applied when dealing with a mighty river like the ganges and a non-tidal, non-navigable river such as the Malaprabha in the Bijapur district. Where over a period of fifty years up to 1905 there was gradual accretion but there was no further accertion down to 1914 when owing to abnormal flood the river altered its course, the accretion was not "gradual" and the plff was entitled only to one half of the old river bed and not the whole of it 1927 Bom. L R. 616 29 Bom. L R. 1405.

——accretions in non-tidal and non-navigable rivers in India belong to the riparian landlords It is part of the Common Law of India that the ownership of river beds is presumed to vest in the riparian owners. 55 I C. 770 (M).

——in adopting the law as to alluvion to India, the Courts [illegible] aditions The principles [illegible] best guide in applying [illegible] ndian rivers . The [illegible] derelict lands exposed [illegible] hange of river's course. Under common Law, land formed by gradual imperceptible degrees is accretion. 40 M. 1083 40 I. C 896

——Govt cannot sue for accretions appertaining to deft's estate. 14 C. L J. 98 · 11 I. C 718.

——where a strip of land in a river suddenly formed into an island and by subsequent drying up joined with the main land of the plff the piece does not belong to the owner of the main land but to the Govt. 36 M. 57 · 12 I C. 338 : 1911 M W. N. 261.

——a non-occupancy raiyat can claim benefit of sec 4 of Reg XI of 1925 and is entitled to claim accretion. 13 C. W. N. 269.

——occupancy rights in an alluvial accretion to a non occupancy holding arise only by 12 years' continuous cultivations of that accretion 29 I. C 37.

——where there is division the mere fact of non-payment of rent or claiming or accepting remission is not proof of abandonment and until abandonment is proved, the right to the lands remains unimpaired, 73 I. C. 955 : 2 P. 800 : 1924 P. 213

——an auction purchaser at revenue sale is entitled to accretion by alluvion. 8 C. W. N. 676.

——gradual accretion enures to the land which attracts it. 3 C. W. N. 777 : 26 I. C. 107 P. C.

[illegible] usage that when the [illegible] the adjoining lands the [illegible] bank, 7 P. L. T. 19 : [illegible] 279 : 4 Pat. 788 : 89 [illegible]

[illegible] *Dhar Dhura* or deep [illegible] ared that the previous increase or decrease in the extent of the land in the *adjoining* village was due to a *slight* change in the course of the stream, held that

Alluvion and diluvion—*contd.*

the custom could not be invoked when there is an abandonment of the old channel and the making of a new one by the river. 26 A. L. J. 625 : 1928 All. 399 F. B.

AMENDMENT.

(1) **Amendment of pleadings**
(2) **Amendment of judgment, decree, order and sale certificate**
(3) **Amendment of execution petition.**

(1) Amendment of pleadings.

(Principles of allowing and disallowing amendment)

——present law is wide and amendment should be allowed to enable court to finally determine all matters in controversy. 87 I C 90. 48 M L. J. 349 : 1925 M. W N 469, 88 I C. 65 : 1925 Mad, 794.

——amendment should be allowed to avoid multiplicity of suits and also any objection that may be taken with reference to a separate suit with relation to another portion of the property. 1925 Cal. 944 : 86 I. C. 615.

not been put in proper form. 78 I. C 319.

——main object of allowing amendments is to avoid multiplicity of suits 64 I C. 99.

——the question whether an amendment should be allowed is a matter within the discretion of the court 26 C. W. N. 73 35 C. L. J. 25.

——amendment of plaint should be allowed only where the claim has been omitted by mistake or inadvertence or for similar reasons and not deliberately. 17 C W. N. 311.

nt events may 1925 Mad. 6.

appropriate to

——amendment may include subsequent Act 20 C. L J 107, 20 C. W. N 1099, 24 C. L. J. 140.

——an appellate court can take cognizance of matters which have happened after the institution of the suit for the purpose of moulding the relief, 67 I. C. 894, but a second appellate court cannot. 65 I. C. 214.

(When the question of limitation arises.)

——... uld not be allowed when ith ... of a plea of limitation whic. ... 41 C. L. J. 149 : 83 I C. 110 ... 78 I. C. 846.

***Amendment of pleadings**—contd.*

[illegible] allow amendment at [illegible] exercised *so as to* [illegible] ecial *circumstances.* [illegible] L. T. 149: 22 Bom. [illegible]

——a court can *allow* plaint to be amended even though at the time *of amendment* a new suit on the same cause *of action* would be *barred* 50 C 878: 27 C.W N. 1007

——amendment should not be allowed to introduce a new cause of action which has become time barred, 87 I. C. 218, *or* a new *party whose* claim is time barred 1925 Mad. 917.

[illegible] power to the court [illegible] t, leave *should* not [illegible] the opposite party. [illegible] C. W N. 749 22 C. W N. 104 [illegible]

——it is *well settled* that where a plaintiff bases his claim upon a specific legal relation alleged to exist between him and the defendant, he should not be allowed to amend the plaint so as to base it on a different legal relation 22 C. W. N. 104

When amendment should be allowed.

——amendment may be allowed at any stage. 20 C. W. N. 1276, 22 C. W N. 611 45 C 305.

——an amendment can be allowed at any stage of the suit at the discretion *of* the court 79 I. C. 911.

——amendment of pleading should be allowed subject to these general *conditions* (1) when there is *bonafides*, (2) when the amendment does not cause such prejudice to the other party *as* cannot be compensated by cost (3) when it does not convert a suit of one character to *suit of* another character 26 C. W. N 73, 35 C. L. J. 25, 17 C. W N 311. 17 I. C 646.

——amendment intended to shorten litigation should be allowed. 1925 Nag. 195.

——an *amendment* which only develops the *original* cause of action *and* does not vary it, should be allowed. 80 I C. 278. 1925 Nag. 9.

——in an action for rescission of contract and for return of earnest *money*, the pltf. can be allowed an *amendment* claiming specific *performance* of an alternative relief, arising out of the same facts. 2 Pat L. R. 82: 5 Pat. L. T 49: 75 I. C. 433.

——to disclose further details of fact which support a cause of action already sued upon is not to introduce a *new relief* or a new cause of action. *1925. Nag* 9.

——amendment *must* be allowed when *it* merely amplifies and does not vary the original cause of action. 1925 *Mad.* 188.

——prayers in the plaint may be amended 10 C. L. J. 538, 35. I. C. 792.

Amendment of pleadings—*contd.*

——in a partition suit pleadings may be amended at any time to include all the joint properties. 20 C W. N. 1276, 15 C. W. N. 677, 6 C. W. N. 641· 22 M. 538 **C. P.**

——when the amendment is only to change the date of cause of action it should be allowed. 1925 M. W. N 781

——it is not an inflexible rule that no amendment can be allowed if plff, had notice in the trial court of the objection to the frame of the suit. 2 Pat. 919

——it is open to court in a suit for specific performance of sale also to give a decree for possession, so a prayer for possession may be allowed by way of amendment. 1925 M. W. N. 802, 12 L W. 579.

[illegible] wed at the appellate [illegible] H C. C 297.

[illegible] an equitable relief to [illegible] allow the party such [illegible] as amended for that purpose even at the appellate stage of the suit, 1925 Cal. 434 : 82 I. C. 964

——where the deft did not appear and the suit was decreed *ex-parte*, amendment of the plaint without fresh notice to him is not invalid. 80 I. C. 375

——the plaint in a suit against the agent of the Railway Company may be amended by striking out the word "agent", 82 I C. 177 : 30 C. W. N. 209.

(*When amendment should not be allowed*)

——change of case at a late stage shall not be allowed. 25 C. W. N. 654 **P. C.**

——neither party to a litigation can be allowed to set up at the hearing an entirely new and inconsistent case. 26 C. W. N. 294· 35 C. L J 103 · 1922 Cal. 254, 67 I C 394 (c) 17 C. W. N. 219, 5 C. L. J. 527, 653, 3 C W. N 325 *Ref*, 25 C. W. N. 654 **P. C**

——a plff cannot be allowed to substitute one plaint for another. 87 I. C. 481 : 27 Bom. L. R 277 : 1925 Bom. 248

——an amendment cannot be allowed where a right legally accrued to deft. will thereby be taken away 83 I. C 110 : 41 C. L J. 149 : 1925 Cal, 67.

——amendment should not be allowed to change the legal relation of the parties. 22 C. W N. 104, 27 C L. J 403 : 33 C. 1047, 10 C. W. N. 874, 14 C. W. N. 366, 44 I C. 996 (c).

——an amendment of plaint should not be allowed where the object is to get round the effect of some admissions made by the plaintiff himself 80 I. C. 355.

——amendment was not allowed to make an alternative claim for personal decree at the hearing of appeal to the Privy Council when the original claim was for mortgage decree only. 47 A. 459 . 27 Bom L. R. 853 : 87 I. C. 292 41 C L. J. 450 : 49 M. L. J. 238 **P. C.**

Amendment of pleadings—*contd.*

——change of boundaries by amendment of plaint *without* notice to the deft. is not illegal if it be not prejudicial to deft. 64 I. C. 305 (C).

——a deft. who has deliberately and under no mistake or misrepresentation admitted a material fact in his written statement, cannot be allowed at a later stage to change his front and make out a new case by denying that fact. 85 I C. 900, 1925 Mad. 950 : 22 L. W. 26

——the legal representative of a deceased pltf. cannot introduce an inconsistent case by way of amendment. 42 M. L. J. 43 : 1922 M W N. 42 : 1922 Mad 49 68 I. C. 703.

——where a suit is dismissed on the ground of want of cause of action, amendment of the plaint should not be allowed in appeal. 25 C. W. N 552.

——but when the maintainability of the suit is questioned it cannot be amended in appeal to make it maintainable. 10 Bur. L. R. 241 ; 35 I. C. 611

(*Amendment of signature and verification*)

——some portion was written after verification and signature, [illegible]

46 A. 637.

——signature in the plaint is a matter of practice and procedure and authorisation is a question of principle, when suit is duly authorised mistake in signing may be amended at any time 40 A. 147, [illegible]

[illegible] ed and [illegible] when [illegible]

——signing and verification may be cured by amendment as they are technical defects. 69 I C 422.

——but where an *issue is framed* as to whether the plaint was duly signed and verified and the court finds that the plaint is improperly signed and verified the court cannot act under S. 53 (b). (Or 6. R. 17), order the return of the plaint for amendment. The proper order in such a case is to direct that the plaint be removed from the file of registered suit ; By such *order* the pltf. will not be debarred from bringing a fresh suit, subject to the law of limitation. 2 C. L. J. 11

——but this case has been dissented *from* in 17 C. W. N. 939 : 15 I C. 583 by Mookerjee. J. *following* the cases of 9 C. W. N. 603, 20 A. 444 (note), 20 A. 442, where it has been held that in such cases the court should return the plaint for amendment before the settlement of issues, because no material issue can be framed unless there is a proper plaint So if there is an issue raised as to the defect in the plaint it must be decided first and the plaint shall

Amendment of pleadings—*contd.*

be returned for amendment to the plainiiff who is entitled to such opportunity.

(*Amending of the names and descriptions of parties*)

——where owing to *bona fide* mistake a suit was instituted in the name of wrong persons as plffs. and the matter in dispute was referred to arbitration by order of Court and subsequently the plaint was amended by substituting the names of the real plffs, held that the persons whose names were substituted as plffs were subject to the question of limitation, to be treated as if they had been described as plffs. in the suit from the very start and that they were entitled to take advantage of and proceed under the order of reference to arbitration. *41 C. L. J. 511 . 88 I. C. 1029 .* 1925 Cal 922

——the name of a co-plff. in a suit of pre-emption cannot be removed at the appellate stage. 47 A. 450 : 87 I. C. 55 . 23 A. L J. 198.

——description of the deft. may be amended. 47 B. 785 25 Bom L R 513 : 1923 Bom. 452 : 73 I. C 1027

——where it was a case of mere misdescription of the defendant it could be rectified by a formal amendment, as the case had been fought out 30 C. W. N. 209 : 94 I. C. 762 1926 Cal. 612

(2) Amendment of judgment, decree, order and sale-certificate—the proper remedy for variance between the judgment and decree is to apply for amendment of decree. 25 C. L. J 339: 77 I C 167, 43 C. 217 : 19 C W. N. 1228.

——the court cannot amend a decree when it is in conformity with the judgment, not even if there is an error apparent on the face of the judgment, 18 C W. N. 876 . 76 I C 786.

——amendment of decree 18 C. W. N. 772, 37 C. 549, 659, 19 C. W. N. 1021, see C. P. C ss 151, 152.

——court has inherent power to correct sale-certificate 12 C· W. N 1027, but new matter cannot be inserted in sale-certificate. 18 C. W N. 313 **P. C.**

——in matter of amendment the court should exercise discretion when no review of the judgment or order is necessary, 20 C. L. J, 18 : 23 I. C 419.

——when a judgment has been affirmed by the first and the second appellate courts the original court cannot amend the decree under s 152 The only court that can amend the decree under s. 152 is the High Court. 11 C. L. J. 159, 24 C. 759, 11 C. L. J. 153 *fol.* 24 B. 548 *not fol.* 14 C W. N. 667 : 11 C. L. J. 560 661 C. 669 **P. C.**

——it is settled law that after a decree has been confirmed, re- [illegible] e of the appellate court is the [illegible] is to be made the application [illegible] 11 C. L. J. 155, 11 A 267, 18 B.

Amendment of judgment, decree etc.—contd.

—after an appeal has ben preferred the first court cannot modify the decree or extend the time for the execution of a Kabulyat, only the appellate court can. 14 C. W. N. 584 : 37 C. 543 : 6 I. C. 275.

—original court can correct mistake when the appeal is pending. 18 C W. N. 772

—but when the appeal is not tried on merit but is dismissed for default the decree of the lower court is not merged. 18 C. W. N. 963 P. C.

—the courts in India have inherent power to amend or vary a decree so as to bring them in conformity with the judgment if they do not fall within s. 152 of the C. P. C, 37 C. 649 : 7 I. C. 876, 36 I. C. 500.

—the appellate court can make amendments which should have been made by the lower court, 38 A. 398.

—the court in passing final decree may rectify any error in the preliminary decree. 38 A. 398.

—allotment in partition may be inserted in the mortgage decree by way of amendment. 19 C. W. N. 1021.

—the H. C. can amend the plaint and decree so as to rectify a mistake in the description of the property. 1923 Pat 46: 1923 P 218.

—the court has inherent power to rectify mistakes in judicial orders arising from the ignorance of the court, 69 I C. 112 and to alter a decree to make it in conformity with the decision. 72 I. C. 679 : 1923 Lah. 147.

—a decree cannot be amended for subsequent change of circumstances. 27 I. C. 300.

—a suit for amending a decree is not maintainable 17 C. W. N. 82 : 15 C. L. J 675 14 I C. 93.

—the court is empowered to set right its own decre and bring it into conformity with the judgment. 37 C 640. 12 B. 174. 4 Bom L R 909.

—the court cannot vary or amend its decree when it is in conformity with judgment, 22 M 364; not even if the judgment is erroneous in law 20 A. 337.

—when a compromise decree is erroneous, only remedy is to bring a suit to set it aside either on the ground of mistake or fraud or some other ground *ejusdem generis*. 4 Pat. L. J. 205.

—clerical error made in the plaint and repeated in subsequent documents may be amended. 14 L W. 445 : 63 I. C. 652, 73 I. C. 674

—Or. 45, r. 13 does not restrict the operation of sec. 152. 11 C. L. J. 155.

—a trial court cannot amend the decree of the appellate court which is the only decree in the case, 63 I. C. 799, but the appellate court can, including the decree of the trial court. 19 A. L J, 375 : 62 I. C. 910.

Amendment of judgment, decree etc.—*contd.*

——when an appeal is pending the trial court can amend the decree. 2 Pat. L. R. 6.

——a clerical mistake can be amended by the successor in office as the word used in sec 152 is "court" and "judge." 2 Pat. L. T. 296 : 63 I. C. 840, 74 I. C. 110

——when the whole system of calculation is challenged and no mere allegation of arithmetical or clerical mistake the court purporting to act under this sec. must be considered to have acted under Or. 47 r. 1 and appeal lies. 3 Lah. L. J. 341.

——it is not competent to a court to amend the decree of another court transferred to it for execution, even though the error may to obvious. 1922 M. 186 : 15 L. W. 301 : 65 I C. 710.

——the court can correct errors in judgment and decree at any moment when those mistakes are due to clerical mistakes in the plaint or other proceedings. They may be rectified if real points at issue are not affected. 66 I. C. 693.

——mistakes for law cannot be amended L. R. 3. A. 1.

——a decree enforced for five years cannot be amended. 1923 Nag. 109

——apart from the power to correct clerical or arithmetical errors or to review judgment, a court cannot alter an order passed in court. 74 I C. 110 (c).

——time for review being over no amendment should be allowed affecting personal liability 15 L W. 393 · 1922 M 192.

——power of amendment under sec 152 is discretionary and should not be exercised to affect the right of the third person, 43 M. L. J. 559: 1922 M. W. N 731 16 L. W. 623, 32 M. L. T 98 : 1923 Mad. 57 : 69 I. C. 977.

——the court should amend a misdescription in the plaint which has caused an error to creep into the record. 21 A. L. J. 328 1923 A. 349 : 72 I. C. 483.

——the court should amend, even if applied at late stage, a decree passed against a legal representative making him personally liable 1923 Bom. 414

——mistake in calculation up to the date of payment in a redemption suit may be corrected at any time. 74 I. C. 842.

——omission of some mortgage property from the plaint and decree through oversight may be corrected. 74 I. C. 1020.

——sec. 153 C. P. C. gives the court general power to amend for the purpose of determining the real question or issue 1 Pat. L. J. 393.

——in rectifying obvious mistake in the decree there is no limitation. 2 Pat. L. T. 281.

——misdescription of the mortgaged property may be amended by the appellate court. 20 A. L. J. 159 · 1922 All. 81 · 68 I C 208

——amending a sale certificate without giving notice to the Jt. Dr. and other persons interested, is a material irregularity. 1922 M. W. N. 130 ; 16 L. W. 760 . 1922 Mad. 63 : 65 I. C. 732.

Amendment of judgment, decree etc.—contd.

——s 153 C. P C allows the court to give leave for amendment at any time in *any proceeding* in a suit, and Or. VI r. 17 allows such amendments at any stage of the proceeding. 25 Bom. L R. 888.

(3) Amendment of execution petition—an execution petition may be amended 22 C. W. N. 540. 27 C. L. J. 398, 55 I. C. 16, 34 B 142, 47 I. C. 911 (c)

——an amended petition of execution which has been refiled should be considered to have been filed *on the first day of filing.* 52 I. C. 765 (*M*), 55 I. C 16 (La).

ANCIENT MONUMENTS PRESERVATION ACT (VII OF 1914).

——s 21 of the Act applies to the purchase of moveable antiquities or relics and the compensation which may have to be paid for incidental damages caused by the removal or protection of such objects of historic interest or art value In ascertaining the market value and the amount of compensation the provisions of Land Acquistion Act enumerated in s 20 are to guide the court. 42 B. 100 43 I. C. 480 : 19 Bom L. R 937.

ANIMALS

——if a person kills a wild animal or wild bird on the property of another person, such dead creature does not belong to the killer but to the proprietor of the property, and such proprietor either himself or by his duly authorised agent can lawfully demand and if refused, seize such dead creature from the possession of the killer. 3 Pat. 549 81 I. C. 82 : 25 Cr. L. J 94.

——a wild animal is the property of person in whose forest it happens to be for the time being. No body has any absolute property in animals which are *feræ naturæ.* 1918 Pat 232 49 I C 198.

——an animal *feræ naturæ* may become the property of a person if there is a complete capture reducing the animal completely into possession. Mere pursuit will not do and so long as it is possible for it to escape it does not become any one's private property. 15 I C. 972 : 13 Cr L J 556 : 15 O. C. 183

ANALOGOUS.

Analogous—The court has inherent power to make order for analogous trial. 17 C. W. N. 526.

——when appeals preferred in analogous suits are pending some in inferior courts and some in superior courts, the former should await the decision of the latter. 11. C. W. N. 112.

[illegible], 39 B. 604, 43

[illegible] eals together.

ANNUITY.

——although an annuity to the person should ordinarily be considered to mean that on the death of one the other should get a proportionate annuity, where there are indications of contrary intention the gift may be taken as a joint gift. 25 C. W. N. 262, 23 I. A. 37 23 C. 670, **P.C.**, 17 C L. J. 87 *Ref.*

—L with the brothers of her hus- which the estate is charged and er right to the annuity to the sation, held that it was not a personal right of the widow and the right was conveyed by the assignment 53 I. C 587 (c).

——though a right to maintenance cannot be transferred, specified property given in lieu of maintenance can be tranferred. 29 I C. 251 (c)

——the right to receive future maintenance cannot be alienated in India though it may be otherwise under the law applied in courts of equity in England 40 M 302 : 34 I. C 381, 34 M. 7 *Dist.*

——an annuity by way of maintenance is alienable whether voluntarily or involuntarily transferred. 52 I. C. 953.

——when a person in enjoyment of an annuity dies and the annuity ceases, his assets when valued cannot include any sum due on accout of the annuity. 33 I. C, 516.

APPEAL *See*, C. P. C.—*Appeal.*

APPORTIONMENT.

Apportionment—Rent is apportioned by partition proceeding by Collector and the holding is divided thereby 10 C W. N 818.

——but a civil court partition does not divide the holding. 12 C. W. N 568.

——a suit for apportionment of rent should be properly framed so as to implead all the co-sharers and the tenants who are necessary parties 28 C. W N. 967, 27 C. L J 438, 5 C. 902.

——landlord cannot break the holding without the consent of the tenant, 22 W. R. 336.

——the purchaser of a share of the tenure may bring a suit for apportionment of rent against tenant, making all the co-sharers parties 5 C. 902 **F. B.**

——whether the sub-division creats new holding must depend upon the intention of the parties 11 C L. J 56 . 14 C W. N 335, 41 I. C 691 (C)

——when the question arises as to whether old tenancy has been sub-divided or new tenancies have been created it depends upon the intention of the parties 24 C L J 275, 14 C. L J. 110, 11 C. W. N. 56 : 14 C. W. N. 335.

——a sub-division of holding or distribution of rent cannot be binding on the landlord unless his consent in writing has been obtained to the sub-division. 13 C. L. J. 267.

Appointment—*contd*

——an assignee from a lessee becomes the lessee from the date of assignment and he is liable only for the rent accruing due after the assignment. 38. M. 86 17 I. C. 933.

——an assignee of a lease is entitled to claim as against the lessor an apportionment of the rent after the date of his assignment as the rent accrues from day to day as between him and the lessor. 38 M 86 17 I C. 933.

——as soon as the title of the assignee is complete he is entitled to claim rent. *The tenant can escape liability if he can establish* [illegible] *th before notice of*

ARBITRATION *see C. P. C.—Arbitration.*

ATTORNEY AND CLIENT.

——when an attorney proposes or is asked by a client to mark on the brief or to pay fees to counsel, which cannot be allowed on taxation, he must make it clear to his client that such fees will not be allowed on taxation and should obtain a letter authorising or ratifying payment 51 C. 829 28 C W. N 597 1924 Cal. 753.

——the actual fess, which, it has been arranged to pay to *counsel must be marked on the counsel's brief and no manipulation* thereof can be permitted for the purpose of taxation or otherwise *above case*

——attorney's duty as officer of court and to his client discussed—disciplinary jurisdiction of the court over the attorney. 29 C W. N 1047 90 I. C 468. 1925 Cal. 964

——an attorney cannot disclose any communication made to him in the course of his professional employment without the consent of both his clients who engaged him. 26 Bom L R. 887: 1925 Bom. 1

Attestation, *See 'Evidence Act—Attestation*
Award *See* **C. P. C.**—*Arbitration*

BANKER AND CUSTOMER

——Bankers have a general lien on all security deposited with them by a customer. Unless there be an express or implied contract inconsistent with it they can set off what is due to a customer on one account against what is due from him on another account although the monies due to him *may* in fact belong to other persons 78 I C. 596.

——a person depositing money with bank to be lent out on [illegible] Bank. 49 A. 376: 100 I. C. 62:

[illegible] letter of request whereby one [illegible] or persons to advance moneys [illegible] on named therein for a certain

Banker and Customer—*contd.*

advancing the same or accepts bill drawn upon himself for the like amount. 51 C. 43 79 I C. 757 : 1924 Cal. 552.

——provisional credit cheques subsequently dishonoured, failure of Bank. 40 C. L. J. 233, 1925 Cal 54.

——by merely adding the amounts of the dishonoured hundis to the debit side of an overdrawn account and showing the debit in the pass book, a Bank does not discharge the hundis by accord and satisfaction or by merger Consequently the Bank has the right to proceed against the customer or the drawer of the hundis. 102 I. C. 801 : 1927 Lah. 577.

——in the case of loss incurred in an ordinary banking transaction between a Bank and a customer, the charging of interest is justifiable, but where the suit-claim is based on an agreement between the Bank and one of its servants as to security to be given by the servant the matter is outside the ordinary banking business. 69 I C. 212.

——where cheques were treated as not finally cleared the money represented by the cheques is not part of the assets on liquidation. 84 I. C 1018 1925 Cal. 54 40 C L. J. 223

——a bank is not affected with knowledge of the ownership in [illegible] of their customers by the mere [illegible] instruments by which such [illegible] W N. 469 : 30 C. L. J. 446 [illegible] L. 1 370 [illegible] C 121 P. C.

——the word "Bank" connotes the business of utilising money received for purposes of profits The treasury receving money from the District Board and respecting their orders does not constitute bank. 43 M. 816 : 58 I C. 893 : 39 M. L. J. 377.

——the Banker making payment of a draft under an authority so to say, is liable, when the draft is found to be forged one, to make good the loss occasioned to the customer 36 B. 455 · 12 I. C. 257.

——the Banker is but a debtor of the customer but where the customer directs the Banker to use it or *collect* rents for him on similar terms, banker becomes a trustee and the customer is entitled to the amount out of the assets of the banker where the banker has committed a breach of trust. 39 M. 1081 : 32 I. C. 965 · 30 M. L. J. 245

——a Bank which credits the customer with the amount of a cheque [illegible]

Banker and Customer—*contd.*

not pass in insolvency to the agent's trustee in bankruptcy. 79 P. R. 1915 : 31 I. C. 215.

——property in Bank-notes passes by delivery and a party taking it *bonafide* for value can retain it as against a former owner from whom it has been stolen 13 I. C. 213=5 S. L. R. 153.

BENAMI TRANSACTION.

Sub-headings of notes.

(1) Nature and proof of benami transaction.
(2) Admission by benamdar
(3) Transfer by benamdar.
(4) Suit by or against benamdar
(5) Suit between benamdar and real owner.
(6) Payment to benamdar or to real owner
(7) Suit against benami auction purchaser

(1) Nature and proof of benami transaction.

(*Onus and proof*)

——the very object of all *benami* transactions is secrecy: but still the person who alleges that property conveyed to another belongs to himself must prove his allegation and prove it beyond reasonable doubt 31 C W N. 252. 38 M. L. T 70. 96 I. C. 142 : 24 A. L. J 758 : 1926 P C 77.

——direct evidence cannot be expected as the whole object is to suppress real fact, true fact can be proved by circumstantial evidence. 24 I C 277. 18 C. W. N. 1071.

——to determine the ownership the main criterion is the source whence the consideration money was paid 19 C W N. 1207 **P. C.**; 22 C W. N. 522 **P. C.**; 105 I. C. 191

——in case of *benami* the most important test to be applied is the source from which the consideration came 27 C. W. N. 305, and the possession of the property. 62 I C 1002.

——the vital test
court should take into
the surrounding circu
1: 1925 Pat. 68, 6 M
97 **P. C**. 46 I C. 1 **P. C**
283 : 7 Lah L. J. 298 · 88 I C. 693.

——to decide whether a transaction is *benami* it is necessary to look at all the circumstances Neither the custody of documents nor the source of the purchase money is a conclusive criterion, though both are important tests. 86 I. C 272, 97 I. C 487 : 1927 All. 59.

——the determination of the question must depend not only on the oral evidence but upon circumstances such as the source of [illegible] the property, the custody of [illegible] and the like. 88 I. C. 699 : [illegible] .41 : 4 Pat 510, 86 I. C. 272:

Nature and proof of benami transaction—*contd.*

——onus of proof is on him who asserts benami. 19 C. W. N. 95 n., 25 C. W. N. 409 P. C., 1925 P. H C R. 239, 6 P L. T. 634 : 87 I. C 849, 88 I C. 699, 31 C. W N. 252 · 96 I. C. 142 : 1926 P. C. 77 P. C., 92 I. C. 25 1926 Nag. 262 : 9 N L J. 120

——onus is on the person asserting it. 35 C. L. J. 589, 554 P. L R. 235 . 1923 Pat. 142 . 76 I. C. 1049, 93 I. C. 273 : 7 Pat L. . 445 ; the other party is entitled to adduce evidence of rebuttal t the close of the evidence. 93 I. C 273 . 7 Pat. L T 445

——the burden of proving that a transaction is fraudulent and ollusive and intended to defeat or delay creditors and is really *enami* is upon the creditors who asserts it. 1921 M. W. N. 80 . C., 25 C W. N. 409 P. C.

——as *benami* transactions are very common in Indian practice ven a slight quantity of evidence to show that it was a sham ransaction may be sufficient for the purpose. 98 I C. 129 . 1927 Cal. 140.

——burden of proof is shifted. 39 C. L. J. 98

——*when from the lapse of time direct evidence of a conclusive* r reliable character is not forthcoming as to the payment of consi- eration, the case must be [illegible]
nd legal inference arising f [illegible]
.. J 393, 43 C 660 · 24 C L [illegible]
18 : 30 M. L. J. 529 ; 33 I. [illegible] C. [illegible]
. 428 : 54 I. C. 700, 21 C. [illegible]
. C., 28 C W N. 62, 131

——a transaction should not be considered to be partly genuine nd partly unreal unless there are very strong reasons. 23 Bom. .R. 893 : 46 B. 85.

——where two brothers constitute a joint Hindu family there is no presumption that one brother must necessarily buy property for the benefit of the other brother. 86 I. C. 886 : 1925 M. 448

——among Burmans the practice of *benami* is not indigenous and though it has to some extent taken root it is not so common as in India proper 100 I. C. 250 : 1927 Rang 102 : 4 Rang. 522. .

(*Purchase in the name of wife or son*)

——a purchase by an Indian husband of property in the name of wife [illegible] *benami* transac-
tio[illegible] presumed to be
for [illegible] India. 29 C. W.
N. [illegible] ; 48 M. 605 : 23
A. [illegible] . C. 998.

——under the Indian law there is no presumption of intended advancement negativing the inference of a resulting trust in the case of a benami purchase of property by the husband or father in the name of wife or child. 48 C. 260 : 32 C. L. J. 490 : 28 M. L T. 194 : 39 M. L J. 296, 23 Bom. L. R 730 : 57 I. C 834 : 24 P. L. R. (P. C. 153) 2 C. W. N. 367, 82 I. C. 832 : 1 C. W. N. 710.

Nature and proof of benami transaction—*contd.*

——whether the husband of a Hindu female intended to make a gift of the properties to her or took the conveyance in her name so as to make her only the ostensible owner is largely a question of intention 39 C. L. J 140, 21 C W N 280 32 I. C. 267, 22 I. C 536 (Pun)), 39 I. C. 530 (Pat)

——where a Hindu having two wives and children by both of them invests the bulk of his savings in the purchase of immoveable properties in the name of one wife she is only a benamdar for him and there is no presumption of advancement 47 M. L. J. 622 : 1925 M. 95, 48 C 260 *Rel on.*

——no presumption of advancement exists in favour of son or wife 85 I. C 855 47 M. L. J 622

——but where the wife had moneys belonging to herself and purchases were made in her name it would be a fair inference that she paid the price out of her own funds. 1928 Mad. 708, 1927 Mad 194 *Ref*

——a Mahamedan purchasing property in the name of wife or son raises presumption that it is gift to them 24 I. C 10, 20 C 56.

(2) Admission by benamdar

——an admission by a benamdar that the property standing *benami* in his name belongs to a person other than beneficial owner does not convey any title to that person 78 I C 52 : 1924 Mad 749 . 19 L W 567

(3) Transfer by benamdar

——*transfer* by benamdar binds the real owner, 20 C. W. N. 522 P C 20 C W N 103 32 I. C 82, 22 C L J 574 . 29 I C. 481, 17 C W N 20 . 16 C L. J 185, 1919 Pat 404 · 48 I C 936.

——a *bona fide* transferee for value from an ostensible owner can protect himself against a claim by real owner or his representative 22 C L. J 574, 18 W R 166 P C , 22 C 909 P. C., 20 C. 296 P. C , 9 M I A 303 P. C , *Ref.*

——one who culpably stands by and allows another to hold himself out to the world as the owner of property and thereby sells it to a *bona fide* purchaser, cannot afterwards assert his title against the latter. 36 C. L. J. 9 : 1923 Cal 240 · 70 I. C. 194

——when, during the hu[illegible] the wife sold a piece of land which [illegible] *mortgaged by her, the pur*[illegible] having by proper enquiries sa[illegible] owner, the husband could [illegible] to redeem the mortgage. 20 [illegible]

——relationship of landlord and tenant can be created by a *benami* lease (Kabulyat) executed in favour of the landlord. 16 C. L. J. 271.

For other cases see " T. P. Act, sec. 41."

(4) Suit by or against benamdar.

[illegible] benamdar of mortgage [illegible] C. 499, 24 C. 644, 11 [illegible] 504 : 22 C L. J. 259: [illegible]

——suit against benamdar does not affect real owner. 34 C. 711: 11 C. W N 817. 6 C. L. J 17 P. C., *But see below.*

——symbolical possession against benamdar does not affect the real owner. 22 C W. N. 807.

——suit by benamdar binds real owner. 10 C. 69, 19 C. L J. 34, 19 C. W. N. 361, 55 I C. 599 (Pat.)

——a suit against a *benamdar* binds the real owner.' But the plff. cannot be allowed by keeping the real owner out of the record to enforce a right against an ostensible vendee which he would not have been entitled to enforce against the real purchaser had he been brought on the record. 80 I. C. 42: 1924 A. 802: L. R 5 A 616.

——in a proceeding by or against the benamdar the person beneficially entitled is affected by the rules of *res judicata*. 75 I. C. 1048 1924 Lah, 702.

——where despite the plea of deft. that she is only benamdar a decree is passed against her as real owner, the real owners are not barred by *res judicata* from bringing a subsequent suit. 36 A. 446 · 25 I. C. 381.

——a proceeding against benamdar and its ultimate result is fully binding on the beneficial owner. It is not necessary to add the real owner of the mortgaged property as a party to a suit on a benami mortgage. 54 I. C. 633 (c).

——a real purchaser does not require a conveyance of title from his benamdar in order to enable him to sue for possession. 24 I. C 17 (c).

——where the tenant is a benamdar of another person a suit for rent lies against the beneficiary. 9 W R. 71.

——the real owner is stopped by the action of the benamdar. 22 C. W. N 891 P. C.

——real owner can recover money deposited to set aside a sale, by the benamdar 21 C. W. N 1130 : 42 I. C. 516.

——though a real owner may be bound by a money decree against his benamdar he is not necessarily bound by a sale of his property in execution 22 C. W. N. 807 : 46 I. C. 104.

——benamdar is a trustee for the real owner and a suit by or against a benamdar binds the real owner. 46 C. 566, 23 C. W. N. 521 P. C.

——a benamdar is a trustee for the real owner and his heirs are liable as trustee on his death. 45 C 909 : 28 C. L. J 192 : 22 C. W. N. 891 : 16 A. L. J. 576 : 24 M. L. T. 62, 20 Bom. L. R. 851 P. C.

——when the deft. successfully defrauded a stranger in collusion with the plff, he cannot, in the suit by plff. for possession, plead benami and fraud on the principle that *that party fails who*

Suit by or against benamdar—*contd*

first has to allege the fraud in which he participated. 1925 Mad. 1016 : 22 L. W. 313.

——the provisions of the Negotiable Instrument Act do not admit of a suit being brought upon a promissory note by a benamdar whose name does not appear in the document 44 A. 290, 13 A. L. J. 695, 28 M. 205, 30 M. 88, which *overrules* 21 M. 391 *fol.*

——suit by benamdar for the removal of an obstruction to access of light and air in a house is maintainable. 35 C. L. J. 43.

——the member of a family in whose name the money of the family is lent can sue for the debt. 15 C W N. 321 · 13 C. L. J. 345 : 8 A. L. J 256 · 21 M L. J. 378 : 13 Bom. L. R. 359. 9 I. C. 739 **P. C.**, 42 I. C 377 (Punj.), 20 B. 435 *contra* 32 M. 284

——benamdar can sue for ejectment 46 C. 566 23 C. W. N. 521 **P. C**, 16 C. 364, 25 C. 98, 3 C W N. 20, 25 C. 875 · 30 C. 265, 7 C W N 229, 22 C W N 367 · 45 C 929, *overruled*, 47 M. L. J. 415 : 1925 Mad 22, 1923 A 10 : 70 I. C. 849, 27 Bom L. R 667

——a benamdar can sue for possession, 1923 Cal 281. 67 I C. 741, for renewal of obstruction to access of light and air in a house, 35 C. L J 43, 64 I C 581, on mortgage, 33 C L J 369. 63 I. C, 244, 18 C. W N. 814 · 19 C L J 193

——but a benamdar cannot sue for title and possession when he is in effect suing the beneficial owner 1923 Cal 536, (23 C. 521 **P.C.**) *Dist*

——a suit by benamdar to recover money will not be decreed where the beneficial owner of the money is before the court as a party *but the court may make the beneficial owner co-plaintiff* and decree the suit. 54 I C. 21 (c)

——a benamdar can execute a decree. 37 A. 414 29 I. C. 593, 18 C W N. 450, 43 I C 801 1918 M. W N. 226 *contra* 25 I. C. 555 (c) *See above.*

——a benamdar can sue for mesne profits 18 C W N. 450 : 20 I C 685 and possession, 1923 Cal. 281 and for damages for breach of contract. 76 I. C. 125

——a transferee-mortgagee can sue though he is simply benamdar of the beneficial owner who is not a party. 41 M 435, 19 C. L. J. 193, 37 A. 113, *fol.*, 9 C. W. N 477 **P. C.**, 46 C 566 : 23 C W. N. 521, 17 A L. J. 66 · 36 M. L J. 68 : 49 I. C. 1 **P. C**, 44 B. 352 56 I C. 349, 42 M. 348 : 50 I. C. 309 : 25 M. L T. 351 **F. B.**

——real purchaser need not have a conveyance from the benamdar to sue *for* possession. 24 I C. 17

——a benamdar cannot apply for the execution of a decree. 40 M. 296 : 32 I. C. 952, 25 I. C. 555 (C), *Contra.* 37 A. 414, but the [illegible]

[illegible] of benami. 27 C. L. J. [illegible] (Lahore) *Dist.*

[illegible] stered under the Land [illegible] t suit cannot raise the [illegible] 695, 15 C. L. J. 114 : 9

Suit by or against benamdar—*contd.*

——previous statement of the plaintiff that the proforma defendant who is now said to be benamdar was the real owner does not

8 C. W. N. 1331.

——sec. 66 C. P. C. discourages benami purchases · so such a uit is not maintainable 20 C. W. N. 147, 23 C. 699, *Doubted*, 23 A. 75, *Appl*

——a benamdar court-auction-purchaser who had paid money o save and preserve the estate, can, when the sale is set aside or irregularity, recover it from the Jt Dr. 21 C. W. N. 1130 · 42 I. C. 516.

(5) Suit between benamdar and real owner.

——when two or more persons are engaged in fraudulent purpose *to injure another, neither law nor equity will interfere to* relieve either of those persons against the other from the consequence of their own misconduct. 36 C. L. J 491, 1923 Cal. 90, 43 I. C 352 *; 32 M. L. J. 484, 52 I C 402.*

——when the purpose for which fraudulent assignment is made s not carried into effect the assignor can recover the property rom the assignee who has paid no consideration 36 C L. J 82: 1923 Cal 154, 35 C. 551, 33 C. 967 18 C L J. 616 22 C L J. 197, 24 I. C. 33. (c), 1923 A 164 38 B 10 · 21 I. C 50 (mortage), 36 C L. J. 491: 1923 Cal 90, 19 C W. N. 1151: 22 C.L J 197 29 I C 399, 18 C. W. N. 1331: 27 I C. 230, 18 C. L J 616 · 22 I. C 86, 33 M. L. J. 696 . 45 I. C. 333 (Mortgage), 1916 M W N. 107 32 I C, 810, 23 I. C. 620: 1. L. W. 169, 52 I C. 866, 13 M L T. 227 · 17 I C 923, 30 M. 6, 24 C. 825, 1915 M. W. N. 273 28 I C. 702 (mortgage).

——although, where the intended fraud has been carried into effect, the court will not allow the true owner to resume the individuality which he has once cast off to defraud others, yet if he has not defrauded any one, the court will not punish his intention by giving his estate away to another whose retention of it is an act of gross fraud. 36 C L. J. 491, 16 N. L. R. 129 : 59 I. C. 285, 33 C L. J. 82.

——the court will not aid a fraudulent grantor to reclaim or recover, from his transferee, property transferred in fraud of creditors or its proceeds, *above case*

owner can s [illegible] been carried into effect. [illegible] C 551: 12 C. W. N. 562 : [illegible] I. C. 230, 19 C. W. N. 11 [illegible] 8 I. C 66, 31 B. 405, 45 I. C. 333.

Suit between benamdar and real owner—*contd.*

——where the owner of property executed a fraudulent transfer with some ulterior notice but continued in possession of the property for more than twelve years, he is entitled not only to confirmation of possession but is entitled to recover possession if he is subsequently dispossessed even though the fraud intended to be effected was carried into effect, 53 I. C 114 (35 C. 551, 27 C 231, 33 C. 967, 13 C. L. J. 625) *Ref.*

——where a property is sold in execution of a decree against the real owner and the *benamdar* deposits the money for setting aside the sale, the real owner cannot step in afterwards and claim the property free from any obligation to repay the money borrowed by the benamdar for setting aside the sale. 47 M. L. J 622 : 1945 Mad. 95.

——to prove dispossession and adverse possession against *benamdar* clothed with all the insignia of beneficial owner very strong and reliable evidence is required. 35 C. L. J 554.

(6) Payment to benamdar or to real owner. effect of,

——payment to benamdar binds real owner, if made without notice and objection by him. 45 M. 84 : 41 M L. J 393 · 1921 M. W. N. 642.

——payment of rent to real owner absolves the tenant from liability to the benamdar 26 M. L. J. 597 25 I C 679

(7) Suit against benami auction purchaser, see *C. P C s 66*

BENGAL ALLUVION & DILUVION ACT (IX OF 1847).

——*chur* formed in the bed of river proved to have existed at the time of *Decennial Settlement* can be assessed with additional revenue although the bed was included in the land of the proprietor at the time of the Settlement. 29 C W. N. 195 · 86 I C 110 · 1925 Cal 447

——certain alluvial lands
solely for assessment and
relation to the parent estate
was a separate estate within
on reappearance they would
formation to which this Act a

——this Act was framed with a view to substitute, in cases of assessment of alluvial lands a simpler procedure than that embodied in Regn. 11 of 1819, which was intended to apply in the main to resumption of lands held free of assessment without the sanction of the proper authorities or under illegal or invalid tenures. 39 C. L. J. 454 : 1924 Cal. 913.

——when the proprietors of a permanently settled estate executed a kabulyat in the following terms,—" if in future any *chur* be newly accreted and the quantity of the taluk land be increased, we shall duly pay revenue for the said increased land", held that the clause meant that the rate of assessment in respect of the accreted land were to be determined in the same way and

Bengal Alluvion & Diluvion Act—*contd.*

according to the same rules as Govt. adopt with regard to all newly formed *char* and not that the rates mentioned in respect of the permanently settled estate are to be accepted. 32 C. W. N. 906 ; 1928 P. C. 193 P. C.

——under this Act the Board of Revenue is the proper authority in all cases of accretions or alluvion and all matters of survey, *measurements, boundaries etc., of assessable land and its decisions* are final provided that there has been no fundamental irregularities indicative of defiance of or non-compliance with the essentials of legal procedure 51 C. 802 · 29 C. W. N. 1 80 I C. 1023 (1924) M. W. N. 588 : 35 M L T. 146 P. C.

——lands covered by the original Decennial and Permanent Settlement are not within the scope of the act. 2 Pat. 839 : 75 I C. 955 : 1924 P. 213.

——the expression "any such new map" plainly refers to the "new map" made according to "new survey" as contemplated by s 3, 50 C 822 : 38 C L. J. 47 · 1924 Cal. 197.

——s. 6 does not require that before an assessment of revenue is made under the Act, there must be a special survey carried out under sec. 3 65 I C 76 (c)

——to exclude estates from the operation of the Act it must be shown that the river beds were included in the permanently settled estates. If the rivers were public navigable rivers at the time of the [illegible] C W.

[illegible] nently [illegible] C. W.

——to entitle the Crown to impose an assessment it must be shown that the lands which are sought to be resumed and assessed with revenue are "added" lands within the meaning of s. 6, *i.e.* lands not included in the original assessment 36 C. L. J. 336 : 71 I. C 849 . 1923 Cal. 247.

——the object of the Act is to enable the Crown to impose assessment on lands gained from the sea or alluvion or dereliction from the rivers. The expression "any such new map" in sec. 6 of the Act refers to the new map according to the new survey contemplated by sec 3. 50 C. 276 : 36 C.L.J. 345 . 70 I C. 510, 1923 Cal 233.

——notice served for the purposes of assessment can be amended. 65 I. C. 76 (c).

——under this Act it must be shown that the land has been added to any estate paying revenue directly to the Govt. 24 C. W. N. 737 : 57 I C 778

BENGAL ALLUVION & DILUVION REGULATION

(XI OF 1925.)

——the proceedings under the Bengal Alluvion and D[illegible] Act deal with the assessment of revenue and the parties are the proprietors and the Govt. The proceedings are [illegible]

Bengal Alluvion & Diluvion Reg.—*contd.*

only with the ascertaining or recording existing rights and not to settling rent so as to bind the tenant. 43 C L J. 152: 1926 Cal. 523 : 91 I. C. 718

——where an owner of a diluviated estate has paid revenue for the site when under water he is entitled to claim the land as belonging to his estate when reformed and such land cannot be dealt with under the provisions of Reg. XI of 1825. 29 C W. N 290 1925 Cal. 249.

——the first part of sec I of Reg XI of 1825 does not apply to land forming the bed of a small shallow river where the bed is recognised as the property of an individual. 90 I. C. 1010 : 1926 Cal. 368.

——submersion and reformation *in situ*, dft. holding under Govt. under a lease, pltf had no remedy. 24 C W. N. 211 . 52 I. C. 673 : 29 C. L. J. 564.

——the word "changes" in sec 3 of the Act means changes brought about by the action of the river or the sea and not changes by the act of one proprietor in annexing to his estate the property of another proprietor 5 Pat. L. J 681 59 I. C 298 · 2 Pat L T. 81.

a patni tenure became
eformed *in situ* they
4 41 C. 683 , 19 C.

——where a particular bit of land belonging to a proprietor is submerged and subsequently reappears it is restored to the owner.

Cal. 565

——lands washed away and afterwards reformed upon the old site, clearly recognizable, are not lands 'gained' within s. 4 of the Reg They do not become the property of the adjoining owner but remain the property of the orginal owner. 31 C W N. 717 ; 45 C. L J. 520 : 101 I C. 1 · 6 Pat. 481 1927 P. C. 89, **P. C.**

"——gradual" means slow and imperceptible 55 I C 366 : 18 A. L. J. 195, 18 I. C. 855 (c), what amounts to gradual accretion depends on the nature of the river. 2 Pat. L. T. 599 · 63 I C 704 and s. 4 requires that it should be gradual 45 I. C. 425 : 14 N L. R 97.

——where land is added by gradual accession it becomes an accretion to the tenure of the person to whose estate it is added. 33 C. L. J. 531 · 64 I C. 805.

——*churs* formed in non-navigable rivers *forming* part of permanently settled estates are not liable to further assessment of Govt. revenue. 46 C. 390 · 46 I C. 305 : 22 C. W. N 872

——lands which have gradually accreted to a *mokarari* holding forming a *chur* in a small shallow river cannot be claimed by the zemindar as forming a portion of his *khas patit* but belongs to the

Bengal Alluvion & Diluvion Reg.—*contd.*

tenant subsequent to the payment of additional rent therefor 45 I. C 929 (c).

——when it is an accretion owing to the change in the course of the Ganges it is liable to assessment. 74 I. C. 881 (Pat)

——where land once washed away is reformed on the same site and is recognizable and identifiable as land belonging to the owner of the site, this Regulation does not apply. 5 Pat. L. J. 632. 57 I. C. 744. 2 P L T. 99, 5 P. L. J. 1: 52 I. C 147, 1920 Pat. 102, 3 P. L. J. 438: 1918 Pat 261 · 47 I C. 102, 1 Pat L. T 229 · 56 I. C 344: 1920 Pat. 245, 3 Pat L J 438. 47 I. C. 102: 1918 Pat 261,

——s 4 applies to rivers the beds of which are private properties. 1 P. L J. 536 · 38 I. C. 135.

——where the land in dispute formed an accretion to rent free tenure it was held in a suit for a declaration of title to it and recovery of mesne profits that the plff was entitled to possession. 18 C W. N 1206: 26 I. C 977 19 C. L J. 595,

——the beds of small and shallow rivers are the property of zemindars subject to assessment of revenue when dried up 26 I. C 406 (c).

——the question of title to a *chur* thrown up in a large navigable river must be determined with reference to the condition of things at the time when the *chur* was first formed and the terms of s 4 (3). 60 I C 395 (c).

——the true view of the law of Alluvion is that physically land is added to land; the right to the new land is *accretion* to the right to the old. The fact that no settlement of revenue is made of a portion cannot affect this *accretion* to the right, unless any question of limitation or adverse possession arises. 55 C. 201: 1927 Cal. 902. 104 I C 655.

——where a kubulyat executed by the proprietors of a permanently settled estate contained the following clause, "if in any *chur* be newly accreted and the quantity of the taluq land be increased thereby, we shall duly pay revenue for the said increased land,' held that the clause meant that the rates of assessment in respect of the accreted land were to be determined in the same way and according to the same rules as Government adopt with regard to all newly formed *churs* and not that the rates mentioned in respect of the permanently settled estate are to be accepted. 32 C 906. 1928 P. C. 193 P. C

BENGAL ALLUVION LAND SETTLEMENT ACT
(XXXI OF 1858)

——where on account of gradual accretion to the lands of *miras* tenureholder the defts. became entitled to those lands as an increment to their tenure and where the plffs.-landlords did not include these lands in their suit for rent for the *miras* and accreted lands were brought under diara operations and formed into a separate estate and settled with the proprietor and the Revenue authorities determined the rent to be paid by the tenure-holder for the accretion and on the basis thereof the proprietor sued for increased rent,

Bengal Alluvion Land Settlement Act—contd.

held, that the plffs. were not ... ed to the rent claimed as there ... by the diara officers 29 C.

... has been settled as a separate estate ... jama, it ceases to have any connection with the original estate, 50 C 822 : 38 C. L. J. 47 · 1924 Cal 197.

— ... rent of accretion according to the ... 5

— ... to add the revenue assessed upon ... jumma of the parent estate and enter into the new engagement with the proprietor for the payment by the latter of the aggregate amount, or to make a separate settlement for the alluvial increment and to make this increment a separate estate accordingly. Although on previous occasions the Govt chose to exercise their right in the above manner they are not under any obligation to exercise their discretion in the same way on a subsequent occasion when a fresh survey is made of all the accretions 32 C. W N. 906 · 1928 P C. 193, P. C.

BENGAL CESS ACT. (Act IX of 1880).

Sub-headings of notes

(1) Amount of cess and liability to pay
(2) Apportionment of cess between co-sharers
(3) Contract as to cess
(4) Cess return and its admissibility
(5) Suit for cess and for rent
(6) Sale in execution of decree for cess
(7) Notice under s 54.

(1) Amount of cess and liability to pay.

—irrespective of whether rent is payable in cash or in kind cess is payable in respect of all lands held by a cultivating raiyat 26 C. W N 368 68 I C 662

—under the provisions of s. 41 of the Act every cultivating raiyat is to pay to the person to whom the rent is payable onehalf of the road cess 6 Pat L T 214 87 I. C. 439 : 1925 Pat 473

—a 'cultivating raiyat' according to the definition means a person cultivating lands and paying rent thereof not exceeding Rs 100 per annum A person who does not himself cultivate is to be treated as a tenure-holder Secondly the rent of Rs 100 should be taken as applied to the whole of the land which is cultivated by the person in question and not as applicable to every individual holding. A person paying a rent exceeding Rs. 100 for his aggregate holding is liable to pay road cess as a tenure-holder and not as cultivating raiyat under s. 41 (3) 47 C L. J 546 : 32 C. W. N. 610.

—the denomination "cultivating raiyat" has nothing to do with B. T. Act, it is defind in s. 4 of the cess Act. 102 I. C. 365 : 1927 Pat. 270 : 6 Pat. 13 : 8 Pat L. T. 643.

Amount of cess and liability to pay—*contd.*

—under this Act a raiyat may be a tenure holder. S. 41 draws a distinction between the holder of a tenure and a cultivating raiyat but not between the holder of a tenure and a raiyat. 15 C. L. J. 428 : 14 I. C. 177.

—the liabilities to pay cess must be determined according to the entries in the cess valution report. Civil Court has no jurisdiction to interfere with it 90 I. C. 621

—under the Cess Act annual value of a tenure is the rental on which the cess at half an anna in the rupee is to be culculated 1. P. L. T. 455 : 58 I. C. 178.

—the policy of the Act is that all persons who benefit by the maintenance and construction of roads and other means of communication and "works of public utility" out of the cesses, should bear the liability of paying the same. "Annual net profits" has reference to the property and not to the individual 38 C. 372 15 C. W. N. 201 : 13 C. L J 124 : 9 I C. 311 P C

—the proprietor is of course bound by the notice under s. 17 to state the whole area of his estate and the fact that land is temporarily diluviated does not remove it from the area to be accounted for. On the other hand the explanation is one that ought to be properly examined and the assessment made on the facts ascertained. 2 Pat L. R. 48.

—sale for arrears of cess does not annul previous incumbrance, liability to pay cess is a personal liability. 3 Pat L. T 282 65 I. C. 138, 30 C. 778, 25 C. 179

—in case of rent-free tenure the liability to pay cess to the superior landlord arises only when the requirements of Ch. IV of the Act are complied with by the publication of the valuation roll for which no presumption will arise 3 Pat L. T. 282 ; 65 I. C. 138, 13 C. 19, 25 C 717, 15 C 327, *fol.*

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—where an under tenure has been created after assessment of the tenure, the] under-tenure holder is liable to pay cess as determined by the court. 4 C. W. N. 776

—land from which profits subject to income-tax are derived, is not assessed with road cess tax except when such land is used for agricultural purposes. 28 C. 637 6 C W. N. 128

—amount to be recovered as cess every year from raiyat by landlord is to be calculated on the amount of rent of the particular year. 39 I C. 505 ; 1 Pat L W. 677

—realisation of back cess for three years was held to be legal. Fixing of revaluation date,—power of Board of Revenue under s 12, 15.—Rule 30 is not *ultra vires* 31 C. W. N. 329 54 C. 119 . 1927 Cal. 322

Bengal Alluvion Land Settlement Act—contd.

held, that the plffs, were not entitled to the rent claimed as there was no liability to pay the rent settled by the diara officers 29 C. W. N. 505 : 87 I C. 442 : 1925 Cal. 758.

——where alluvial land has been settled as a separate estate with jama, it ceases to have any connection with the original estate, 50 C. 822 : 38 C. L. J. 47 . 1924 Cal. 197

——a co-sharer-proprietor can realise rent of accretion according to the lease 19 C. L. J. 614 . 26 I. C. 215

——s. 31 empowers the Govt. either to add the revenue assessed upon the alluvial increment to the jumma of the parent estate and enter into the new engagement with the proprietor for the payment by the latter of the aggregate amount, or to make a separate settlement for the alluvial increment and to make this increment a separate estate accordingly Although on previous occasions the Govt chose to exercise their right in the above manner they are not under any obligation to exercise their discretion in the same way on a subsequent occasion when a fresh survey is made of all the accretions 32 C W. N. 906 : 1928 P C. 193, P. C.

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— [illegible] n created after assessment of [illegible] is liable to pay cess as deter- [illegible]

[illegible] to income-tax are derived, is not assessed with road-cess tax except when such land is used for agricultural purposes. 28 C. 637 6 C W N. 128

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Suit for cess and for rent—*contd*

——s. 20 does not bar a landlord to recover rent settled under s. 105 B T. Act when the road cess return previously filed shows a lesser rate. 6 P. L J. 622 : 3 Pat L. T. 141, 65 I. C. 3.

——s. 20 does not deprive a proprietor who by a mistake enters a piece of land in wrong part of his return, of his right to claim rent The object of the Cess Act is that no land within the estate should escape assessment and for this purpose it is immaterial whether *zerat* land is entered as in the possession of a tenant or *khas* possession of the zeminder. The zemindor will be liable to punishment only if he enters land of one class in another class. 27 I. C. 304 (c), 43 I. C. 497 : 2 P. L. W. 42 (note)

——a rent suit is maintainable although the landlord has not entered the name of the tenant in cess-return. 18 C W N 172n.

——there is no bar to a rent suit if the provisions of sec. 20 Cl. (a) and (b) are substantially complied with 11 C W N 211.

——entry in record of rights subsequently made cannot override the entry in cess-return as to the amount of rent payable by a tenant. 1917 Pat 313

——s 20 is not a bar to the landlord recovering rent at the rate settled in a proceeding under s. 105 B T. Act, when the road cess return showing a lesser rate was filed prior to such proceeding. 65 I. C 3 · 3 Pat L. T. 141 : 6 P. L J. 622 ; 1922 Pat 57.

——s 20 (b) does not apply to *bhoali batai* holdings and the landlord is entitled to recover rent at a higher rate than that mentioned in the road-cess return 41 I. C 61 : 1918 Pat. 166 2 Pat L J 617 . 2 Pat. L W. 35

——when any holding, estate or tenure in respect of which a [illegible]

II or Part III of the Sche. 15 I C. 424 (c).

——but where a holding is wrongly entered in part I Sche. A in the return instead of in part II, the entry does not bar a suit for rent in respect of the holding under s. 20 of the Cess Act 43 I C. 501 2 Pat L J 653

(6) Sale in execution of decree for cess.

——by the sale in execution of a decree for cess, the right, title and interest of the J. Dr. pass 24 C 27, 25 C. 179, 30 C. 778, 3 Pat. L T 212: 68 I. C 138

(7) Notice under s. 54.

——notice under s. 54 [illegible] precedent to the recovery [illegible]

[illegible] been published by the [illegible] e not bound to pay [illegible] 44 I. C. 32 (c).

——a notice under s 54 is a condition precedent to the liability of paying cess 72 I. C. 1.

BENGAL CHOWKIDARI ACT (VI OF 1870)

Applicability.

——the Act applies to Simanadari lands in Thana Indas, Dist Bankura, granted to Simanadars for performing the duties mentioned in s 1 of the Act. 43 C. 217 . 33 I. C. 553 20 C. W. N. 404.

——the Chowkidari Act does not apply to the lands of the zemindari of Kelah Sukunda in Orissa which was held at a fixed jama in perpetuity under a sanad confirmed by s. 33 Reg XII of 1805. 15 C. W. N. 300 . 9 I. C. 688.

S. 1.

——the word 'assigned'' in sec. 1 means "assigned by Govt. or appropriated by its authority or with its permission and the provisions of the act do not authorise a claim by Govt. for resumption of chowkidari chakran lands, in a zemindari granted by the zemindar himself and which had not been excluded for assessment as chowkidari lands at the time of settlement, 42 C. 710 : 19 C. W. N. 65 . 26 I C. 676 17 Bom L. R 32 P. C

——sec. 1 does not govern cases in which there might be definite and conclusive evidence to satisfy the court as to what was the nature of services required from the service tenure-holder. 28 C. L. J. 281 : 48 I C. 362

——chowkidari chakran lands are lands, which having been assigned by the Govt at the time of the settlement have not been taken into account in the assessment of land revenue 14 C L. J. 151 : 11 I C 899.

S 48.

——under sec 48 the Collector has no power to settle village chowkidari chakran lands with only one of several zemindars 37 I C 937 (Pat)

S. 50, 51.

——where before resumption the zeminder has entered into contracts affecting his existing estate the rights of third parties under the contracts are preserved 28 C L. J. 160 22 C W. N 660 : 46 I. C. 435

——Art 144 L A. applies to the suit brought by the patnidar against a zemindar for the recovery of possession of chowkidari chakran lands transferred to the latter under the Act 41. I. C. 728 (c)

S. 51.

——this sec. does not entitle a patnidar upon resumption and transfer of chowkidari chakran lands by Govt. to the zemindar to hold the lands rent-free Its scope is to sustain the contract between the zemindar and the patnidar under which the latter is entitled to possession of the lands as part of the tenure. 52 C. 376 : 29 C. W. N 328 : 86 I. C. 781 . 1925 Cal. 651.

——where chowkidari chakran lands are resumed by the Govt. and transferred to the zemindar subject to the payment of rent assessed in accordance with s. 51 of the Act, the plff claiming possession under a prior pattah is entitled to possession only on payment of additional rent. 53 C. 6 : 30 C. W. N. 653 : 1925 P. C.

S. 51—*contd.*

226 **P. C**, 42 C. L J. 227 · 49 M. L. J. 722 : 93 I. C. 607 **P. C**, 44 C. 841, 46 C. 173 *Expl. and const.* 1925 Cal 651 *Appr.*

——the word "contract" primarily means a transaction which creates personal obligation but it may, though less exactly, refer to transactions which create real rights. 46 C. 173 : 25 M L T. 8 : 23 C. W. N. 198 : 48 I. C. 262 **P. C.**

——patnidars and darpatnidars are entitled to possession of chowkidari chakran lands on resumption by Govt and assessment of jama 44 C. 84 : 25 C. L. J 499 : 22 M. L T 489 : 40 I C. 981 **P. C.**

——the patnidars are not liable to any additional rent on resumption of chowkidar's chakran lands unless there is anything to the contrary in the Patni lease 40 I C. 395 (c)

——choukidari chakran lands are held on condition of service and a chowkidar who occupies such lands is not entitled to a right of occupancy therein. 52 I. C 181 (Pat).

Ss. 58, 61

——an order under s 61 of the Act by a Commissioner appointed under s 58 of the Act is final and conclusive and cannot be reviewed by a second Commissioner, and if the latter does so, it would be *ultra vires* and contrary to law. 18 C. W. N. 143 20 I C. 644.

Ss 60, 61.

——if the proceedings under s. 61 are conducted according to Bengal-Reg. VII of 1822 and after full notice to all parties, the order is final and binding on civil courts. 9 I C 322 (c).

S. 61.

——the person who is not called in enquiry under the Bengal Chowkidari Act is not entitled to notice and the report of the commissioner under s 61 is final 21 C W N. 238 32 I C 545.

——when there is compliance with the provisions of s 61 the propriety of order cannot be questioned in the civil court The words "final and conclusive" must be taken in their ordinary and literal meaning, the finality and conclusiveness not being restricted to Revenue Courts alone. 95 I. C 536 (c) (11 C 632, 2 C L J. 302) *fol* 2 C L J 306 *not fol*

for other cases, see "*Chowkidari Chakran Lands.*"

BENGAL ESTATE PARTITION ACT.

S. 2. (Repeal and savings)

[illegible] Collector for [illegible] r under S 63 [illegible] le before 1897 [illegible] all subsequent *proceedings for* partition must, under s 2 cl, (b) of Act V of 1897, be carried on under Act VIII of 1876 as if Act V, 1897 had not been passed 10 C L. J 189 · 36 C. 726 : 1 I. C. 549.

S. 3 (Definition).

See the cases in the B. T. Act. under the terms "tenure", "permanent tenure." "holding", "tenant" and "rent".

(*IX*) (*Estate*)

——where a portion of land that was covered with water and unfit for cultivation, was not divided, but left joint during *batwara* proceedings, its revenue payable on the entire estate having been apportioned among the several divided estates, in a suit, brought after such land had become dry and cultivable by a cosharer for partition of it, under Bengal Act VIII of 1876, held that the Collector was not bound to make the partition under that Act, as the land in suit was not liable for the payment of *one and the same demand of land revenue* and therefore not a joint undivided estate within the terms of sec. 4 Cl. (9) of this Act 10 C 435, 7 C. 153 *approved*, 24 C 725 F B *Dist*

——a suit for separate possession after partition, of a share of a portion of an undivided estate, in which portion only the pltf has a fractional share can be maintained in Civil Court, when no division is asked for 24 C 725 F B. 16 C 203 *fol* 23 C. 679, *overruled*.

((*XV*) *Assets*)

——a co-proprietor who purchases a raiyati holding in an undivided estate must be held to have purchased it on behalf of the general body of maliks He has right of possession as against the remaining co-proprietors on condition that he pays to them as *compensation an amount equal to the rent* formerly paid by the raiyat But the money paid is not rent When the estate comes under partition the holding must be included in the *bakasht* list and its valuation as an asset must be determined as provided by S. 3 XV (*b*) end not by s 3 XV. (*a*) 3 Pat L R 198 (Rev)

——section 3 cl (XV) of of the E P Act empowers a partitioning officer to assess rents on the lands allotted for the purpose of equalising the allotment and this has nothing to do with the assessment of rent when raiyati *Kasht* falls within the allotment of a proprietor 31 C W N 341 P. C.

——for the purposes of a *raibandi* record, the rental value of any land classified as *bakasht malik* must be valued in accordance with the definition of assets given in the Act and in no other way; the *lagan* paid by a proprietor to his fellow-proprietors should not enter into the calculation at all 3 Pat L R. 182 (Rev)

S. 4. (who is entitled to claim partition)

——mere joint possession is not a sufficient basis for entitling a person to have the land partitioned my metes and bounds. In order that persons may be co parceners, and so have a right to partition, it seems, that not only must they be in joint possession of the [illegible] same title. [illegible] held not to [illegible] der. 20 Cal. [illegible] *see the full*

S. 4. Who is entitled to claim partition—*contd.*

——it cannot be laid down as a general proposition of law that there can be no partition between parties, the interest of one being subordinate to that of the other The court must in each case determine whether, having regard to the nature of this interest owned by parties and to all other circumstances the balance of convenience is in favour of allowing partition. The mere fact of the parties owning interests which are not co-ordinate in degree, ought not to be a bar to partition So a suit by the proprietor of 16 annas Zemindari against putnidars under 6 annas of the Zemindari to have his 10 annas share of the lands divided by metes and bounds would lie. 24 C 575, 1 C W. N. 406 F. B. 20 C 379 *Diss.*

L. J. 40, 34 C, 878) *Ref*

S 5. (Partition according to interest)

——the interest of a joint proprietor of an estate may consist of specific parcels of land and may therefore bear no proportion to the Revenue assessed on it originally. A co-sharer who is in possession of certain villages, is entitled to have those villages assigned to him under sub sec (2) of this section though by the increase of value, their assets would be out of proportion to their revenue The words 'his interest in all the land and undivided share held by him" in sub sectn (4) mean the sum of his interest in the lands and share of estate and not interest proportionate to his liabilities

forming part of the parent estate, but no interest extending over the whole estate, in other words, it applies to proprietors who have an interest in some out of the total number of villages constituting the estate If he has a share in the remainder also, then it follows that he has a fractional interest in the entire estate as well as a fractional interest in a part, the latter fractional interest being the difference between the larger and the smaller interest that is to say, if he has a half share in twenty mouzas and a one-sixth share in fiftyfour mouzas, it must be held that he has a one-sixth share in the entire estate and in the twenty mouzas a fractional interest represented by the difference of one-half and one-sixth. 87 I C 274 : 2 Pat. 403, 1924 Pat. 187.

——a proprietor of a mahal composed of several *mouzas* having fractional interest in each is not entitled to claim allotment in each ... *mouza* as that would ... where there are many ... rent fractional inte.

S. 5. Partition according to interest—*contd.*

——in a permanently settled district there is nothing in law to justify a claim made on the basis of the proportionte distribution of tenants. The landlord has no special claims on the perosnal services of his tenants The liability of the tenants begins and ends with the payment of rent. 3 Pat. L. R 196 (Rev.)

——one of the co-sharers of a joint estate suing conjointly with the others would under Reg XIV of 1814 be entitled to a separation of a mouzah from the rest of the zemindari and an assessment upon it of a proportionate jama, and having done so he would alone be entitled to have an order for partition of that mouzah as between himself and his co-sharers therein. If the zemindari which the plaintiff seeks to have divided is so intermixed with the nighbouring zemindaris that the line of boundary cannot be reasonably identified, he cannot call upon the Collector to make a new line But if the Collector has the means of ascertaining where the boundary lies, he is bound to carry out a partition. 21 W. R. 225.

S. 7 (Partition where partition has been made by private arrangement.)

——section 7 of the E P Act evidently contemplates a formal division of the lands of an estate by metes and bounds, agreed to by all the co-owners, and a possession of separate lands held in severalty by each such co-owner The Collector, therefore, is not precluded by that section from making a partition where there was not such a partition of the estate already subsisting Where the lands have been partitioned in such manner and such division is subsisting *at the time of the application* to the Collector, inspite of any further sub-division of the parcels, no partition of the estate can be made under the Act except on the joint application of all proprietors or in pursuance of a decree or order of a Civil Court, and this too, even in the case where after such private division each of the separate parcels becomes or some of them become, by reason of transfer or succession or otherwise, jointly vested in more proprietors than one. 11 C. L. J 291 14 C. W. N 632

——the private arrangement described in section 7 is not necessarily the same private arrangement that would prevent the application of section 99 68 I C 500 1923 Cal. 279, so also was held in 87 I C 581. 1926 Cal 433.

——the partition referred to in this section as sufficient to bar proceedings for a partition under the Act must be of the most complete and formal description. [illegible]
Settlement, the formation of [illegible]
by the parties in Civil Court o[illegible]
vate partition under section 7. [illegible]

——if in case of a private partition a comparatively large area is left undivided it will not bar a subsequent partition by Collector. 78 I. C. 653 : 3 Pat. L R 62 : 1924 Pat. 594 : 3 Pat 614.

——this section evidently contemplates a formal division of the lands of an estate by metes and bounds agreed to by all the co-

S. 7. Partition where partition has been made by private arrangement—*contd.*

owners and a possession of separate lands held in severalty by each such co-owner 14 C, W. N. 632 : 11 C. L. J 291.

——where there had been a previous arrangement by which the co-sharers had possession of different lands but there had not been a complete partition by metes and bounds and an *ijmali* share was retained and some co-owners who were ignored in that partition subsequently obtained an *ijmali* share in each of the *moujas*, there was no complete partition as contemplated by this section. *above case.*

——when it is shown that the parties have acquiesced in the result of a partition it must be presumed that they or their predecessors in interest were parties to the partition Where the parties have been holding their estates in separate shares from time immemorial, the fa[illegible]
lost in antiquity is [illegible]
for a long period. [illegible]
and no direct evide[illegible]
yet very long posse[illegible]
of the lands in the estate are sufficient to prove that there was a complete partition. 74 I. C 642 : 1923 P 441 : 1 Pat. L. R 258

——where the lands of an estate have been divided by private arrangement formally made and agreed to by all the proprietors who have in pursuance of such arrangement, taken possession of separate lands to be held in severalty as representing his interest in the estate, no partition should be allowed under this Act But the burden of proving such partition is on person setting it up. The distribution disclosed by the settlement Record must be shown to be the result of a formal partition and not the embodiment of a mutual arrangement. 2 Pat L. R. 116 (Cr)

——if a complete partition is once effected, no subsequent partition under the Act can take place except on a joint application by all the proprietors, even though after such partition each of the separate parce[illegible]
vested in more proprie[illegible]
there was joint owners [illegible]
under the Act. 14 C. [illegible]

——where a registered share of 2 *annas* 8 *dams* in a village applied for partition and a registered sharer of 8 *annas* 16 *dams* objected on the ground of private partition and the Settlement Record showed an old accepted partition, the principles of section 7 should apply because the parties concerned having specific shares in the village would under a partition receive allotments in the village only and the objections to the disturbance of the private partition are as strong as in a case in which the whole of the estate is concerned 3 Pat L R 89 (Cr.)

——on an application under section 7 for perfect partition the Collector may or may not accept the partition effected by the Civil Court 38 I. C 593 · 1 P. L. W. 51

S. 7 Partition where partition has been made by private arrangement—*contd.*

——*Quære.* Whether a Civil court has jurisdiction to prohibit absolutely a partition to be made by the Revenue authorities 14 C. W. N 632 : 11 C. L J 291.

——if it is established that there was a private partition as alleged in the plaint, the order of the Collector for partition was clearly without jurisdiction in view of the provisions of sec 12 of the Act VIII of 1876 and it would be wholly unnecessary for the plffs to have such order set aside. 10 C L J. 189 : 36 C. 726 1 I. C 549.

——a private partition though not binding against the Government or against a purchaser at sale for arrears of revenue is binding between the parties to it and their representatives. 18 W. R. 327.

——where the private partition existed for 50 years and it was subsequently maintained in a judicial decision since which the co-proprietors exercised rights of ownership independently of each other for many years, a partition of the whole estate cannot be demanded although a regular separation of one share has been intermediately obtained by a suit in a Civil Court 5 W R 40.

——parties holding separate portion under private partition cannot apply for a batwara when they cannot subsequently agree among themselves. 15 W R 165

——where each proprietor receives his portion of the rent proportionate to his interest in the lands they cannot be divided under the Batwara laws 7 W. R 51.

——the mere fact that original partition proceedings have been lost in antiquity cannot disturb divisions which have existed for a long time 3 P. L. J. 118.

——an entry in the order sheet of the Collector to the effect that possession had been delivered to the defendants is no evidence that the defendants are in possession If the defendants allege that they are in possession, the fact must be proved. *above case.* 7 C. L J 251 *Ref*

——a partition of joint property is not an exchange within the meaning of S 118 of the T P Act and is not, by law, required to be effected by an instrument in writing, 10 C L J 503 3 I C 247 (25 C 210, 4 M. I A 137 7 W. R 35 P C) *Ref.* 4 M. L T 354 *Dist.*

——the law does not require a partition to be effected by an instrument in writing, and the right of partition is an incident of property. 25 C. 210 : 2 C W, N, 91

——a division may be effected without an instrument in writing and may be either total or partial. 10 C L. J 503: 3 I C. 247, (4 M. I. A. 137: 7 W. R 35, P. C., 9 M I A. 543· 2 W. R. 31, P C. 2 I. A. 263: 1 C. 153: 21 W. R. 255, 18 B 611, 9 C. L J, 133: 13 C. W, N. 309) *Ref.*

——where the plaintiff and some of the defendants were joint owners of certain property, and plaintiff alone was owner of another

S. 7. Partition where partition has been made by private arrangement—*contd.*

property, and by an oral arrangement, plaintiff got the former property in its entirely, the transaction was an exchange under S. 118 of the T P Act and not a partition, and was invalid in not being in writing and registered. 5 C W. N. 724.

——an unregistered deed of partion is not admissible in evidence nor any oral evidence is admissible but if any arrangement has been acted upon it is admissible. 4 Pat. L T. 957

S. 8. (Tenants for life not entitled to claim partition).

——a Hindu widow succeeding to her husband's share in revenue-paying estate is not the holder of life estate only within the meaning of s. 10 of the Act VIII of 1876, and even if section 10 were applicable to a widow's estate still a Civil Court would not be debarred from decreeing partition of such estate at her instance, if a proper case be made out by her. There is distinction between a life estate and a Hindu widow's estate 9 C 244, 9 W R. 108

——it is settled law that co-owners of limited and qualified estates under the Hindu law, such as Hindu widows and daughters, are entitled to enforce partition *inter se* of joint property 13 C W N. 611. 9 C L J. 421.

S. 10 (Amount of land-revenue to be assessed on each separate estate)

——the decision about revenue at Batwara proceedings under this Act will be preferred to that under the Revenue Sale Law. 33 I C. 721 (P)

——a partition made by Collector does not alter the amount of revenue payable, it only apportions that amount. There is no settlement of the revenue in any sense at the time of partition. 24 C 887

12 (Execution of decree for partition.)

——the object of the Act (VIII of 1876) is to exclude the jurisdiction of the Civil Court in cases where the question relates to the division of the Government revenue or to the datails of the partition Where, however, the question raised goes to the very root of the matter and relates to the jurisdiction of the Collector to make a partition inspite of the provisions of sec 12 of the Act, the Civil Court has jurisdiction and is competent to decide the matter in controversy between the parties 10 C. L J 189 36 C 726; 1 I. C. 549

——having regard to the provisions of s 265 of the Civil Procedure Code the Civil Court can make a partition of a revenue paying estate when no separate allotment of the Government revenue is asked for A suit for separate possession, after partition, of a share of a portion of an undivided estate, in which portion of the estate only plaintiff has a fractional share, can be maintained in a Civil Court, if no division is asked for. 24 C. 725: 1 C. W. N. 374 F. B, 16 C 203, *fol* 23 C 679 *overruled*, 8 C. 537 and 649 *Dist*

S. 12. Execution of decree for partition—*contd*

——the meaning of s 265 C P. C. is that where a revenue paying estate has to be partitioned into several revenue paying estates, that partition must be carried out by the Collector so that there may be a proper security for the revenue 16 C. 203.

——the jurisdiction of the Civil Court in matters of partition of a revenue paying estate is restricted only in questions affecting the right of Government to assess and collect in its own way the public revenue, 2 C L J 351, 15 C 198

——a Civil Court has jurisdiction to execute a decree for parti- [illegible] -t assume juris- [illegible] l Court has no [illegible] n a partition of [illegible] W. 9 : 4 P. L. J.

——partition of Revenue paying estate may be in the Civil Court if no division of revenue is asked for 1917 Pat 13 (43 C 1031: 20 C. W N 1085) Ref.

——decree of Civil Court on application to partition an estate is no decree under section 54 C P C. and cannot be transferred for execution to the Collector 38 I C 593 1 P L R 51.

——the duty of the Collector, to whom a decree has been [illegible] Procedure Code (Act XIV of [illegible] to mere division of the lands [illegible] the delivery of the shares to

——when the Collector makes a partition under section 265 C P. C the Civil Court has no power to examine his work or to direct him to make a fresh partition. 15 B 527.

——where a decree for partition of an estate is transmitted by the District Court to the Collector for execution under section 265 C P C the Court that made the decree is not deprived of its judicial power to hear and decide objection to the division of the estate by the Collector 19 M 435

——for the purposes of limitation, execution proceedings in a partition decree taken by either of two share-holders are taken only on behalf of both 3 C 551 2 C L R 187

[illegible] -er, of a consent [illegible] te of application [illegible] 1 the date of the [illegible] the L. Act (Old). 9 C. 568.

S. 16 (Sale for arrears of land revenue, of share under partition.)

——the purchaser of specific portion of the land of an estate separately registered with a separate jumma under section 11 of Act *XI of 1859 cannot claim a batwara of the whole estate and cannot* obtain a share of the whole land proportioned to the amount of the sadar jumma paid by him 1864 W. R. 59.

S. 21 (Notification and notice of application)

——it is not the Deputy Collector but the Collector himself that should try objections raised after notification under section 21, 38 I. C 833. 1 P. L. R. 219.

S 22 (Power to reject application on receipt of objection)

——it is not the Deputy Collector but the Collector himself that should try objections raised after notification under section 21, 38 I. C 833 : 1 P. L. R 219.

S. 23 (Procedure when question of right or title or interest is raised.)

——the objection contemplated by this section relates to a question of right, title or extent of interest as between any applicant and any other claimant as proprietor of the estate 4 Pat L. T. 633 : 1 Pat. L. R. 386 : 75 I. C. 1046 : 1924 Pat 211.

S. 24 (Resumption of proceedings after postponement)

——section 24 of the Act prescribes the procedure to be followed when the objection raises any question of title or right and section 26 then provides that, if the objector institutes a suit to have his title or right established and if he succeeds in the litigation, the [illegible] to the result of the parti- [illegible] In other words, the success- [illegible] the allotment which could [illegible] 36 C. 726 : 10 C. L. J 189 [illegible] 1 1 C. 549.

S. 25 (Suit instituted after four months not to affect proceedings)

——where in the course of a partition proceeding the defendants set up a claim that they were tenants of some land and the plaintiffs who were some of the joint proprietors objected and the objection was overruled by the Collector and then the plaintiff brought a suit for declaration that the defendants had no such tenancy right, held that the suit was not barred by this section on the grounds that (1) as the defendant did not claim any right or title in or to the parent estate but only claimed the status of a tenant under the proprietors in respect of a specific parcel of land, [illegible] ction does not say that a suit [illegible] merely provides that a suit ins- [illegible] affect or stay proceedings for [illegible] section 29 had any application [illegible] under section 45 or section 46 not being one of the orders mentioned in section 119, the provisions [illegible]

16 C. W. N 639 ; 13 I. C. 123.

S. 25. Suit instituted after four months not to affect proceedings—*contd.*

——this section applies only to suits by persons claiming right [illegible] case where [illegible] partition is [illegible] 24 Pat. 21: 1924 P. 209.

——where in a partition suit commenced under Act VIII of 1876 the provisions of this setion were applied and it was decided that the suit was barred, held that the provisions of this section were not applicable but the corresponding section of Act VIII of 1876 was applicable and that the suit was not barred under that section or Art 14 of the Limitation Act 36 C 726 10 C. L J. 189: 1 I C 549

——this section does not bar the right to bring an action; it only limits the effect of the decree, unless the action is brought within a certain time 16 C 117.

——where a person brings a suit under section 42 of the Specific Relief Act for the purpose of staying a partition which was ordered by the Collector under the Act of 1876, on the ground of a private partition having already been made, he *must prove that there has* [illegible] ntitled to and [illegible] the property [illegible] e can have no [illegible] parent estate. 16 C. 117.

——the fact that the partition proceedings were pending before the Collect under section 31 of the Act of 1876 was no bar to a suit for declaration that under a partial partition effected between co-sharers, a portion of the land had been separately allotted to the plaintiff, 15 C. 198.

——this section does not apply to a suit for declaration that there was such a partition as is contemplated by section 7 and that the Collector be restrained from taking further action to make the partition. 74 I C 642 1923 P 441: 1 Pat L. R 258

——a suit for declaration that a prior private partition having taken place the Revenue Court had no power to grant partition is not barred by section 25. 75 I C 1046: 4 Pat. L T 633 1 Pat L R. 360; 1924 Pat. 211.

——under this section a suit to contest an order under section 29 must be brought within four months of the date of the *order.* 61 I. C. 90: 6 P. L. J. 41: 2 P L. T. 130.

S. 26 (Decree made while partition proceedings are in progress)

——sections 26 and 27 recognise a suit *for declaration of* interest and is not barred by section 42 of the Specific Relief Act. 14 I. C. 225 (c)

S. 26. Decree made while partition proceedings are in progress—*contd*

——where a partition of a *mahal* has been effected by a Revenue Board it cannot be re-opened by obtaining a decree in a Civil Court with regard to the portion of the *mahal.* The proper remedy is to apply under section 26 of the Act for separation of the interest acquired by a Civil Court decree. 39 I. C. 165: 1 P L. W. 277.

——in a suit for declaration of title in which plff also claimed an allotment of his share which had been refused him by the [illegible] that as it was found [illegible] was also entitled under [illegible] recept to the Collector [illegible] iare corresponding with

S. 27 (Decree made after partition proceedings completed.)

——a suit is maintainable for a declaration of the extent of interest of any party to a partition under ss. 26 and 27 of the Act 14 I. C. 225 (c)

S. 28 (Power of Civil Court to order partition on application to Collector)

——the Collector is not bound to recognise proceedings of Civil Court partitioning an estate but taking no action under this section. 38 I O. 593 1 P L. W. 51.

[illegible] under Act VII of 1876 (B C) [illegible] roprietors are in posses- [illegible] interests in the entire [illegible] Act, a dispute arises as [illegible] ertain specific lands, the Civil Court has jurisdiction under ss, 24 and 26 to try a suit for the determination of the question, because it involves a question of right or title, such suit is not barred by sec. 149 (*d*) of the Act The jurisdiction of Civil Court in matters of partition of a revenue-paying estate is restricted only in questions affecting the right of Government to assess and collect the public revenue in its own way 2. C L. J. 351.

S. 29 (Admission of application for partition and procedure thereon).

——whenever possible partition under the Act should follow the Civil Court partition 38 I C. 833 1 P L. W 219

——the fact that the partition proceedings were pending before the Collector under s 31 of the Act of 1876 (which corresponds to this section) is no bar to a suit for declaration that under a partial partition effected between co-sharers, a portion of the land had been separatly allotted to the Plaintiff 15 C 193.

S. 44 (Powers of Deputy Collector in making a partition).

——under section 44 a partition Deputy Collector has the powers of a Survey Officer under the Bengal Survey Act (Act V of 1875

S. 44. Power of Deputy Collector in making a partition—*contd.*

B. C. and of a Revenue Officer prepring a record of rights under Chapter X of the Bengal Tenency Act The procedure as to the
eof is laid down
l 47 lay down
2 and 103 A of
ocal publication
as the tenants
The Rules of
rrespond to the
Rules of the Local Government framed under section 103 A. So the
s payable
Record of
Act are
they are
be very

——But it has been held by the Patna High Court that a partition proceeding deals with the rights of proprietors and so far as

Pat. 162 : 7 Pat L T 257.

S. 46 (Particulars to be recorded)

Collector has the power
Act (Act V of 1875 B.
record of rights under
the procedure as to the
thereof is laid down in
he same rules as are laid
down under sections 102 and 103 A of the Bengal Tenancy Act. Section 48 treats of the local publication of the record and furnishing to the landlords as well as to the tenants copies of the entires relating to tenures or holdings. The Rules of the Board of Revenue referred to in section 48 correspond to the Rules of the Local Government framed under section 103 A. So the entries in partition papers as to the amount of the rents payable by tenants are evidence in the same way as entries in the record of rights prepared under Chapter X of the Bengal Tenancy act are admissible as evidence under section 103 B. *Prima facie* they are evidence against the tenants though that evidence may not be very valuable. 13 C. W. N. 93 : 4. I. C. 316.

——absence of the certificate of local publication of the record is not sufficient to show that there was no publication A presumption should be made of the regularity of the proceedings of the officer conducting a partition. *See the above case.*

S. 46. Particulars to be recorded—*contd.*

——in a case under this sec the Deputy Collector may take the rent which he considers to be accurate rent or as near the accurate rent that can be ascertained. But there is no provision in the Act precluding the tenant or the landlord thereafter from *contending that the real rent payable by the tenants is* a different figure. It is not a case of holding being split up and different portions allocated to different landlords with proportionate rent as would be the case in proceeding under s. 81. 9 Pat L. T. *480. 1928* Pat. 409.

——A *Raibandi* record differs from, and is simpler than a settlement record, its objects being merely to record the annual rental value *of every portion of the estate, so that each proprietor may* [illegible] of the total expressed in rupees. [illegible] an *ad hoc* valuation, i e it has [illegible] partition proceeding itself In [illegible] om either a regular settlement record or a "fair rent" record prepared under the "fair rent" secs. of the Bengal Tenancy Act All objections against entries made in the record with regard to possession etc, have to be decided summarily by the Partition Officer and he is specifically debarred [illegible] decision so given is an *ad hoc* [illegible] outside the partition pro- [illegible] *sioner when deciding as an* [illegible] in entry in a *raibandi* record cannot pass a final order which the Partition Officer himself would not have been competent to pass 3 Pat L. R. 186 (*Rev*)

[illegible] rcel of land, the first thing [illegible] whether it is in the occu- [illegible] ccupation of a proprietor [illegible] *ccupation of* a *cultivating* tenant he records the rent payable by the tenant. For this purpose he takes the entry in the latest settlement record as his basis and throws the *onus* of proving any change on the person who objects to it If the la[illegible] he estimates the rent wh[illegible] If it were to be let out t[illegible] present rental value [illegible] actuarial rent is totally [illegible] Tenancy Act rent whic[illegible] decessor of the possessing proprietor, and also from the 'lagan which the possessing proprietor had actually been paying to his fellow proprietors under the provision of s 22 of that Act. 3 Pat. L. R 186 (*Rev*)

S 47 (Attestation of survey papers)

——sections 46 and 47 lay down almost the same Rules as are laid down under section 102 and 103 A of the Bengal Tenancy Act. *Janaki Dubey vs. Kirtharath Ray & others* 13 C. W. N 93: 4 I. C. 316.

S. 47. Attestation of survey papers—contd.

——Entries in draft record of rights published under section 103 A are not admissible in evidence. *Gulab* vs. *Ram Narain* 18. C W. N. 896, *Ambor Ali* vs *Lutfu Ali* 21 C W. N. 996; 25 C. L. J. 690.

S. 48. (Publication of survey papers etc.)

——This section treats of the local publication of the record and furnishing to the landlords as well as the tenants copies of the entries relating to tenures or holdings The Rules of the Board of Revenue referred to in section 48 correspond to the Rules of the Local Government framed under section 103 A. 13 C. W. N. 93; 4 I. C. 316.

——absence of the certificate of local publication is not sufficient to show that there was no publication On the other hand it will be presumed that the Deputy Collector did his duties according to the Act and the Rules prescribed by the Board of Revenue. A presumption should be made of the regularity of the proceedings of an officer conducting a partition 13 C W. N 93. 4 I C 316.

——but the inference under s 103 A of the Bengal Tenancy Act can be drawn from the finally published Record of Rights and not from the *khasra* papers or from any materials upon which the finally settled Record of Rights is formed 67 I. C 871 · 1923 Cal. 194.

——So also entries in draft Record of Rights published under s. 103 A are not admissible in evidence in a suit for rent *Galar Kuer* vs *Ramratan*, 18 C W N 896, *Ambar Ali* vs *Lutfu Ali* 21 C W. N 996 · 25 C L J. 690, see also *Imrit Mahton* vs *Bahadur Singh*, 34 I C 857. *Sarup Roy* vs *Srikanta Prosad* 55 I. C 922 but it has been held, distinguishing the cases of 55 I C 922 and 18 C W N. 896, that draft Record of Rights is evidence but no presumption arises therefrom, 2 Pat 814.

(*Evidentiary value of partition paper*)

——*A Batwara Khasra* map prepared in pursuance of a partition effected under the Estates Partition Act of 1876 is a document of title and is admissible in evidence under section 13 of the Evidence Act, *Ajodhya Prasad Singh* vs. *Kamal Narain*, 38 I. C. 491 (P), (5 C. 287, 16 C W N 116) *Ref.*

——*a Batwara Khasra* (measurement paper) prepared under section 54 of the Bengal Act VIII of 1876 cannot come within the provision of section 35 of the Evidence Act inasmuch as it is not an official book, register or record such as is referred to in that section. So where the name of a tenant in possession is entered in such a register, such an entry is not admissible in evidence under section 35 Evidence Act. *Purna Roy* vs. *Keshen Roy*, 25 C. 90, (6 C. L. J. 139, 4 C. 79) *Ref.*

[illegible] nder s. 54 of [illegible] dmissible in. [illegible] where some

S. 48 Publication of survey papers etc.—*contd.*

——*a Batwara Khasra* is not a record within the meaning of section 35 of the Evidence Act and an entry made there in the name of tenant in possession is not admissible in evidence under that section but under section 13 it can be put in to show the history of the plot in question before the creation of the tenancy. *Sadhu Saran* vs. *Ambika Lal.* 68 I C. 676; 1923 Pat. 163

——*Batwara Khasra* prepared under the Estates Partition Act (VIII of 1876) is not a record within the meaning of s 35 Evidence Act, *Nanda Lal* vs. *Mahanth Chanurpat.* 17 C. L J. 462.

——a map made for the purposes of a partition which affected the public revenue is admissible in evidence for what it is worth, though it may be for a limited purpose only. *Abdul Hamid Chowdhury* vs. *Brajendra Kumar Roy Chowdhury.* 90 I. C 643 1926 Cal 290

——certified copies of Chittas and maps relating to partition under Reg. XIX of 1814 and kept in the Collectorate were held to be good and admissible evidence quite apart from s. 35 of the Evidence Act [illegible] the record of the partition between the predecessors *Mandal* vs. *Mahamad Alla*

——entries in Batwara papers prepared under the Estates Partition Act are valuable pieces of evidence, *Chattranath* vs *Baborali* 29 C. W. N 833: 86 I. C. 835 1925 Cal. 635, 87 I. C. 694

[illegible] ed to a partition paper in the [illegible] e history of the document, [illegible] iose presence and for what [illegible] *Arun Chandra Singh* 36

——entries in *Batwara* papers are admissible but it is for the court to decide whether they rebut the presumption of Record of Rights 63 I. C. 226.

S. 49 (Power of Deputy Collector to accept previous Survey etc)

——where the Survey Record of Rights and Batwara Khatian prepared under this section showed the possession of the plaintiff, but the possession of the land was delivered over to the defendants and an order under section 144 of the Criminal Procedure Code was also passed against the plff section 119 was no bar to the maintainability of the suit 65 I. C 586 3 P. L. T 13: 1922 P. 193, 3 P. L W. 226 *Dist.*

——in view of considerable difficulty and uncertainty in realising sairat rent, the value of the sairat rent is not equivalent to the assets of ordinary rent. Acceptance by a co-sharer of the system of valuation before the papers are adopted under section 49 does not operate as an estoppel. Equity could only be ensured by a reasonably approximate distribution of the risk. 1 Pat. L. R. 259 Cr.

S. 49. Thak and survey maps, evidentiary value of.

——unless it can be proved that the person against whom a thak or survey map is attempted to be used expressly consented to the delineation or admitted the correctness of such map, it has not the binding effect. 3 C. W. N. 99.

——to say that a map has no binding effect is quite a different thing from saying that it is not evidence. As the object of a thakbust survey and map is to ascertain and delineate the boundaries of the estate borne on the Revenue Roll of the District, the entry in a thak map that certain lands formed part of an estate becomes a relevant fact under section 36 of the Evidence Act and it is open to a Court to presume that the same state of things existed at the time of the Permanent Settlement. 7 C W. N. 849.

——maps and surveys made in India for revenue purposes, are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible and valuable evidence of the state of things at the time they were made. They are not conclusive and may be shown to be wrong, but in the absence of evidence to the contrary they may be judicially received in evidence as correct 30 C. 291 7 C W. N. 193 30 I. A 44 P. C.

——the state of things described in the thak and survey maps cannot be presumed to have existed at the time of the Permanent Settlement. They are valuable evidence of the state of things at the time they were made 3 C. L J 316, 13 C L. J 293.

——but it has been recently held that it can be presumed as a matter of law that the state of things described in the Thak and Survey maps existed at the time of the Permanent Settlement. The question what lands were included in the Permanent Settlement is a question of fact and not of law which may or may not be satisfactorily proved by subsequent survey maps The onus of proving that any particular land were included in the Permanent Settlement of 1793 is on those who affirm that such was the case, and the burden of proof is not necessarily shifted by the production of the Thak and Survey maps showing that specified lands are included in a particular estate. The Thak and Survey maps are valuable evidence of the state of things at the time they were made, [illegible] conclusively what was the [illegible] Permanent Settlement. 34 C. L. J. 141.

——where the thak map itself showed that the plff.'s predecessor and his co-sharer were disputing about the land and the survey map showed that it was a newly formed *chur* land at the time, the thak map was held not sufficient evidence of plff's title as proprietor. 10 C. W. N. 835 p. 837.

——a survey map is evidense of possession at a particular time *viz.* the time at which the survey was made and may be evidence of title, but as to whether it is sufficient evidence or not, is a question to be decided in particular case 15 C. 353.

S. 49. Thak and survey maps, evidentiary value of—*contd.*

——the Thak map is valuable evidence of possession, and as evidence of possession, it is also valuable evidence of title. *Maijuddi Biswas* vs *Ishan Chandra Das Sarkar.* 13 C. L. J 293. (22 C 252 and 30 C. 291 P. C.) *fol.*

——revenue Survey Maps are evidence of title and possession. They are not conclusive and may be shown to be wrong, but in the absence of evidence to the contrary, they may be properly and judicially received in evidence as correct when made. 12 C. W. N. 273 : 7 C. L J. 414 P C, 12 C. W. N. 273 : 7 C. L. J. 414 **P. C.** *But see below.*

——the Thak authorities had nothing to do with title or possession and no deduction as to title or possession can legitimately be drawn from Thak maps. 31 C. W. N. 473; 1927 Cal. 403, (30 C. 291, 22 C. 252) *Relied on.*

——thak and Survey maps may be presumed to have correctly delineated the boundaries of villages and thus to furnish valuable evidence of possession at the time they were made and so also of title. But such presumption fails where the maps were promptly [illegible] . N. 1280.

[illegible] . ven great weight to the [illegible] .ot conclusive but in the [illegible] will be presumed to be [illegible] was found by two Courts to have been in the possession of the owner of certain estate for 60 years, was not shown to be within its boundaries in the Revenue Survey map of that estate, held that the fact of possession as found by two Courts upon evidence overweighed the negative evidence of the map 25 C. L. J 425 21 C W N. 291 **P. C.**

——there is a rebuttable presumption of accuracy in favour of a survey map but the presumption was not rebutted in the circumstances of the particular case 28 C L J. 223

——under the circumstances of the case the Judical Committee held that the Thak Survey proceedings were in truth determination by public [illegible]

[illegible]

——there is a *prima facie* presumption in favour of the accuracy of Thak and Survey maps and it is for the party who impugns their accuracy to prove his case. Such map may be shown to be incorrect [illegible] udication of a Court or by [illegible] (C).

—[illegible] Amin in connection with [illegible] y of a village is a

S. 49. Thak and survey maps, evidentiary value of—*contd.*

——as a general rule the thak and the survey maps should agree, where they differ, the one that more clearly agrees with the local landmark should be followed. There is no general or definite rule making incumbent upon the Court to follow either the one or the other The Court may, if it considers the thak map reliable, follow it in preference to the survey map. 6 C W. N 629.

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——kistwari maps (survey maps) are under section 36 of the Evi Act evidence between the parties *quantum valet*. They are primarily evidence of possession, but evidence of possession is always evidence of title. 64 1 C 326 3 Pat. L. T. 140

Evidentiary value of Registers.

Entries in Collector's Register kept under Act VIII of 1876.

——where a Collector according to the provision of Bengal Act VIII of 1876 ... pt by him, held that such register kept by a public ... h entries are admissible

Quinquennial Registers.

——the Quinquennial Registers are admissible in evidence. 7 W. R. 14.

——The Quinquennial Register of 1895 kept under the Bengal Regulation 48 of 1793 is admissible in evidence to rebut the presumption under section 50 (2) of the Bengal Tenancy Act. 86 I. C. 538 · 1925 Cal 1037.

Evidentiary value of Quinquennial papers.

——Quinquennial papers prepared by the Revenue Authorities from 1795 to 1799 under the provisions of Regulation XLVIII of 1793 are admissible in evidence. Reliance can be placed upon hand sketches drawn up by the parties on the basis of the information derived from the quinquennial papers and the *Hakikat Chauhaddi* papers. 34 C. L J. 141 ; 65 I C. 866.

——the Quinquennial Register of 1795 kept under the Bengal Regulation 48 of 1793 is admissible in evidence to rebut the presumption under s. 50 (2) of the B. T. Act. 86 I. C. 538 : 1925 Cal. 1037.

S. 59. (Duties of Deputy Collector when partition has been approved or disapproved by Collector.)

——where there is discrepancy between entries in partition papers and the map the entries will prevail as the map can only delineate the allotments in the paper. 28 C. W. N. 46 : 1924 Cal. 245 : 81 I. C 29.

S. 49. Thak and survey maps, evidentiary value of—*contd.*

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C.

——there are three main kinds of thak maps in existence, (1) eye sketches in which no actual measurements were made, (2) maps in which rough magnetic bearings were used and rough linear measurements made, and (3) maps made from careful magnetic bearings and careful linear measurements If the revenue survey map which has carefully and accurately prepared by competent officers and the thak-bast map do not tally it is quite impossible to . . . . the demarcation pillars put down
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rities furnish sufficient data The Revenue survey map prevails over the thak-bast map. The signature of the Revenue Surveyor on the thak map does not mean that if the thak map is reduced to the same scale as the Revenue Survey map, then the two boundaries will necessarily tally but merely that the Surveyor has satisfied himself that the boundary accepted and intended by the demarcation staff has been correctly picked up on the ground and correctly surveyed on the revenue map. 83 I. C 205: 3 Pat 85. 1924 Pat 402

——although the thak-bast map is a part of the thak Survey, it is not meant to be and is not in fact a scientifically prepared plan but merely a rou . . . . fully prepared
plan showing the
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Where it appears that when he made the survey and prepared the Revenue map he had the Thak-bast map before him, the revenue map must be accepted as showing the result of the Thak Survey even more accurately than the Thak-bast which was not intended to be scientifically accurate The words "as per thak" mean as per thak pillars 96 I C 1027: 1926 P. 385

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bast map and the survey map produced on behalf of the plff. was held to be greater than that of the survey maps produced on behalf of the defts

——an entry in the thak map that it was prepared in the presence of the representatives of a certain party is admissible in evidence 10 C. L. J. 527 : 4 I. C. 422.

S. 79. Places of worship—*contd.*

15 C. W. N. 552. But in *Basanta Kumar Ghosh* vs. *Moti Lal Ghosh* reported in the foot note of page 555 of the same Volume it was held that when it is inconvenient to divide a property, that property must be kept in the possession of the person in occupation and the person, who cannot conveniently get actual possession, compensated

——when partition of dwelling houses is effected, the common procedure is to divide rooms, if necessary, by means of walls which are kept joint. 12 C. L. J. 346.

S. 81. (Splitting up of tenure or holding and apportionment of rent.)

——on the partition of the parent estate, the original arrangement by which there was one tenancy under one holding of landlords comes to an end. The effect of the partition is to create separate and distinct tenancies under the proprietors of each estate. 26 C. 832

contained no prohibition against the division of holdings and tenures. 10 C. W. N 818

——but in the Civil Court what is divided by the partition amongst the landlords is not the tenancy but merely lands which are held by the tenants There is no recognition of the division of the holding or of distribution of rents, the tenants remaining jointly liable to the landlord for the entire rent. 12 C. W. N 568

——this sec gives the Collector power to split up any tenure or holding for the purposes of partition This power must be exercised only in order to effect on equitable partition and the existing rent should then be apportioned. The words "split up" are used in the sense of severing completely in several parcels the holding which before the partition was held under several persons When a part of a non-transferable holding is transferred and that part falls exclusively to the allotment of a co-sharer proprietor he can eject the transferee from that part, though before partition the latter was not ejectable as being the purchaser of a part only 47 C. L. J. 618, 1928 Cal 560.

——where a Deputy Collector acting under this section summons the tenants and proceeds to enquire into the necessity of splitting up a holding and to make an order that the tenure or holding is split up, he exercises the powers of a quasi-judical Officer and an order passed by him under this section is not a nullity. Such an order [illegible] r rent in [illegible] merely [illegible] by suit [illegible] section [illegible] e period

S. 81. Splitting up of tenure or holding and apportionment of rent—*contd.*

of limitation if its effect is to be ignored. 29 C. W. N. 221; 86 I. C. 14; 1925 Cal. 437.

——there was a *Quaere* made *per Page, J*, whether a person aggrieved by an order under section 81 is entitled to chalenge it otherwise than by the method prescribed by this Act. 29 C. W. N. 221: 86 I. C. 14; 1925 Cal. 437.

——in a permanently settled district there is nothing in the law to justify a claim made on the basis of the proportionate distribution of tenants. The landlord has no special claim on the personal services of his tenants. The liability of the tenant begins and ends with the payment of rent 3 Pat. L R 196 (Rev)

——where in a partition proceedings under this Act it was contended by all the landlords that certain lands were rent-free lands and the lands were taken as such in the adjustment of assets of the different co-sharers, the landlords to whom the lands were allotted could not afterwards deny that the lands were rent-free 29 C W.N. 833; 86 I C 835; 1925 Cal 635, 1925 Cal. 866 *Diss.*

fol, 6 C. 543 and 666 *Dist*

——when the plaintiff proves his title by purchase of a *putni* and ... ıds ... J. ... 43,

——the production of a *Lakheraj* Sanad is not necessary to prove that land is held rent-free It may be legally established by long and uninterrupted possession without payment of rent 10 W R 461.

——the presumption of a lost grant may be drawn in a case where the public of a locality have been using a bathing ghat for a long period 1925 Cal. 1233. 88 I. C. 505.

S. 82 (Land held rentfree not to be divided without consent of proprietors)

——mere possession of land for a long series of years without payment of rent does not necessarily mean a rent-free grant. 38 C. L. J. 307.

——the finding that the defendant and his predecessors had been in possession without paying any rent for over 12 years was not by itself sufficient for basing a valid title in bar of the plaintiffs suit. But where the settlement *khatian* showed that the defendant claimed the land as rent-free and the plaintiff's agent denied the claim, there was a claim of niskar title unqualified by reference to ... the same by the plaintiff's agent. ... claimed to the knowledge of the ... years after, would be barred. 15 C. L. J. ...

S. 82. Land held rent-free not to be divided without consent of proprietors—*contd.*

——the mere non-payment of rent for 12 years does not create rent free title. The claimant must assert his right to the knowledge of the landlord 52 C 576 29 C W. N. 328 86 I. C. 781 1925 Cal. 651.

——the holder of a rent-free holding is entitled to possession of all lands forming accretions thereto, but he is not entitled to hold the same rent-free 18 C. W. N. 1206

——where a tenant proves that for more than 60 years rent was never paid, that in the partition proceedings under the Estate Partition Act the lands were described as rent-free, an inference of rent-free tenancy can be drawn. Long possession without payment of rent in open defiance of a landlord's claim raises a strong presumption against him. 29 C. W. N 833, 86 I. C 835 1925 Cal. 635

——the mere fact of the tenants having constructed a dwelling house on the land in dispute and having been in possession thereof for any length of time will not give them a title to remain on the land permanently as rent-free tenants. 88 I. C 553 1925 Pat. 612, 3 Cal 696 *Ref*

——where a *Sanand* was granted by Hindu Raja to certain tenants [illegible] embankments to a silted up [illegible] no rent was recovered for the [illegible] *Sanand* spent money in re- [illegible] he circumstances of the case and having regard to a long course of conduct implying the rent-free character of the tank the Raja was estopped from revoking the license and from asserting that the subject-matter of the grant should be assessed 16 C W. N 304

——non-payment of rent for a long time gives rise to the presumption that it is rent-free 24 I C 319 (C), but the cause of non-payment of rent may be ascribed to some other reason. 25 I C. 586

——there is no presumption that the lands are *Lakheraj*. 4 M I A. 497 P. C

S. 83. (Land held at fixed rent on permanent intermediate tenure).

Application of the section.

——The section applies only to permanent tenures the existence of which is admitted by all the recorded proprietors and has no application if denied by any one of them. 37 C. 662 : 15 C. W. N. 45.

Permanent Tenancy.

——Long possession and uniform payment of rent are not by themselves sufficient to justify a finding that the tenancy was permanent from its inception. 37 C. L. J. 478.

——When a tenant of a land claims a permanent tenancy the onus is on him to prove that he has such a right and no tenant can obtain any such right by prescription against his landlord from whom he holds the land. 28 C. W. N. 809 : 82 I. C. 226 : 1924 P. C. 65

S. 83. Permanent Tenancy—*contd.*

——the person who sets up permanent tenancy must prove it. 25 C. W. N 485 P.C. 30 C. W. N 807: 1926 Cal. 322.

——a tenancy may be permanent without payment of premiums. 35 C. L. J. 90: 64 I. C. 774: 1922 Cal 123.

——the use of the word *taluk* in a lease *prima-facie* imports permanency. If there are no words of inheritance in a *patta* or *kabuliyat* yet incidents may be proved by evidence bearing on the history of the tenure and the conduct of the parties. 65 I. C 145.

——when the original purpose of letting out is unknown the tenant is to prove the permanent nature of the tenancy An assertion in the *kabala* executed by a tenant in favour of his transferee, that his right in it is a permanent one, is admissible in evidence in such suit under section 13 of the Evidence Act 39 C. L. J. 526. 1924 Cal. 991.

——where the origin of the tenancy is unknown, permanency of tenancy may be inferred from circumstances 27 C. W. N 969, *73 I. C. 2 (C), 71 I C 330 (M), 17 I C 370 (All)* When the Court can infer a tenancy to be permanent was considered in 92 I C. 963: 1926 Cal. 634

——when the original nature of a grant is unknown, and the predecessors in interest of the defendants who were purchasers in execution of a decree, were found to be tenants on the lands in dispute being in occupation for 60 years, and were found to have raised substantial structures on the land, the Court was justified in drawing the inference that the holding was permanent, 11 C. W. N. 242 5 C L J, 178

erected pucca buildings on the land and also constructed pucca ghats in the tank, the Court was justified in drawing the inferences that the tenure was permanent one. 12 C. W. N. 236 (note)

——in order that the presumption of permanency may be drawn it must be established that the origin of the tenancy is unknown and substantial *pucca* structures must be built without objection by the landlord. 29 C. W. N 138 52 C 43: 1925 Cal 309

——*if there were a series of successions and recognitions and* the rent continued to be uniform for a long time permanancy may be inferred 27 C W N 969

——the fact that certain land had been in the ccupation of the defendant and his predecessors in title for several generations at a fixed rent inspite of the fact that the value of the land increased abnormally shows that the tenancy must be a permanent one 30 C. W. N. 709 : 96 I. C. 315

——before the Transfer of Property Act a patta was not necessary to create a permanent tenancy. 14 C L. J. 614.

——a permanent tenure cannot be created except by a registered document 40 I C. 100.

S. 83. Permanent tenancy—*contd.*

——where a tenure had been found to be in existence for at least 75 years but the origin of the tenancy was unknown while substantial structures were erected on the land and the conveyance of the tenure referred to the tenure as *miras* tenure, the inference is perfectly legitimate that the tenure was of a permanent character. 37 C. 662 : 15 C W. N. 45.

——when a tenure or holding has existed for many years, held upon a nominal rent never enhanced, and has been the subject of a transfer and succession, the only inference possible is that the tenant held a permanent tenure The fact that the deeds of transfer recite that the transferee, on paying expenses to the landlord, and on causing expunction of the transferor's name, shall take a pattah in his own name, does not go against the presumption that the tenure is permanent. 34 C. 902 : 11 C. W N 865 6 C L. J. 122 P. C.

——where a tenancy has existed for more than 60 years and successive landlords have recognised the devolution of the tenant's interest by succession and assignment, the presumption is that the tenancy is a permanent one. Payment of an unaltered rent for the same period also strengthens the presumption, which is not rebutted merely because of a provision in the *Kabulyat* that on a transfer by assignment, one fourth of the purchase money should be paid to the landlord. 9 C. L. J. 475 4 I. C 173

——occupation of the land at an unaltered rent for 100 years, although its saleable value increased from Rs 300 to Rs 3000 and [illegible] itable and trans- [illegible] d recognising such [illegible] 32 C. 51 8 C. [illegible] P. C.

——The mere fact that rent has not been changed for a long time, does not show that the tenancy was a permanent one Such an inference as to permanency can only be drawn from all the facts of the case proved and admitted 36 C. L. J. 73.

——but where the rent was not enhanced for 59 years there might be an inference of perpetual lease. 1926 Cal. 264 90 I. C. 820.

——so also where a tenure has been in existence for over 80 years at a uniform rate of rent the presumption of a permanent tenure arises. 90 I. C 781. 30 C W. N. 807 1926 Cal 322.

——no importance is to be attached to statements in the rent-receipts granted to a tenant describing him as tenant at will when there is nothing to show that the tenant consented to the insertion of these words in the receipts or were even aware of it. 24 C W N. 1. (P. C) *See* also 66 I C. 61

Held at fixed rent.

——where the rent was *thika mokrari* and the grantee was authorised to cultivate the land from generation to generation it was a permanent tenancy with fixed rent. 35 C. L. J. 90 : 64 I. C. 774.

S. 83. Held at fixed rent—*contd.*

——where the origin of the tenancy is known the fact of the rent being altered once negatives the hypothesis that the rent had been fixed in perpetuity. 38 C. L. J 121.

——to rebut the presumption of fixity of rent there is nothing to require that the change in the rate of rent should be substantial. A change of one pice even *per kani* is sufficient 86 I. C. 587: 1925 Cal. 1025.

——where in a subsequent lease of 1886 there was a provision that if at any time on measurements the tenants were found to be in possession of excess area they should pay rent at the original rate for the excess area and the tenants were to continue in occupation from generation to generation and pay proportionate cesses, the rent was fixed in perpetuity 35 C L. J 138.

——in order to ascertain the effect of grant resort must be had to the terms and the whole circumstances 27 C W. N. 328

——the presumption of fixity of rent does not apply where the *origin of the tenancy is known.* 70 I C 207.

——mere forbearance on the part of the landlord does not justify the inference that the tenure is not enhanceable 33 C. L J. 372.

——the fact that the rent of the holding has not been altered for a period of 59 years is a factor which must be taken into account in considering if the rent has been fixed in perpetuity. But such an inference is not inevitable, as it may be due to special circumstances such as the land being overgrown with jungle. 90 I C, 820

——where a tenancy was created for the purpose of reclamation but the origin was unknown, and it was not limited in duration and had descended from father to son and from son to grand-son and the rent was never altered and excess lands reclaimed from time to time had been included in the tenancy and rent had been assessed thereon but at each settlement the rent assessed at the previous settlement had been left untouched while the rent was progressive, the full amount being reached in the fourth year and the parties agreeing that the lessee should thenceforth continue to pay the full amount, held that from these circumstances the inference might legitimately be drawn that the tenure was permanent and the rent had been fixed in perpetuity 1 C. L. J. 572.

——where it was stipulated that the tenant should in addition to rent pay the cess as may be settled by the Government in future and should further pay standard rent for all additional land to be found on measurement, the tenancy was at fixed rent. 38 C. L. J. 350.

——if there is an indication in lease that there will be no [illegible] additional rent would be [illegible] ea is held, held that the [illegible] *mokurari* is not used in

S. 83. Held at fixed rent—*contd.*

——but where there was a stipulation that the tenant would have to pay additional rent for additional land at the *kabulyat* rate the tenancy was not exempted from enhancement. 38 C. L. J. 369.

——where under the arrangement the tenure was not liable to rent for the first four years, after that it would carry on a progressive scale until in 1898 it would reach one rupee one anna per bigha and since there was no enhancement by operation of law, held that the maximum rent reached in 1898 was the fixed rent of the tenure so long it would last 47 C. 280 P. C.

——where the rent was not enhanced for 59 years there would be an inference of perpetual lease. 1926 Cal. 264, 90 I. C. 820

——where it was stipulated that the tenant would cultivate from generation to generation and was to pay a *ticca mokrari* rent, held that the tenant held at a fixed rent although no premium was paid 35 C. L. J. 90; 64 I. C. 774

——where the record of rights records the tenants as holding at fixed rate it may require very slender evidence to rebut the presumption raised by the record but so long as the entry is not rebutted there is no onus on the tenant to produce evidence of fixity of rent 96 I. C. 884; 1926 Cal. 1222.

S. 84. (Lands held in common estates how to be dealt with.)

——common land in which the extent of the interest of the proprietors has not been ascertained, cannot be the subject of proceedings under this section, nor can they be distributed in the proportion in which Government revenue is paid. 3 Pat. L. R. 49 (*Rev.*)

——section 112 (Old) corresponding to this section is limited to cases where the community of interest in the land in dispute between proprietors of the estate under partition in a body and the proprietors of the other estates is admitted 22 C. 286.

S. 88. (Procedure in case of dispute as to boundary of estates.)

Applicability of this section and section 84

——section 112 of Act V of 1876 (corresponding to section 84 of the Act, is limited to cases where the community of interest in the land in dispute between the proprietors of estate under partition as a body and the proprietors of the estates is admitted When this is not admitted the provisions of section 116 of Act V of 1876 i e. the present section apply. 22 C. 286.

Dispute as to boundary

——when the [illegible] here the divid- [illegible] have not been [illegible] rden of prov- [illegible] in the posi- [illegible] d to do what

S. 88. Dispute as to boundary—*contd.*

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——on question of boundary, where the dividing line in dispute runs through the waste lands, which have not been the subject of definite possession, the rule as to the burden of proving the affirmation is not applicable The litigants being in the position of counter-claimants, both parties are bound to do what they can to

21 C 504 P. C.

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187, 6 C. W. N 390) *fol*

——owners of adjoining lands are not bound by consent to a boundary which has been defined under a mistaken apprehension

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as not been meanwhile
If the boundary line
has led to any dispute,
boundary, in settlement of
between their properties,
from such settlement. 12

——it cannot be presumed as a matter of law that the boundaries of an estate as shown on the *thak* or survey map are identical with the boundaries as they stood at the time of the Permanent Settlement (30 C 291 P. C.) *fol.*; but it is open to the Court to presume, in the circumstances of a particular case, that the condition of the locality has not changed materially between the date

Dispute as to boundary—*contd.*

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——the Topographical Survey map of 1869 in which the bound- given, was held to be in which of the two veen which admittedly 1 two pargannahs, the rgannah boundaries are found entered in such map the presumption will be that they were so entered in pursuance of instruction received from authorities. 11 C. W. N 230.

——where the possession of the plaintiff's land is taken by an adjoining land-owner under mistaken knowledge on the part of both parties as to the true boundary it is adverse to the plaintiff 83 I C. 132, 1925 Rang. 111.

Lands included in the Permanent Settlement.

——by the Permanent Settlement Regulations, Government he be a of permanently settled estates, or any such relationship as would debar Government from claiming and exercising against those owners the rights of an ordinary proprietor The fact that the Government continues to receive the full revenue from the proprietor of a permanently settled estate for the entire estate, does not preclude the Government from claiming title by adverse possession in respect of any portion thereof. 3 C W. N. 99

——in every case the question what lands are included in the Permanent Settlement of 1793 is a question of fact and not of law. The onus of proving that any particular lands were included in the Permanent Settlement is on the person who affirms it. 30 C. 291: 7 C. W. N. 193: 30 I. A 44 P. C.

——the question what lands are included in the Permanent Settlement is a question of fact and not of law, which may or may not be satisfactorily proved by subsequent survey maps The onus of proving that any particular lands were included in the Permanent Settlement that such was the lifed by the produc- specific lands are

——from the fact that the bed of a large nevigable river is shown to be included within the thak boundaries of a particular estate, it does not follow that the bed was settled with the zemindar at the time of the Permanent Settlement. 65 I. C. 76, (c)

S. 89 (Procedure when proprietor of an estate is dispossessed by any decree)

——where the land of the dwelling house of one propritor was allotted to another and hence there was a mistake in fixing rent, the proprietor who was allotted that land cannot sue to eject the proprietor of the dwelling house as a trespaser but is entitled to a decree for rent. 16 C. L. J. 19: 13 I. C. 498.

S. 94 (Procedure as to giving possession of separate state)

——sections 94 and 95 would seem to imply that the separate accounts can have no further existence after a partition as those sections have the effect of *separating* the accounts of each separated estate and if any further protection is required by way of separate account it would seem that a separate account must be freshly opened The partition of an estate has not the effect of destroying separate accounts. 78 I C. 723. 1924 Pat 586. 3 Pat. 581.

——where the plaintiff obtained under this Act a partition of lands owned by him jointly with another and an application to the Collector to give effect to the partition was dismissed and more than a year after he sued for declaration of title and possession, the order of the Collector was held not one under this section and hence the suit was not barred under section 119 nor was it barred under Art 14 of the Limitation Act 29 C W. N 839: 89 I. C. 193: 1925 Cal. 953. Partition does not create any right. It only indicates the mode of enjoyment. I C. W N 121 p 128.

——a partition by the Collector merely apportions the amount of revenue there is no settlement of the revenue in any sense at the time of such partition, 24 C 857

S. 95 (Separate estate should be liable for separate revenue.)

——sections 94 and 95 would seem to comply that the separate accounts can have no further existence after a partition as these sections have the effect of separating the accounts of each separated estate and if any further protection is required by way of separate account it would seem that a separate account must be freshly opened The partition of an estate has not the effect of destroying separate accounts. 78 I. C. 723. 1924 Pat. 586; 3 Pat 581.

S. 96 (Boundary-marks.)

——Where the parties consent to be bound to regard the boundary line as laid by the survey authorities as conclusive they cannot afterwards question the cerrectness of the same. 1922 Pat. 87.

S. 99 Savings of tenuers, leases and incumbrances.

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[illegible] te" in the section are

S. 99. Savings of tenures, leases and incumbrances—*contd.*

wide enough to include cases where a specific portion of the estate is let out in patni; a co-sharer's share in any definite plots of land included in a joint estate being as much "a portion of share" as an aliquot part of a share is, though the illustration to the section lends support to the opposite view. 29 C. W N. 202 · 1925 Cal. 456. 86 I. C. 130.

——to make out a case under section 99 it has to be proved in the first instance that the estate that has been partitioned was held in common tenancy, for there is no presumption to that effect from the mere fact of partition under this Act Next it has to be proved that the tenure, lease or incumbrance was not created by the plaintiff Then the plantiff will get a decree for khas-possession along with the defendants While common tenancy has to be ... brance

jointly ... private *arrangement between the parties* So *where cartain lands in an* estate were owned by members of an undivided family and defendants held them as a tenure under the co sharers to whose exclusive share they had been assigned by private partition and in the partition of the entire estate by the Collector those lands were allotted to the plaintiff's share, held that under the private partition the lands were held in severalty and not in *common tenancy*, the plaintiff took them subject to the tenure of the defendants. 21 C L J. 605.

——this section does not apply when the estate partitioned by the Collector had already been privately partitioned amongst the ...

W. N. 426

——grants of share in specified mouzas which are themselves only portions of an estate held in common tenancy come under this section. The Act does not apparently contemplate any *tertium quid* (a third something) between common tenancy and several holdings. 54 Cal. 586 : 31 C. W. N. 885 : 101 I. C. 359 : 54 I. C. 196 : 1927 P.C. 117, P.C.

cation of some of the proprietors under section 7. 1923 Cal. 279 : 68 I. C. 500.

——the private arrangement described in sec 7 is not necessarily the same private arrangement that would prevent the application of section 99. 1923 Cal. 279 : 68 I. C. 500.

S. 99. Savings of tenures, leases and incumbrances—*contd.*

,——the private arrangement described in section 7 is not necessarily the same as would prevent the application of this section and if it is found that the estate was held not in common tenancy but in severalty in pursuance of some private arrangement among the parties, this section will not apply. A plaintiff suing in ejectment, unless he brings his case under section 99, must take the estate subject to the tenure of the defendant, 87 I. C. 581 : 1926 Cal. 433.

——a co-proprietor may be in possession of a particular piece of land within the joint estate by virtue of his right as a joint owner but by such possession the right of others in that piece of land is not affected All co proprietors continue as tenants-in-common with regard to the land unless the co-owner in possession acquires a separate right Any person accepting an interest from the co-sharer in possession of it must take it subject to the right of the others to enforce a partition and such incumbrancer cannot complain if the land is allotted to some other co-proprietor and thereby he is deprived of his right to it. But when a co-proprietor holds a particular piece of land in severalty the position is different A person holds a land in severalty when he holds it in his own right only without any other person being joined or connected with him in point interest With regard to co-proprietors in joint estate an interest in severalty in a portion of the land within the joint estate in favour of one of the co-proprietors can be created *by a formal agreement referred to in ss. 76, 77 and 78* by all the co-owners by which possession is given to one of them 97 I C. 539 (C).

——the act does not apparently contemplate any *tertium quid* (a third something) between common tenancy and several holding. 1927 P C., 117, 101 I. C 359 P. C

——the plffs, were three co-sharers of an estate of which a lady was the fourth-sharer. By means of a private arrangement among them certain lands were assigned to the various co-sharers in severalty, other lands remaining ejmali or joint as before Some forty years after the lady co-sharer leased out her share in the estate in putni to third parties who were subsequently in possession. There had been separate possession of these lands by virtue of the private partition for the past 70 years Subsequently the Collector, under Act VIII of 1876 effected a partition of the whole estate. In the course of the proceedings, the specific lands allotted to the lady co sharer in the original private partition were allotted to the plffs and these plffs, instituted suits for rent against the tenants of the lands making the putnidars defts, held that the putnidars were entitled to retain possession of the lands alloted to their lessor (the lady co-sharer) in the private partition by which the plffs. were bound notwithstanding the subsequent partition by the Collector under Bengal Act (VIII of 1876) even assuming that the putnidars were not parties to the said partition proceedings by the Collector. 120 C. 285.

——if a co-sharer of an undivided estate mortgages any portion of the estate, and if subsequent to such encumbrance, the Collector,

S. 99. Savings of tenures, leases and incumbrances—*contd.*

partitioning the estate under the Estates Partition by Act (old) allots the encumbered portion to another co-sharer, the latter takes the portion allotted to him free from the encumbrance created by the first mentioned co-sharer. But in the case of private partition it may be urged that when any land of an undivided joint estate, encumbered by any co sharer, is allotted to any other co-sharer, the latter should ta[illegible]
the encumbered [illegible]
in the allotmen[illegible]
3 C W. N. 209,

——the mortgagee of an undivided share in joint property is entitled only to the lands allotted to the morgagor on partition, if the partition is fair and equal and is not vitiated by fraud, and he is entitled to proceed against what may be called the substituted security. 6 C. L. J 49.

——but a usufructuary mortgagee is entitled to sue for mortgage-money when he has been dispossessed from the mortgaged property by a co-sharer of the mortgagor who obtained the same on [illegible]

——where a mortgage was granted by a mortgagor not of his own share in entire estate belonging to a joint Hindu family but of specific lands of which the mortgagor was in possession by an [illegible] would [illegible] case is [illegible] C. 877:

——a sale of *khamar* land by one co-sharer to another with a condition for the payment of Government Revenue by the vendee to the vendor is an anomalous burden and not an incumbrance, and if the vendee's name was not registered *batwara* authorities cannot take [illegible]

——but where [illegible] and the [illegible] co-sharers [illegible] in 1905 [illegible] B C), but [illegible] dispute [illegible] withhold payment of rent to the plff. 11 C L J 95

——a permanent lease granted by co-sharers without the concurrence of one of them is not binding on that person and consequently if the property composed in the permanent lease is allotted

S. 99. Savings of tenuers. leases and incumbrances—*contd.*

to him in the partition he takes the property without being subject to the lease. 53 C. 694; 43 C. L. J. 333; 30 C. W. N. 511: 95 I. C. 516: 1925 Cal. 714 F. B.

S. 119. (Certain orders under this Act not to be contested in Civil Court).

When Civil suit lies.

... New) is to exclude where the question ... nue or to the details ... tion raised goes to the very root of the matter and relates to the jurisdiction of the Collector to make a partition inspite of the provisions of section 12 (Old) (section 7 New) of the Act, it is impossible to hold that the Civil Court is not competent to decide the matter in controversy between the parties. Where therefore, the Board of Revenue on appeal decided that the private partition set up was not established and the Collector proceeded with the partition, and ... Collector it ... the reality ... clusive and ... e the competency of the Collector to make the partition in view of section 12 of Act VIII of 1876, held that the Civil Court was competent to decide the matter in controversy and the suit was maintainable. 36 C. 726 10 C. L. J 189: 1 I C 549

——if in the course of partition proceedings under the Estates Partition Act VIII of 1876 in which the proprietors are in possession of specific lands as representing their interest in the entire estate as contemplated by s. 9 (b) of the Act, a dispute arises as to which of the proprietors is entitled to certain specific lands, the Civil Court has jurisdiction under Ss 24 and 26 to try a suit for the determination of the question because it involves a question of right of title; such a suit is not barred by s 149 (d) of the Act. The Civil Court has jurisdiction to try suits of this description, not merely because it involves a question of right or title, but also because the question is one of the extent of interest. The jurisdiction of the Civil Court in matters of partition of a revenue-paying estate is restricted only to questions affecting the public revenue. 2 C L J 351.

——when the plea of prior private partition is rejected by the Collector the question cannot be re-agitated in the Civil Court. 9 Pat. L. T. 267; 1928 Pat 343.

——section 149 (Old) does not bar a separate suit for the establishment of a *miras* title found against by the Revenue Officer even

S. 119. Whe civil suit lies—*contd.*

dings. The object of section 149 is to exclude the jurisdiction of the Civil Court in cases where the question relates to the decision of the Government Revenue ...
exclus
a ques

orders mentioned in section 119, the provisions of section 119 were no bar to a suit for a declaration that a third person claming the right of tenancy is not in reality a tenant in respect of any land in the estate although the Collector overruled such objection 16 C. W. N. 639 : 13 I. C. 123.

——a suit by a person dispossessed in pursuance of an order of the Collector under s 116 of the Estates Partition Act VIII of 1876 (section 88 of this Act) for possession of lands will lie even though no suit is brought to set aside the Collector's order under s. 149 of the said Act 24 C 149

——where the plaintiffs did not desire to alter the boundary of the separated estates nor did they want that the allotment of the defendants should be reduced or that the acts of the partition authorities should be in any way interfered with but they only wanted that their tenure should not be held to be reduced by the action of the partition authorities and that they should hold the disputed lands under the defendants as tenants, the jurisdiction of the Civil Court was not ousted. 97 I. C. 539 : 1927 Cal. 65

——where in the course of a *Batwara* proceeding there has been no adjudication of the question whether certain plots are included in an estate, the mere fact that in the final partition award an allocation of the lands was made is no bar under this section to the maintainability of a suit for a declaration that the lands were not so included. 7 Pat. L. T 779 · 1926 Pat 421 : 96 I. C 632 6 Pat 73

——where the Survey Record of Rights and Batwara khatians prepared under section 49 of this Act showed the possession of the plaintiff, but the possession of the land was delivered over to the defendants and an order under section 144 of the Criminal Procedure Code was also passed against the plaintiff, section 119 was no bar to the maintainability of the suit. 65 I. C 586 : 3 P. L. T 13 1922 P. 193, 3 P. L W. 226 *Dist*

——where the plaintiff obtained under this Act a partition of lands owned by him jointly with another and an application to the Collector to give effect to the partition was dismissed and more than a year after he sued for declaration of title and possession, ... 94 and
...barred
... 193:

——a partition proceeding deals with the rights of proprietors
... they are only entitled to
... been the intention of the
... clusively determined by the

S. 119. When Civil suit lies—*contd*

Record of Rights prepared for the purpose of partition. Decision of the Revenue authorities as to the extent or otherwise of the tenure cannot conclude question of title in Civil Courts 90 I. C. 817: 5 Pat 8: 1926 Pat 162: 7 Pat. L. T. 257.

——it was neither intended nor enacted that the Revenue officer, who carried out the partition, should concern himself with or affect to decide, disputed question of title to the land under partition That is a function more fittingly performed by a Court of law. This principal duty of the Revenue Officer in effecting the partition being to provided that the security for the payment of revenue should be safeguarded The object of the legislature in enacting section 149 of the Act of 1876 (corresponding to the sec) was to prohibit any attempt that otherwise might have been made by way of litigation to reagitate such vexed question as whether the partition was not, or the proportionate revenue imposed upon any separate estate was correct or fair .. ...A civil suit for declaration of title and for possession is not barred when the plaintiffs do not seek either to contest or disturb the partition as made, nor do they question in any way the quota of the revenue payable by any of the separate estates into which the parent estate has been divided 55 C 392, 1928 Cal. 41: 105 I. C. 149.

When Civil suit does not lie

——a civil Court cannot question the correctness of order passed in partition proceedings directly. 28 C W. N 46 1924 Cal 245

When Civil suit by tenant lies.

——this section merely recognises the right to challenge an [illegible]

cannot conclude question of title in Civil Courts. 90 I. C. 817: 5 Pat, 8: 1926 Pat 162: 7 Pat. L. T. 257.

BENGAL LOCAL SELF GOVERNMENT ACT (III OF 1885).

——conviction of the accused under Rules 15 and 19 of the Dt Board Bye-laws for having encroached upon and cultivated lands claimed by the Board to be then roadside land but never formally acquired by them, although its officers have been taking earth therefrom, is illegal and must be set aside. The Dt. Board can take action and acquire right over zemindar's lands adjacent to its road only under Act III of 1885.. 19 C. L. J. 635: 23 I. C. 475: 15 Cr. L. J. 267.

Bengal Local Self Government Act—*contd.*

——a Dt. Board can bring a private channel under its control and administration only by making an agreement with the person in whom the property in any channel is vested, under s. 78 of the Act and not by simply spending money for it. 15 I. C. 996: 18 Cr. L. J. 580.

——the Dt. Board has power to make bye laws providing for penalties for encroachment on roads. 3 Pat. L. T. 464: 65 I. C. 571.

——s 138 (d) of this Act empowers Lieutenant-Governor to frame rules which restrict alienations as well as to frame rules for the procedure to be adopted when alienations are made. Rules 93 and 98 framed by Lieutenant Governor under the Act are not *ultra vires* and rule 98 which has to be read with rule 93 is not merely directory but is mandatory and the combined effect of these two rules is that the property which has vested in the Dt Board cannot be transferred except with previous sanction of the Local Government and except by an instrument under the Common Seal and signed by the Chairman and two members of the Board. 43 C. 790: 23 C. W. N. 370. 23 C L J. 26

——in order to give rise to fresh cause of action, new injury and not the development of an old one, is sufficient. 1 Pat L. T. 269: 5 Pat L. J. 359 58 I C 749.

——s 146 of this Act provides a period of limitation for a suit against the members of the Dt. Board and hence if properly construed it does not apply to a suit against the Board as a separate legal entity. 1 Pat. L T. 269 5 Pat. L. J. 359 . 58 I. C. 749.

BENGAL MUNICIPAL ACT (B C. ACT III OF 1884).

(1) Assessment.
(2) Definitions
(3) Election.
(4) Erection of buildings &c., manufactury business &c., when offensive.
(5) Jurisdiction of civil court.
(6) Meaning of words and phrases used in the sections.
(7) Municipal property, dealing with.
(8) Power of municipal authorities,
(9) Prosecution under the Act.
(10) Rules under the Municipal Law.
(11) Suits against Municipality.

(1) Assessment. (Ss. 85—171).

S. 85.

——the word "[illegible]" [illegible]

S. 85—*contd.*

Municipality brings to his residence his income, no matter where earned or from what source derived, the income becomes part of his "means" or circumstances liable to assessment. 48 C. 443 : 25 C. W. N. 47 : 61 I. C. 511.

——"circumstances and property" in ss. 85 (a) and 88, defect in assessment list. 26 C. W. N. 311.

——"circumstances" in s 85 means 'circumstances' within the Municipality. 39 C. 141 : 12 I. C. 32, 56 I. C. 821 · 1 Pat. L. T. 591, 23 C. W. N. 475 : 29 C. L. J. 379.

——assessment must be with reference to income of property within the Municipality. 25 C. W N. 45 : 32 C. L. J. 210 : 60 I. C. 284 4 Pat L. T 673 . 54 I. C 227, 23 C W. N. 475 . 29 C L. J 379, 27 C. 849, 35 C 859 . 12 C W N. 709, 39 C. 141, 17 C. W N. 1230 : 19 C. L. J. 205 *contra*. 25 C W N. 47 : 48 C. 443 : 61 I. C. 511

——s. 85 (a) is not limited in its application to a case where only one person occupies an entire holding When personal tax is in operation, several persons occupying the same holding are each subject to assessment, according to their respective circumstances and property within the Municipality 34 C. L J. 284 : 64 I. C. 649.

——in construing the Act, so far as it invests the Municipal Commissioner with power to tax the subject its provisions must be construed with the utmost strictness 21 C. 319

——the person to be taxed must occupy a holding within the Municipality and the taxation must be according to the person's circumstances and property within it. 23 C W. N. 475, 849

——meaning of the terms "occupier" and "occupation" has been discussed in. 32 C W. N 940

——person living with a particular individual occupying a holding by reason of some connection with or relation to him, such as sons or servants, would not be separately assessable by reason of possessing separate incomes. 2 C W N 689.

——in the absence of a contract creating the relation of landlord and tenant the Municipality is not entitled to levy a tax from any person 3 Pat L. T 339 76 I C. 178 : 1922 Pat, 286.

——where a rate payer occupied a holding within the Municipality and was assessed with tax in reference to the salary earned by him therein, the assessment was rightly made, the circumstances and property meant the whole amount he earned. 33 C. 859 : 12 C. W. N 709 : 7 C. L. J 631, 41 C 168 : 17 C. W. N. 1230.

——the holding as referred to in clause (a) of s. 85 is a holding as defined in s 6(3), 17 C. W. N. 812.

——the word 'holding' is not enough to cover arable land which is therefore liable to the assessed under this Act. 37 C. 697.

——a "house" in s 6(4) includes the land or premises engaged or held with the building. 22 C. W. N. 376 : 46 I C. 298 : 19 C. L. J. 714.

——the *naib* of a zemindar who was occupying a small house adjoining the zemindar's katchary did not pay any rent. The Municipality assessed taxes under s. 85 cl. (*a*). held that the occupier of

S. 85—*contd.*

the house was the zemindar and therefore he and not his *naib* was liable to be taxed in respect of it. 15 C. L. J. 689 15 I. C 909.

——where the Head master of a High school was by special leave allowed to reside in a hostel as a boarder but he had no particular seat or bed reserved for him, in a suit to determine the validity of his being assessed to personal tax under s 85 (*a*), held that the headmaster was not in occupation of a holding within the meaning of the sec and the assessment was illegal Moreover the occupation of the headmaster was not that of a servant because such occupation was not ancillary to his duties as a headmaster. 32 C. W. N. 940

——portion of house let out for shop—assessment of latrine rate when not exempted. 15 C W N 519 13 C L J 674 : 9 I C. 218.

——when a shop keeper lives elsewhere and pays latrine cess for the house he need not pay for the shop unless it contains a latrine or cess pool. The proviso does not exempt the owner of the shop if it is occupied by a different person. 15 C. W. N. 519 : 13 C. L. J. 674 : 9 I. C. 218

——Adjacent plots of land belonging to some person—one holding—separate assessment improper—title—meaning of. 7 Pat. L. T. 35.

liable only to one assessment and not separately 90 I C 74 (C)

——the period for which a house is for residence during the year determines whether it is a dwelling house. also the action taken by the Municipality for conservancy purposes must be taken into account. 38 I. C 789 (C).

——a dwelling house is a house that is dwelt in A holding ordinarily used as a place of business and occupied by plff while in state of unsound mind and having a cookshed and cowshed over it is not a dwelling house. 19 C W N 1027 · 31 I C. 10.

——*thakurbari* is not a dwelling house and is to be excluded from assessment 10 C W N. 1027.

——a co-sharer who is not in actual possession and enjoyment of a holding within the jurisdiction of the Municipality, is not liable for water rate and latrine fee For the purposes of assessment occupation must be actual. 40 C. L. J. 295 . 25 C. W. N 283 : 60 I. C. 498.

——this Act defines the term "owner" but not "occupier". Occupation for the purposes of assessment of rates include actual possession as its primary element, for legal possession does not of itself constitute occupation 40 C. L. J. 295 : 25 C. W. N. 283 : 60 I. C. 498.

——mere ownership does not constitute rateable occupation. Every owner is not an occupier just as every occupier is not an owner : in order to constitute rateable occupation, there must be a

S. 85—*contd.*

use and enjoyment which is or is capable of being beneficial. 40 C. L. J. 295 : 25 C. W. N. 282 : 60 I. C. 498.

——where there are more than one tenant the owner is liable for the water and lighting rates as the respective status and their relationship is peculiarly within the knowledge of the owner. 64 I. C. 351.

——the income derived from arable lands is no longer exempted and should be taken into account 37 C 697.

——a lessee from the Municipality must pay Municipal rates unless there is provisions in the lease for exemption which he must establish. 13 I. C. 183 (c), 8 C L J 525 *Rel.*

S. 87

——the assessment is not invalid for error or defect or form 37 C. 44.

——every defect in the assessment list prepared under s. 87 does not destroy the jurisdiction of the commissioners and render the assessment *ultra vires* 34 C L. J. 284 64 I C 649.

——*thakurbari* is to be excluded from assessment. 10 C. W. N. 1027

S. 93

——s 93 does not authorise re-assessment after splitting up one property into two, such re-assessment can only be done at the next regular assessment. 3 C. W. N 75

——when a holding can be re-assessed and when not by the extension of the Municipal area discussed. 46 C. 784. 23 C. W. N. 611 · 51 I. C. 993.

S. 101

——this sec must be read with s 85 (*b*). it explains the term "annual value" used in that section. 11 C 275

——'machinery" within sec. 101, what is, 23 C. W. N. 158n, 727 : 46 C. 910 : 54 I C 337.

——a balancing tank was held not to be a "machinery" within s. 101, 49 C 190 26 C W N 761, 67 I. C. 926 1922 P. C 27, P. C.

Ss 102, 103.

——the reasonable [illegible]

[illegible]

must be a formal meeting to [illegible]
commissioners intend the same [illegible]
to them by not holding any r[illegible]
rate of percentage on the new [illegible]
I. C. 231 : A. I R. 1926 Cal. 607 . [illegible]

Ss. 112, 113, 114, 46, 351A.

——even if an assessment has been made by an assessor not authorised under s. 46, when once Appeal Committee of the

Ss. 112, 113 114, 46, 351A—*contd.*

Commissions appointed under s. 114, confirms the same the civil Court cannot interfere except on the ground of *ultra vires*. 37 C. 44.

S. 113

——where a person is wrongly assessed to pay water and privy-tax he has his remedy under s. 113 of the Act and unless he exhausts this remedy he cannot invoke the assistance of the Civil Courts. 30 C. W. N. 405 : 53 C. 453 : 44 C. L. J. 275 . 1926 Cal. 607 : 94 I. C 231.

Ss 113, 114

——where an application objecting to the assessment is not refered to the Commissioners under s. 114 all the subsequent proceedings with respect to assessment and realisation of taxes are *ultra vires* The Municipal authority after acting *ultra vires* in not disposing of the objection to the original assessment under s. 113 cannot protect themselves by making a fresh assessment leaving the original objection to the assessability of the holding undisposed of. The two assessments cannot be treated independently. 7 Pat. L T. 805 96 I C 444 · 1926 Pat. 547.

Ss. 113, 114, 116.

——where the deft. objected to the assessment and under s 113 applied to the Commissioners to review the amount of assessment, and the application was made by a committee under s. 114 and disallowed *and it was urgent that the Civil Court had no jurisdiction* to modify the assessment under s. 116, held that if the question relates to the amount of assessment according to the circumstances and property within the Municipality then the decision of the Commissions under s 114 is final and the Civil Court had no jurisdiction to re-open the question of assessment Here the assessment being made with respect to circumstance and property not within the Municipality but also outside it, the assessment was *ultra vires* 23 C. W. N. 475 . 29 C. L. J. 379 : 50 I. C. 394

Ss. 113, 116

——In para 2 of this sec. the word liability means a liability apart from the question of occupation. It much mean the liability of any person being the occupier of a holding 2 I C 319.

——where a person is wrongly assessed to pay water and privy-tax by the municipality he has his remedy under S 113 of the Act and unless he exhausts this remedy he cannot invoke the assistance of the Civil Courts. 30 C. W. N. 405 : 94 I. C. 231 : A. I. R. 1926 Cal. 6 7.

——"valuation" in the s 113 corresponding to the sec of the Calcutta Municipal Act meant the act of valuing. 26 C. 74.

S. 114

——this sec. does not mean that every application shall be heard and determined by all the commissioners appointed as members of the Appeal Committee. 39 C. 141.

S. 116

——in construing this Act so far as it invests the Municipal Commissioners with power to tax the subject, the Court must scrutinise its position very closely and construe them with utmost strictness 21 C 319.

——a suit to cancel an assessment by *Municipality and to* declare that the assessee was not liable to assessment, is maintainable in the Civil Court, when the assessment is *ultra vires* of the powers of the Municipality or is made upon wrong principles 21 C 319.

——in an action for recovery of tax it is open to the assessee to urge in defence that the assessment is not in conformity with statutory provision and *ultra vires.* The question can be opened by the civil court The decision of the commissioner under s. 111 is final only when the assessment is made in accordance with s. 85. An assessment of tax under s. 85 (a) with *reference to property and* income of an assessee outside the Municipality is *ultra vires.* 23 C. W N 475 29 C L J 379 50 I C 394

——s 116 must be read with reference to s 113 and the word "liability" must have the same restricted meaning given to it in s 116 as in s 113 S 116 has application to a dispute as to whether a person assessed to a tax does or does not occupy a holding, and there is, therefore, no bar to the entertainment of a suit to set aside such assessment 21 C 319

——jurisdiction of civil court to question assessment 27 C. 819, 39 C 141, 41 C 168 17 C W N 1230 35 C 859 . 7 C L J 631, 37 C 374 14 C W N 437 11 C L J 400, 3 C W N. 73, 23 C. W. N. 611 46 C 784 29 C L J 379 23 C W N. 475

——where a Municipal Corporation has acted in contravention of the provisions of the statute in imposing an assessment it is open to a civil court to declare that the assessment is illegal. 17 C W N 812 17 C L J 131 15 I C 548, (35 C 859 · 7 C. L. J. 631, 37 C 374 11 C L J 400), *Rel*

——even if an assessment has been made by an assessor not legally authorised under s 46 when once the commissioners appointed under s 114 accept or revise the same, the Civil Courts cannot interfere except on the ground of *ultra vires* 37 C 44.

——the right of a person assessed to obtain a declaration that he is not liable to assessment is a recurring right and a suit to obtain such a declaration is maintainable even if brought more than three months after the assessment. 2 C W N. 689

Ss. 121, 122

——doors and window shutters of *pucca* building form part of immovable property and cannot be attached as movable property. 11 C. 164, 13 M. 518 1 Weir 730

——where the distress warrant authorised the distraint of the movables of the defaulter wherever they might be found within the Municipality, or any other movables found within the holding specified, held that the tax daroga was justified in attaching goods proved to belong to the defaulters which were found within the municipal area. *36 C. 67*

S. 130

—when a tax is wrongly struck off it can be still realised 2 C. W. N. 23 (note).

(2) Definitions S. 6.

Cl (3) "Holding"

—the word "holding" is wide enough to cover arable land which is, therefore, liable to be assessed under the provisions of the Act. 37 C. 697.

—a holding means land held by an occupier under one title or agreement and surrounded by one set of boundaries. 17 C. W N. 812: 17 C. L J. 131.

—a holding means land held by an occupier under one title and one set of boundaries, that is to say, it is on the basis of occupation and not on the basis of ownership that the question as to whether certain premises form the holding or not, is to be determined 101 I C. 755: 1927 Cal 592

—Where there were two plots of land belonging to the same person with a building on each of them. One of these buildings was divided into three compartments and the other into two and these five compartments were in the occupation of five different tenants On the north as well as on the south of the buildings there were two plots of land which formed open spaces which were not divided and were common to all the compartments in the buildings, held it could not be said that the premises were surrounded by one set of boundaries within this clause. 101 I. C. 755 1927 Cal. 592.

Cl. (4) "House"

—a 'house' includes the land or premises engaged or held with the building 22 C. W. N. 376 46 I C. 298. 19 C.L J. 714

Cl. (11) "Owner"

—where several persons are interested in a holding and each is entitled to receive rent from the person immediately holding under him, for the purposes of this Act, the person liable as owner is the one under whom the person in physical occupation immediately holds 17 C. W. N. 812, 17 C. L. J 131.

—for the purposes of this Act, an owner includes not only an owner in the actual occupation of the holding but also an owner entitled to receive rent from the occupier or otherwise It also includes a manager, or agent, or a trustee for any such person. 38 C. 51.

—where a house was purchased in the name of the father and the major portion of the consideration money was paid by the son out of joint funds belonging to himself and his brothers and further the expenditure on subsequent extensive alteration and additions were similarly defrayed by the son out of the said funds and the son was occupying the house while the father was living abrood, held that son having a substantial interest in the property should be treated a 'owner' in the ordinary acceptance of the word. 33 C. 501.

Cl. (11) "Owner"—*contd.*

——a Receiver appointed by the H. C. is not the 'owner" of the premises he holds as such, nor is he an "agent or trustee" within the definition of the term in S. 3 (22) of the Calcutta Municipal Act. 38 C. 714, 30 C. 721; *Fol.*

Cl. (13) "Road."

——road includes a path which the public has a right of using, over a low ridge between paddy fields 17 C. 684.

——in order to establish that a 'road' is a public road it is sufficient if acts of uses by the public are shewn to have been acquired in by the owner and these acts are of such a character as to warrant the inference that the owner intended to make over to the public the right to use the land as public highway. 6 C L. R. 282

(3) Election

——s. 15 authorises the Local Govt to frame rules in all matters necessary to the better conduct of election including the preparation of a register of voters. 24 C. W N 969 48 C. 378; 57 I. C. 960

——the mere deduction of income tax from interest in Govt. Paper by Public Debt Office when such income tax can be recovered on the ground that a person's income does not amount to Rs. 1000 a year does not entitle that person to vote. 38 C. 501, 15 C. W. N 586; 13 C L J 47 · 10 I C 43

——a person, who is on the register of qualified voter is a person qualified to be 'commissioner' and this includes a person nominated as a voter by an incorporated Company entitled to vote. 16 C. W. N 710, 16 C. L J. 212, 14 I. C. 166

——unless the name of the candidate is entered in the list of voters he is not entitled to vote for election nor is he qualified to be elected 30 C W N. 977 44 C. L. J 31: 96 I. C. 620. 1926 Cal. 1070, 22 C W. N 312 *fol* 22 C 717.

——a teacher of a school under the municipality is not qualified to stand as a candidate for commissionership 47 I. C. 169 (c).

——the members of a joint Hindu family are persons within s 15; merely becoming a member of a joint Hindu family is no *disqualification to vote* The right *to vote* conferred on *every* person by s 15 cannot be cut *down*. 36 C L J. 189; 64 I C, 168.

——the income of a father and his son as members of a joint Hindu family were jointly assessed for income tax. The *son* brought a suit for declaration that he was a qualified voter under s. 15 (2) because he was assessed to income tax and under cl. (3) because he was a graduate and occupied a holding along with his father, held that both the father and the son were qualified to claim [illegible] son could not be considered to [illegible]d was not qualified under cl. (3) [illegible] W. N. 699, 15 C. L. J. 789) *Ref.*

(3) **Election**—*contd.*

——where a certain person's name was entered in the list of

——rule 6 is to be read with s. 11. Name of qualified voter

31 I. C. 741.

——*suit to set aside an election or to declare a particular person* as duly elected is maintainable 24 C. W. N. 189, 24 C 107.

——there is nothing in the rules framed under the Bengal Municipal Act to prevent a candidate withdrawing at any time before the closing of the poll. 91 I. C 722: 30 C. W. N. 670: 1926 Cal. 1016.

——injunction should generally be confined to preserving the status ... to the property in ... injunction restraining ... from taking his seat ... 90 I. C. 819 (M)

... Dt. Magistrate who has merely received proceedings

an election unless it can be shown that the result of the election was thereby affected, (iv) breach of the rule 5 providing for two days' notice for extraordinary meetings of Commissioners does not invalidate an election unless there has been material prejudice to the election, (v) the election cannot be set aside on the mere ground that the polling officer owing to the exigencies altered the polling station, (vi) an election cannot be set aside for stray cases of breaches ...

offi

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the

(4) Erection or construction of buildings, drains manufactories &c. when offensive.

——the Municipal Commissioners have no power under s. 224 or any other section of the Act to require the owner or occupier of a building to remove a drain in the building not being a branch drain nor one leading to a public sewer. 20 C L J. 138: 20 I. C. 368

——a channel for passage of water is not a drain unless it is shown that offensive matter passes through it and cesspool is pit into which water is discharged from drains as defined above and not any channel. Pits for collecting rain water or rice water are not cesspools and cannot be removed or closed by Municipality under s 224. 40 I. C. 552. 1 Pat. L. W 774.

——the erection of a new verandah in the place of an old one, is liable to be demolished under s 237, if in contravention of the [illegible]

——enlargement of building,—material alteration,—bye-law prohibitting erection of building 3 Pat. L. T 143: 1 Pat. 44: 1921 Pat. 349: 63 I C. 290.

——rules not framed by the Municipality under s 243, conditional sanction. 3 Pat. L. T. 226 1 Pat. 26

——under s. 238 period of 15 days runs from the date of the [illegible] from the [illegible] ilding 1 [illegible] 202, 204 [illegible]

I. C. 862: 1925 Cal. 934: 29 C. W N. 817

——it is open to a Municipality by a requisition under s 200 to compel a person to erect a fencing by the side of a tank. The person so bound can validly transfer to the Municipality the duty of erecting such fencing by conditions entered into by the latter [illegible] Cal 101: 73 I. C. 776.

[illegible] factory or place of business [illegible] smells *may arise.* 26 C. W. N. [illegible]

——a "Kiln" within s 273 (21) is a structure of a permanent nature Making bricks by panjas or clamps as is done in the country side does not amount to using the place as a Kiln and no offence is

(4) Erection or construction of buildings, drains, manufactories &c. when offensive—*contd.*

committed thereunder s. 373. 26 C. W. N. 926. 36 C. L. J. 168: 49 C. 1014.

——the words "erect or re-erect" in s. 240 do not necessarily mean build or rebuild an entire house from its foundation. It depends upon the circumstances of each case. 2 Pat L W. 190: 1917 Pat. 338 : 3 Pat. L J. 38 : 41 I. C 713.

——the building of a new and additional masonry wall which materially enlarges a courtyard does constitute the erection of a house within secs. 238 and 240 and its erection without sanction of the commissioners is an offence 26 I. C 651 16 Cr. L J. 59 (C)

——a platform erected on the open space intervening in the street drain and the house amounts to an erection of a building under s. 240 for which previous sanction is necessary. 37 I. C. 854 : 3 Pat. L. W. 352.

——s. 261 covers a case of a manufactory or place of business from which offensive or unwholesome smells may arise. 26 C. W. N. 994 : 1922 Cal 99

——the word "wood" in s 261 includes timber. A timber-yard requires a license under the sec. 6 P. L. J. 263 : 2 Pat. L. T. 722 63 I. C. 327

——owner, if includes part proprietor, grant of license. 1926 Cal. 261.

(5) Jurisdiction of Civil Courts.

——a suit for injunction b[illegible] of a Municipality for his refusal to [illegible] voters on a technical ground [illegible] s. 42 S R. Act and s 15 prov. [illegible] 378 : 24 C. W N. 969 : 57 I. C. ....

——s 202 of the Act cannot be applied where there is a dispute between any person and the Municipality with regard to title to any property. Such dispute must be decided in the Civil Court. 59 I. C. 137 : 22 Cr. L. J. 25. (C).

——a person aggrieved by an order under s. 241 (3) has a statutory remedy of an appeal to the Commissioner, provided by s 242 A. and while that remedy exists unexhausted it is not open to him to seek redress in a Civil Court. 37 I. C. 854 . 3 Pat L W. 252.

As to the jurisdiction in the question of assessment, see 'Assessment'

(6) Meanings of words used in the secs.

——the expression "signed" in s. 37 implies that the signature must be affixed for purposes of execution of the decument and the insertion of the name in any part authenticating the instrument is sufficient 36 C. L. J. 109 : 50 C. 180.

——"two miles" in s. 155 means two miles along the bank of the river. 21 C. W. N. 601 : 26 Cal. 639 : 35 I. C 782.

——the term "owner" includes a part proprietor also and such a person can apply for a license under chap X of the Act. 85 I. C. 333 ; 1927 Cal. 261.

(7) Municipal property.

——the property in the road vests in the commissioner by s 30 and the Municipality can use the road as owner of it for the purposes of the Act 3 Pat. L. T 339 76 I C. 178 1922 Pat 286

——private path does not vest in the Municipality, right of the Municipality over the roads vested in it 43 C 130, 20 C W. N 615 · 33 I C 271

——If the public have a right of way over a private pathway the Municipality have some control over such a pathway under s. 31 so as to prevent the road becoming a nuisance or the rights of the public being interfered with, *above case*

——under ss 30 and 34 Municipal commissioners have powers to abandon an old road for a new one to exchange lands for public purposes, acquire lands necessary for improvement of a road to straighten a crooked road and dispose off fragments of the old road falling outside the alignment of the new one 11 I C 28 (c)

——the words "not being private property and not being maintained by Govt, or at the public expense" do not apply to 'all roads including the soil' 9 I C 562 (c)

——as to bridges, tanks, drain &c the subsoil beneath them does not vest in the Municipality 33 C 1290

——the subsoil of roads have however no market value for the purposes of the Land Acquisition Act 25 C 194

——the purchase or lease must be under seal and the provision of section 37 complied with, otherwise it will not be valid 34 C 1030

(8). Powers of Municipal authorities

——where a corporation is constituted by a statute all persons and corporations are presumed to know the nature and extent of its powers 37 C L J 589

——a lease of Municipal property would be void unless it has been sanctioned by the commissioners at a meeting The burden of proof is on the lessee In the normal course of events all resolutions must be recorded and signed by the President 37 C L J 589 75 I C 506 1923 Cal 575

——the Chairman has no power to lease or sell lands. 9 C L J 286, nor to purchase lands 34 C 1030

——s 234 is an emergency section whereby a person who wants to use a road is temporarily allowed to deposit any moveable property on it on payment of reasonable fees, but the Municipality is not entitled to lease out its right of carrying on trade. 3 Pat L T 339 76 I C 178 1922 Pat 286

——Local Govt may make rules imposing cost of meter for house connection on the owner or occupier 47 C 426

——the Local Govt can under s 15 frame rules for the proper conduct of election 24 C W N 969 57 I C 960, 48 C. 378.

——a distinction is drawn under s 44 between acts done by the "Commissioners" and acts done by the "Commissioners at a meeting." 95 I. C. 726. 1926 Cal 1073

Powers of Municipal authorities—*contd*

——under s 45 a Chairman cannot delegate to the Vice-Chairman his powers under the Licensed Warehouse and Fire Brigade Act. 25 C. W. N 960 : 66 I. C 428 : 34 C. L. J. 203.

——a Municipality is competent to deal with collectien of blocks or huts in an area locally known as *bustee* in Bengal under s. 245, even though within the area there may be pucca building outside the area which are affected. 29 C. W N. 445 : 86 I. C. 618 : 1925 Cal. 676.

(9). Prosecution under the Act.

Ss. 6 (4), 204, 218.

——in the absence of a definite finding that a piece of patit land or orchard adjoining the accused's house was held and engaged along with the house or as part of premises, a heap of broken pottery stacked on the road and in front of the patit land or orchard could not be regarded as an obstruction placed against or in front of the accused's house within s. 204 of the M Act 22 C. W. N. 376 . 46 I. C. 298 . 19 Cr. L. J. 714.

Ss. 30, 234, 235.

——though a street may be vested in a Municipality and the Municipality as the owner thereof may enter into contract under which any road or portion of it may be leased for holding a stall and realise money under such a contract it cannot in the absence of any contract impose any toll on persons using a road as a place for exhibiting goods for sale and further a road or a portion of it cannot be treated as a Municipal market or a market for which the provisions of part X of the Act can apply and specially in a case where part X has not been extended to the particular Municipality any attempt to collect a tax or toll from persons using a road for exposing goods for sale whether the attempt is made by the Municipality or by one who purports to have obtained a lease of the right to collect tolls, from the Municipality is justified by the Act and persons who obstruct such an attempt cannot be said to form an unlawful assembly , 76 I C. 176.

S. 44

——s. 44 does not empower the Chairman to sanction a prosecution under s. 6 of the Bengal Food Adulteration Act. 1923 Cal. 561 : 76 I C. 394.

S. 45.

——under s 45 of the Bengal M. Act the Chairman can delegate to the Vice Chairman his powers under that Act only and not those under the Licensed Warehouse and Fire Brigade Act, s. 9 of which provides for the delegation of these powers to a special committee and no prosecution under s 15 lies on the basis of refusal of license by the Vice-Chairman. 25 C. W. N. 960 : 66 I. C. 428 : 34 C. L J. 203 : 23 Cr. L. J. 284.

S. 45—*contd.*

——A delegation of powers by the Chairman of a Municipality to the Vice Chairman under s. 45 does not cease with the termination of a Chairman's office but continues until it is withdrawn *by a written order of the succeeding Chairman.* 38 I. C. 305: 18 Cr. L. J. 273.

——the word 'prosecution' must be taken as being used in general sense and as covering all matters incidental to or connected with prosecution and therefore when the delegation order by the Chairman speaks of powers in regard to suits and prosecution, it clearly means not only the actual institution of suits and prosecutions but matters relating thereto including an application and notice under s. 204. 1926 Cal. 1073 95 I C. 726.

Ss. 45 and 204.

——the word 'prosecution' must be taken as having used in a general sense and as covering all matters incidental to or connected with prosecutions. Therefore, when the delegation order of the Chairman speaks of powers in regard to suits and prosecutions it clearly means not only the actual institutions of suits and prosecutions but matters relating thereto including an application and a notice under s 204 95 I. C. 726: 1926 *Cal. 1073.*

S. 60.

——The District Magistrate is not in any way disqualified from hearing an appeal before him in the case of a prosecution of a Municipal Head Clerk by reason only of a copy of the proceeding sanctioning his prosecution having been submitted to him under s 60 of the Municipal Act The fact that as Head of the District he receives copies of the proceedings of the Municipality does not *make him an interested party. When he had received no extra* judicial information about the case there is no ground for transfer of the case. 61 I. C. 515 22 Cr. J. 387 23 C. 44

[illegible] to the District Magistrate [illegible] Municipality which was 23 C 44.

——where the Magistrate who tried a case arising out of the proceeding of the Municipality, was himself the President of the Municipal Committee and was present in the meeting in which the resolutions were passed the case should be transferred 69 I. C. 384 23 L L J. 704, 1922 Lah. 72.

S. 162.

——how distress warrant is to be derived. 1 P. 423: 3 P. L. T. 559: 1922 P. 532

Ss. 175, 178, 179, 202,

——there are two distinct stages in the preliminary procedure when an owner is required to do a thing by the Municipal authority. first there is the initial notice under s. 175 of the Act followed by objection if any on the part of the person notified and

Ss. 175, 178, 179, 202—*contd.*

Ss. 178, 224, 271

——the fact that 15 days' time is mentioned in the original notice served under s. 224 does not absolve the Municipal authorities from the obligation of again specifying after the disposal of the objection under s. 178, the time within which the requisition shall be complied with. 66 I. C. 417: 23 Cr. L. J. 273: 1922 Pat. 183: 3 Pat. L. T. 301.

S. 196.

——a customary sweeper is entitled to collect rubbish and night soil ... it in a place fixed by ... ght soil are the properties ... entitled to do with it as ... ed his influence with the sweepers and had the night soil deposited in a place not fixed by the Board and sold it and appropriated the amount himself, held that he was guilty of breach of trust. 45 A 281 21 A. L. J 149: 1923 All. 480.

S. 222.

——an order of a Magistrate passed under s. 202 is a judicial proceeding ... not debar- ... it be can- ... parties an ... 1926 Cal

——sec. 202 gives a summary power to remove a wall or encroachment only when it is erected on a road drain or sewer or aqueduct and it cannot apply to a case where there is a dispute between any person and the Municipality with regard to the title to any land. Such disputes must be determined in the ordinary way by the Civil Court ... selves of the provision of ... shown that the land en ... itself. An order under ... open to interference by ... L. J. 25.

——where on the recommendation of the Municipality the Magistrate had a full enquiry made and passed an order under s. 144 Cr. P. C. to demolish a hut as being dangerous he is in no way responsible for any damage caused thereby even if his order was wrong 18 I. C. 84 (c).

S. 217.

——where the petitioner was convicted under s 217 of the A of encroachment on a public road upon a finding that the ro in question which was given a name by the Municipality was ma over the petitioner's land to a trenching ground and so used some time and was subsequently given up with the closing of t trenching ground, this alone was not sufficient for the conclusi that the road was a public one 22 C W N 599 46 I C 518: [illegible]

[illegible] of prosecution of a pub [illegible]

[illegible]

of prosecution" in the remarks [illegible]
"I have seen myself' and in that of other 'prosecute [illegible] neither of these documents disclosed any authority written otherwise showing the consent of the Commissioners or the Vi chairman on their behalf to a prosecution 16 C W N 834 13 L J 524 15 I C 736

S. 218

——the six month s time within which a prosecution for failu to comply with a requisition under s 218 of the Act must commenced must be computed not from the date when the encroac ment came to the knowledge of the Chairman but from the expi of the time limited in the requisition for the removal of the encroac ment, as the offence consists in failure to comply with the requi tion. 6 Pat L J 174 63 I C 715 23 Cr L J 427

S 224

——the fact that 15 day's time is mentioned in the original noti served under s 224 does not absolve the Municipal authorities fro the obligation of again specifying after the disposal of the objecti under s 178, the time within which the requisition shall be compli with 66 I C 417 23 Cr L J 273

——where a Municipality in a [illegible] under s 245 ordered t removal of a pucca privy s 224, was substantially complied wi 26 C [illegible]

Ss 238, 240

——the building of a new and additional masonry wall whi materially enlarges a courtyard and constitutes the erecting of house within the meaning of ss 238 and 240 of the Act and erection without the sanction of the Municipal Commissioners is offence under s 273 sub-sec (1) of the Act 26 I C 651 16 C L. J. 59

S. 240.

——Rebuilding certain pillars, the balcony and putting up t roof of a house in the place of the old one which was destroyed fire is "re-erection" and not merely repairing within the meaning

S. 240—*contd.*

s 240 of the Act. 38 I. C. 305: 18 Cr. L J. 273, 29 C. 491 *Doubted*. 18 B. 547 *Dist*

——the building of a new and additional masonry wall which materially enlarges a courtyard and constitutes the erecting of a house within the meaning of ss 238 and 240 of the Act and its erection without the sanction of the Municipal Commissioners is an offence under s. 273 sub-sec. (1) of the Act. 26 I. C 651: 16 Cr. L. J. 59.

S. 241.

the existence and the which would contravene aviction under s 273 is

S. 243.

——s. 243 forbids the erection of a hut without a month's notice to the Municipal Commissioners and if any one erect a hut without such notice he is liable to be punished under the first portion of sec. 267. 10 C. L J. 16.

S. 244.

——before prosecution under this sec. no notice is necessary. 10 C. L. J. 16

S 250.

——in order to give the Magistrate jurisdiction to seize *ghee* from the possession of a person under s 250 it should be shown that the chairman of the Municipality had just cause to believe that the *ghee* was for the purpose of sale or offered or exposed for sale. 43 I. C. 796: 4 Pat. L W. 62: 19 Cr. L. J. 220, 30 C. 421 *Ref.*

S. 251.

——the examination of the Chemical Examiner is indispensable for admitting in evidence his report made prior to the initiation of proceedings under s. 251 of this Act. 50 I. C. 26: 20 Cr. L, J 266

S. 261.

——a timber-yard is a depot for trade in wood The word wood is [illegible]

——where no resolution passed by the commissioners at a meeting fixing the local limits within which licenses should be required under s 261 for offensive or dangerous trades, was on the record nor was there any secondary evidence of any such resolution and the petitioner was convicted under cl 2 of s. 273 of this Act for having

S. 353—*contd.*

——the sanction of the Govt. is not necessary to prosecution of the Administrator General for non-compliance with a municipal requisition. 7 C. W. N. 750

S. 356.

——s 356 provides that every notice, summons or other demand under the Act may be served personally on or presented to the person to whom the same is addressed or may be left at his usual place of abode with some adult male member or servant of his family. Hence when a distress warrant is presented to an adult male member of the family the service is legal. A distress warrant issued under tl [illegible] because there [illegible] is no law which [illegible] in the warrant [illegible]

(10) Rules under the Municipal law.

——s. 241 (d) indicates the lines upon which the rules should be framed. If the Municipality exceeds the jurisdiction, the rules are *ultra vires* 37 I C 854 : 3 Pat. L W, 252

(11) Suits against Municipality.

——Municipality can sue or be sued in the name of the chairman. 46 C. 784 : 23 C W. N. 611.

——where no damages are claimed against the officers of a municipality for any wrong done by them personally, and relief is sought against the Municipality itself, the only proper deft. is the Chairman. 23 C. W. N 611 . 46 C 784 51 I. C 993.

——the expression signed in s. 37 implies that the signature must be affixed for purposes of execution of the document and the insertion of a name in any part of the writing in a manner to authenticate the document is sufficient 50 C. 180 . 70 I C, 794 ;C L. J 109 . 1923 Cal. 35.

——s 363 is applicable to cases where the plff claims damages [illegible]

——a suit by a Municipal servant for recovery of money due to him under contract with the Municipality is one for breach of contract and is not governed by s 363 It is only in cases where the plff claims damages or compensation for wrongful act committed by the Commissioner or their servants in the exercise of their statutory powers that s 363 applies 65 I. C. 105, 3 C. L. J. 376 *Ref.* 6 C 8 *fol.*

——where a demand is made from a taxpayer who makes the payment under protest, that is to say, on an understanding that he would be entitled to a refund if his contention that the demand was *ultra vires* was correct, a suit for the recovery of such taxes need not be filed within three months. 7 Pat. L. P. 805 : 96 I C. 444 : 1926 Pat. 547.

Suit against Municipality—*contd.*

——where the Vice-Chairman of a Municipality acts under the direction of the commissioners the acts done by him are acts done under the Municipal Act and if the provisions of s. 363 as regards notice are not complied with by a person aggrieved by the act, a suit by him against the Vice-Chairman to recover damages is not maintainable. 24 C. W N. 891 : 48 C 45 : 59 I. C. 572

——where the officers of a Municipality act maliciously and without reasonable and probable cause, the special limitation provided in s. 363 is inapplicable The provision of the said Act are applicable to acts done in good faith. 12 C. L J. 410, 3 C. L. J. 36 (note.)

BENGAL N. W. P. AND ASSAM CIVIL COURT ACT (XII of 1887).

S. 1.

——the Honorary Munsiff is a "Civil Court" within the meaning of the Act, so if a case is transferred to him from a Small Cause Court, an appeal lies from his decision to the Subordinate Judge. 22 A. L. J. 880 : 82 I. C. 292 : 1924 A. 761.

S. 8.

——A Dt. Judge can assign any case to an Additional Judge who is entertaining an appeal on such assignment and does not act beyond his jurisdiction. 34 A. 205 · 9 A. L J. 95 : 13 I C. 384.

——an Addl. Dt. Judge is empowered to exercise the powers of a Dt Judge in suits under s. 92 C. P C In such cases he need not be empowered by the Local Govt. 48 C 53 62 I. C 115.

——an Addl. Dt Judge can dispose of reference under the Land Acqn. Act, made over to him by the Dt. Judge 50 I C. 690. 798 (c)

——under s. 8 sub-sec (2) the Dt. Judge can assign only certain function to the Addl. Dt Judge but cannot transfer to him any case for decision 42 C 842 21 C. L J. 437 F B. 41 C. 866 : 18 C. W N 612 . 22 I. C 951 *overruled.*

——the powers of an Additional District Judge appointed under s 8 of the Act are the same as those of a District Judge with respect to cases transferred to him. 2 Pat 609 78 I C. 701 1924 P. 593

——an assignment of business within local limits of one subordinate court to another, by Dt Judge under this sec. is not the same thing as the transfer of business under s 150 C. P. C. 26 C. W. N. 216 · 70 I. C 210 1922 Cal. 41.

——redistribution of the civil work in the District does not alter the forum of the court so far as the execution of a decree is concerned 2 Pat L. T. 374 : 6 P. L. J. 304 : 62 I. C. 487.

——the power of the Local Govt. under this sec. refers to alteration of local limits of the jurisdiction of Civil Courts but the *Local Govt. can obviously act only within its own jurisdiction* and it cannot give jurisdiction to a Civil Court in respect of anything outside its own jurisdiction which has been determined by the

S. 8—*contd*

Notification of the Imperial Govt. 5 Pat. L. J. 451 : 57 I. C. 201 : 1 Pat. L T. 288.

——the munsiff of one court can execute the decree and attach property situated within the jurisdiction of the munsiff of another court as assigned by the Dt. Judge and the order of the munsiff of the former court refusing to order execution is not appealable but can be revised by the H. C. 41 C. L. J. 166 : 86 I. C. 775 : 1925 Cal. 679.

S. 10.

——where a District Judge leavs the station the only person who has any right to deal [illegible] Judge is the Subordinate [illegible] office of the District Ju[illegible] the District Judge in respe[illegible] irregular. 31 C. W. N. 814 : [illegible]

S. 18

——Where the suit is valued at less than Rs. 5000 the appellate court has jurisdiction to award a sum exceeding Rs 5000. 4 Pat. L. J. 447 : 52 I. C. 452 : 1920 Pat. 17 (16 A. 286 ; 17 C. 704 ; 34 C. 954) *Dist.*

——the disposal of an appeal by a lower Appellate Court cannot be questioned as being without jurisdiction on the ground of the valuation being beyond the pecuniary limits of the jurisdiction unless the disposal of the appeal on the merits has been prejudicially affected 4 Pat. L. J. 447 : 52 I. C. 452 : 1920 Pat 17.

S. 19.

——where value of interest claimed by the plff. is less than Rs 1000 the suit is cognizable by a Munsiff. 23 I. C 964 (c)

——where a judge has in the proper exercise of his jurisdiction passed a decree for possession and also a preliminary decree for mesne profits he must be held to have jurisdiction to make a final decree in accordance with his decision even if the mesne profits are found to exceed the amount of his pecuniary jurisdiction as *regards* the value of the suit. 42 C. L. J. 49 : 29 C. W. N 869, 89 I. C 726: 1925 Cal 1076 F B.

——mesne profits *pendente lite* are not to be considered in determining the value of the suit for the purpose of jurisdiction. *above case.*

S. 20.

——this section deals with forum of appeal only. 1925 Pat. 133

——this sec. does not deal with rights of appeals from the orders of the Dt judge but only with the forum of appeal if any. 3 Pat. 1018.

S. 21.

——where a suit was originally valued at Rs. 7,500 and the plaint was amended claiming relief for Rs. 2,500 only, held that the

S. 21—*contd.*

subject-matter of the suit at the bearing of the first court was less than Rs. 5,000 and appeal lay to the District Judge and not to the H. C., 18 A. L. J 741 · 57 I. C. 134

——where the original suit on a mortgage ...

266.

——where the arbitrator ...
Rs. 2 005 due by one party t
for filing the award the
recovery of Rs 2,005 by
867 : 19 C. L. J. 260 : 22 I. C. 793

——where a suit valued at more than Rs 5,000 was decreed *exparte* by the subordina'
appeal from the order of
13 C. P. C., held under s. 2
jurisdiction to entertain
Pat. L. W 445 : 45 I C. 920.

——a Dt. Judge cannot hear an appeal from a decree or order where the value of the suit exceeds Rs 5,000. 45 C 926 27 C L. J. 115 : 45 I. C. 758.

——where a Munsiff passes a decree for mesne profits exceeding the pecuniary jurisdiction, appeal lies to the Dt. Judge. 2 Pat L. J 143: 6 Pat. L. J. 54· 60 I. C. 346

——where appeal lying to the Dt. Judge is preferred to the Subordinate Judge he should bear and dispose it of without any order of transfer under s. 22. 37 All. 76 : 13 A. L. J 41 : 26 I. C. 783.

S. 33.

——an order under this sec. being an administrative one cannot be revised under s. 107, Government of India Act by the H C. 27 C. L. J. 477 · 42 I. C. 519.

S. 37.

——this sec only says that neither Hindus nor Mahomedans against their will should be subjected to the law of the other or the English or any other law. It allows a man to adopt for himself any special custom which he pleases. This sec. does not apply to a dispute between Mahomedans themselves. 33 I. C. 114.

——parties who were Mahamedans are under this sec. entitled to adduce special evidence with respect to an issue relating to a family custom contrary to Mahomedan Law that female descendants could not inherit in the presence of male descendants. 17 C. L J 143 . 17 C. W. N. 97 : 15 Bom. L. R. 76 P. C

——separate suits for partition of ejmali lands lying in different villages can be brought against the same defts. and in such suits lands remaining uncultured and incapable of partition need not be included. 19 C W N. 356 : 23 I. C 442.

BENGAL RENT RECOVERY ACT (X of 1859.)

——a non-transferable occupancy holding can be sold in execution of a rent-decree obtained by the sixteen annas landlords. 25 C W N. 554: 66 I. C 46

——under this Act right of occupancy can be acquired under a *trespasser* as well as under a *temporary immediate holder.* 18 C. L. J. 23: 21 I. C. 204.

——rights of occupancy acquired in *chakran* lands under s. 6 of this Act are protected under s. 19 of the B. T. Act. 44 C. L. J. 271: 1927 Cal. 46:

——under this Act right of occupancy is a personal right and cannot be transferred beyond the life of each tenant. 46 I. C. 657 (Nag).

——right of occupancy is personal and non-transferable and a *thikadar* cannot acquire such a right. 2 Pat L T. 654 · 62 I. C. 59

——the effect of the transfer of a holding purchased at a Patni sale with the consent of the landlord under Act X of 1859 can only be that the original tenant [illegible] holding altogether and a new

——when the price of
to the agreement one whol
price of the produce should be regarded, not as an abwab but as rent. 3 P L W. 270: 37 I C 980 1917 Pat. 287.

——"under tenant" in s 13 does not mean a tenant under another tenant but a tenant or tenure-holder holding directly from the proprietor. 2 Pat. L J. 75 38 I C 820.

——the presumption under s 16 of the Act will be displaced by the fact that a tenure came into existence for the first time long after the date of Permanent Settlement, notwithstanding the rent, at which it has been held, has not been varied for 20 years and so the tenure is liable to enhancement of rent 26 I. C. 908 (c).

——s. 16 of the Rent Recovery Act applies to a sale in execution of a decree for cess because of s 208 of the Chota Nagpur Tenancy Act and consequently a purchase in execution of a cess *decree takes the property free of incumbrance* 103 I C. 464: 1927 Pat 2o6 6 Pat 217.

——the question of usage as to the payment of rent in several instalments arises only when there is no written agreement. 20 C. W. N. 680: 32 I C. 185.

——a suit in civil court for the recovery of possession by a tenant who has been ousted by his landlord under s. 9 of the Sp. R Act is barred by s 23 (c) of this Act according to which the suit is cognizable by the Collector only. 17 C. W N. 1201: 21 I. C. 224.

——the true sense of sec. 109 is that an execution creditor cannot ignore any moveable property of the Jt. Dr. before proceeding against his immovable. 17 C. W. N. 87: 16 C. L. J. 586: 15 I. C. 735.

——s. 310 A. C. P. C applies to execution sales under s. 109 of this Act by a Deputy Collector. 15 C. W. N. 863: 38 C. 852: 14 C. L. J. 284.

BENGAL SURVEY ACT (V of 1875).

S 6 (Collector may enter upon land)

——the proclamation required by s 6 applies to a survey carried on under ss. 4 and 5 of the Act. 2 Pat. L. J 18 : 3 Pat. L. W. 429 : 38 I. C. 744.

S. 41. (Mode of determining boundary)

——under this section the Collector is to determine the boundaries according to actual possession and cause it to be secured by boundary-marks. If no steps are taken challenging the order, it is to be regarded as an order of a Civil Court declaring the parties to be in possession in accordance with the boundary as determined by the Collector. But the order is not binding on the Civil Court on the question of title and does not preclude the Civil Court from finding that during a period anterior to that order the party against whom the order was passed, was in possesion 1925 Cal. 1052 : 85 I. C. 1012.

——the possessory order under s. 41 bears analogy to a decision under s 34 of Regn. VIII of 1822. Unless the order is reversed or modified by competent authority it has the force of an order of a Civil Court declaring the parties to be in possession of the land in accordance with the boundary as determined by the Collector. 34 C. L. J. 465 ; 66 I C. 923

——the order of the Collector determining the boundary of an estate operates as an order of a Civil Court declaring the parties to be in possession of the lands in accordance with the boundary as determined by the Collector. 61 I. C 46 6 P. L J. 51 2 Pat L. T. 118.

——but the judgment of the survey officer in dispute as to boundary is no evidence of title. 1928 Pat 399, 8 C. W. N. 876 *fol.*

——the order of the Collector under s 41 is equal to a decree of the Civil Court and the Magistrate must pay regard to it in a proceeding under s. 145 Cr. P. C, 38 I C. 333 18 Cr L J 301 (C).

——a decision on a partition map made behind the plaintiff is not binding on the Civil Court upon the question of title. 19 C W. N. 1038 : 31 I. C. 41.

——an order under this section has the force of a Civil Court decree aud a suit to upset the order must be brought within 12 years from the date of the order The order is not void simply because no boundary pillars were set up. The correctness of the boundaries will be presumed. 59 I C. 840 (Pat)

——revenue Officers appointed with the additional designation of Settlement Officers are vested with the powers of a Superintendent of Survey under the Bengal Survey Act. He has the powers of Collector under s. 41 and can delegate his powers to an Assistant Settlement Officer. 3 Pat. L. T. 617 : 66 I. C. 471 : C. W. N. (1922) Pat. 114 · 1923 Pat. 96.

S. 45 (Power of Collector in doubtful or disputable cases of boundary).

——the latter part of this section does not require the publication of a proclamation previous to the demarcation of land. 2 Pat L. J. 18: 38 I. C. 744: 3 Pat L W 429.

——where a *Canangoe* appointed by a Settlement Officer in connection with the settlement of certain *Khas mahal* belonging to Government, was obstruc[illegible] in the land by way of dem[illegible] he was not acting in the [illegible] the meaning of sec 186 of [illegible] conditions required by the Act had not been proved. 6 C. W. N. 120.

——sec. 45 cl (b) applies only to a survey or some similar proceeding taken by a revenue officer for some public purpose and against which any party, who may be affected by the boundary laid down by such officer, would have a right to object Where therefore, such a proceeding, though initiated under the above Act, was taken not for a public purpose, but for the purpose of a division of private property as between the owners thereof, section 62 would not bar the party aggrieved by the result of such proceeding from suing in a Civil Court to have the boundaries ascertained. 6 C. 453 7 C L R 491

S. 62. (No suit to be brought unless appeal first preferred.)

——this section is a bar to a civil suit by a person against whom an order determining a boundary dispute has been made under s. 41 of this Act, for confirmation of possession on the allegation that he has been in continuous possession from before the order, such an order having the force of a Civil Court decree is binding on the parties as regards the question of possession. 14 C W N 366

——if the plaintiff suing for declaration of title and confirmation of possession or in the alternative for recovery of possession of land which has been the subject of survey proceedings, has been in possession all along, s 62 will be a bar provided the proceedings of the Assistant Superintendent of Survey were otherwise regular. But if there has been dispossession since the order of the said officer, the suit will be one for declaration and recovery of possession and this section does not apply 41 I C 86 (Pat)

——section 62 does not apply to a suit for possession or dispossession by reason of survey and settlement proceeding, 40 I. C. 588, 14 C. W N. 366, *Dist.*

——a decision under the Survey Act relating to boundary-dispute would be conclusive as to possession, but would not bar a suit based on title A suit for declaration of title is not barred under s. 62, though no appeal was preferred either under s. 59 or s 60. - 8 C W. N. 876.

——judgment of the Survey officer, in a dispute as to boundary, is no evidence of title. 1928 Pat. 399, 8 C. W. N. 876 *fol.*

S. 62. (No suit to be brought unless appeal first preferred—*contd*

——a formal decision on the question of boundary in a boundary dispute under s. 62 of the Bengal Act V of 1875 would be conclusive only as to possession and would be no bar to a suit based upon title. 13 C. 280 In the above case Mr. Justice Banerjee held that the effect of the order would be conclusive as to possession *at the time of the survey and not at the time of the institution of the suit.*

——when the order demarcating the boundaries is made it is equivalent to an order of a Civil Court declaring the defendant to be in possession of the land in question. The decision of the Revenue officer under s 41 of the Act has the force of a Civil Court decree and it is binding as between the parties to the proceeding as regards the question of possession. 14 C. W. N 366

BENGAL TENANCY ACT, see "*Tenancy Act of Bengal*".

BENGAL VILLAGE SELF-GOVERNMENT ACT.

——s 51 of Act V of 1919 does not bar the jurisdiction of a Civil Court to entertain a suit contesting the validity of an election under the Act. 52 C. 943 90 I. C. 700

——*Rule 8 and other rules relating to meetings under s 101* (2) (c) of the Act do not govern meetings of the members of the Union Board convened by a Govt Officer for the purpose of electing a President after a general election. 52 C 943 90 I C 700 1926 Cal 279.

Bonafide payment.

——*bonafide* payment of rent to the assignor without notice of assignment is good payment. 17 C L J 372

——payment of rent to co-sharer is not sufficient discharge from liability to others 25 C 322

BONAFIDE TENANT, see, *B. T. Act s 3.*

BOUNDARY.

Subheadings of Notes.

1. **Dispute as to boundary.**
2. **Identity of land.**
3. **Recital of boundary in document, evidentiary value of**

1. Dispute as to boundary.

——in case of boundary dispute the parties are counter-claimants and onus is on both the parties, and the court is to ascertain the boundary line whatever may be the evidence before it 11 C W N 230 p 234, 21 C 504 P C., 27 C L. J 593, 18 A, 290, 65 I C 743 But the onus may be shifted on one party when other party is given possession of, by magistrate. 23 C W. N. 592, 29 C 187: 6 C. W N. 386 P. C., *Fol*

——principle to be applied when the boundary-line passes through waste lands which have been the subject of definite possession. 65 I C. 743 (c)

Identity of land—*contd.*

the parties are entitled to recission therefrom, but the lessee has the option to affirm the contract and hold the lease for a lesser quantity with proportionate abatement of rent, 37 C. 293.

——misdescription of boundary line in the map will be rejected. As soon as there is an adequate and sufficient definition with convenient certainty, of what is intended to pass by a deed, any subsequent erroneous addition will not vitiate it. 50 C. 394: 1923 Cal 669.

——if in fact the boundaries include an area greater than that referred to in the Revenue Returns, such a miscalculations or misrepresentation cannot defeat the title to the estate. 34 C. L J. 141: 65 I. C. 866

——when description of land is given in a deed by boundaries and areas, the land within the boundary passes, (*per Vincent, J*), intention of the parties should be looked to, (*per Chitty, J*) 13 C. W. N. 702 If the boundaries are uncertain, the intention should be taken to be to convey the specified quantity of land within those boundaries. 14 C W. N 268

——when the boundaries and the quantity are equally and

sary, by the surrounding circumstances and the subsequent conduct of the parties, 37 C 293.

(3) Recital of boundary in document, evidentiary value of.

——recitals of boundaries of other lands in documents between third parties are not admissible in evidence. 35 C. L. J. 19 25 C W. N. 1022, 19 C. W. N. 468.

——a mere description of boundaries given in a document between third parties is inadmissible in evidence under ss. 11 and 13 of the Evidence Act. Nor it can be said to be a statement

L. J. 374: 86 I. C. 734: 1925 Cal. 1034

——when the lessee's right to possess was denied on the ground that the lessor was not entitled to it and a patta executed a year previous to the lease in question by the lessor, in respect of another plot contained a description of the boundary of the land demised which clearly evidenced his title to the other plot in question, held that the statement in another lease was not admissible. 29 C. W. N. 469: 86 I. C. 674: 1925 Cal. 684.

——the recital in a sale deed between strangers to the effect that the land comprised in the document is bounded by the suit

Broker—*contd.*

——there is difference between broker and agent for sale Under the custom of the Calcutta Jute Market brokers are liable to both buyers and sellers in the cases of what are called "principle contracts" 50 C. 12: 1923 Cal 419: 74 I C 273

——the broker was not liable to the plaintiff for the money misappropriated by the sub-broker without the knowledge of the broker. 25 Bom L R. 1014, 44 Bom. 139 *fol*

——the right to exercise the profession as a broker is not a personal right and is assignable in law 18 C W N 1194· 19 C L. J. 313 24 I C 387.

——ordinarily a broker for sale is entitled to a percentage on the money which he succeeds in realising for his principal, but where the transaction cannot be completed because the purchaser introduced by the broker could not pay within a reasonable time and the principal realises nothing, the broker could not be said to have earned his brokerage. 2 Rang. 45. 79 I. C 750 1924 R 232

——suits for money in case of sub-broker receving money from constituent and misappropriating. 48 B 20 77 I C. 266. 1924 Bom 232.

BUDDHIST LAW.

Sub-heading of notes.

1. **Adoption.**
2. **Applicability of the Law**
3. **Conversion.**
4. **Divorce.**
5. **Ecclesiastical Law.**
6. **Gift.**
7. **Husband and wife**
8. **Joint property.**
9. **Legal authority.**
10. **Marriage.**
11. **Minor and gurdian.**
12. **Partition.**
13. **Pre-emption.**
14. **Religious offerings.**
15. **Seduction.**
16. **Succession.**
17. **Widow.**

(1) Adoption.

——there is no special ceremony in Burmese adoption but the adopt[illegible]
daugh[illegible]
the a[illegible]
L. J. [illegible]

—[illegible]
may [illegible]
other [illegible]
relati[illegible] P. C.
36 Cal. 978 P. C. *fol.*

Adoption—*contd.*

——the Manukya *Dhammathat* requires that a *kittima* son or daughter should be adopted with the intention publicly signified of taking the adoptee as son or daughter This intention may be inferred from a long course of conduct 1923 Rang 189, 1 R 102

——when several boys are shenbyued at the same time and none of them is a natural born son no presumption in favour of adoption can properly arise without direct declaration 1923 Rang 189 · 1 R 102

——under the Burmese Buddhist Law there is no ceremony for an adoption but the adoption must be a matter of publicity and notoriety 45 C 1 43 I C 863 22 M L J 413 22 C W N 97 · 27 C. L J 68 11 Bur L T 28 P C Direct evidence of giving and taking *is necessary but not the writing nor any ceremony is required.* 12 Bur L T 256 50 I C 454

——where a person adopted by Burmese parents enters the priesthood he must be held to have severed himself from all family ties 11 L B R 124 66 I C 573

——an adoption is a matter of intention and may be proved even in the absence of any formal declaration 11 Bur L. T 65 45 I C 737

——*Kittima and Appatitha are two distinct forms of adoption* to which totally different considerations apply 41 I C 749 11 Bur. L T 245

——kittima adopted son is not entitled to claim from the adoptive mother on the death of the adoptive father the *aurasha* son's quarter share of the estate of the adoptive parents 1926 Rang 148 4 Rang 184

——adoption just previous to the death of the adopter is valid 32 I C 539 U B R (1915) II 87 I

——it is only when adoption is proved by circumstantial evidence that notoriety and publicity *must be proved* 33 I C. 927 9 Bur L T 154

——*adoption is a contract and so a minor cannot adopt.* 92 I. C. 719 1925 Rang 350

——*adoption under the Buddhist Law is not a mere* contract and is not a grant or other disposition of property 31 I. C 94: 1915 U B R 74

——a *Appatitha* child takes half the estate in the absence of any natural or *kittima* children equally with *the co-heirs of* the adoptive parents 50 I. C 524 11 Bur L. T, 221

——no inference against adoption can be *drawn from* the fact that an adopted daughter worked in the fields for her adoptive parents as even children of well to-do parents often assist in cultivating the family acres. 4 Bur L. T 158 11 I. C 774

——a second adoption during the life-time of the first adopted child is not prohibited though such adoptions are unusual. *above case*

(2) Applicability of the law.

—the personal law of Shan Buddhists resident in Burma does not appear to be in any way different from that of Burma Buddhists and ordinary Buddhists Law applies to the case. 2 Bur L. J. 114 : 1923 Rang 218.

—Burmese Buddhists Law is not applicable to Rojbansis even if they are Buddhists and the law applicable to them is the customary law prevailing amongst them. 9 Bur. L. T 248: 35 I. C. 431.

(3) Conversion.

—conversion of father to Christianity after marriage according to the Burmese Buddhist custom of marriage, the mother remaining a Buddhist, does not dissolve the marriage and the legitimacy of child is not affected. 25 I. C 700

—conduct of the person is the least in determining the law applicable to him when he proposes both Buddhism and Mohammedanism 98 I. C. 155 : 1927 Rang. 31 : 5 Bur. L. J. 111.

(4) Divorce.

—the [illegible] ment of the [illegible] property of [illegible] *fol.* 7 B L [illegible]

—where both husband and wife had been married before, the husband cannot divorce the wife without proving such misconduct as would entitle to a divorce as by mutual consent. There is no right of divorce at the mere caprice of the husband 1 R. 722.

—under the Burmese-Buddhist Law suits for divorce should be framed *and tried as suits for one of the three kinds of divorce* permitted by that law or for [illegible] the alternative. When it is [illegible] of divorce is to be granted [illegible] method of partition is to be [illegible] I C. 1005.

—the Dhammathats clearly give the husband of an adulterous wife, the right to require her to leave the house with only the clothes on her back. 2 Bur. L. J. 65 : 75 I. C. 6 : 1923 Rang. 160.

—*wife can sue for divorce on the ground that the husband* had taken a lesser wife. 102 I. C. 473 : 1927 Rang. 112 : 6 Bur L. J. 22.

—under the Buddhist Law a divorce may be allowed to a wife on proof of a single act of cruelty on the husband's part. 46 I. C. 144, 2 I. C. 674, 64 I. C. 957.

—in connection with a partition on a divorce by mutual consent, *payin* property is to go to the party who brought it to the marriage and this rule is still to apply even if the property may have been changed *in form.* 79 I. C. 562 : 11 L. B. R. 48.

—*payin* property, right of wife to. 64 I. C. 805 : 11 L. B. R. 52.

Divorce—*contd.*

——a *decree against* a Burmese Buddhist husband or wife can ordinarily be executed against the property of the marriage, whether *payin* or *lettetpwwa*, to the extent of so much as is necessary. 103 I. C. 568 : 1927 Rang. 209 : C Bur. L J. 166 *F B.*

——if there is no deed of divorce, the fact that the husband deserted the wife for 12 years before her death and that he had failed to maintain her during that period is sufficient to constitute divorce 1 Bur. L J. 24 . 1922 L. B. 28, 105 I C. 269.

——a Buddhist wife in Burma is entitled to a divorce by mutual *consent if the husband is guilty of a single act of misconduct.* 64 I. C. 957 : (1921) 4 U. B. R 68, 46 I C 144.

——suits for divorce should be framed and tried in one or other of the three kinds of divorce, or in the others in the alternative, and the question of status or existence of the properties to be partitioned should be left to a subsequent suit 59 I C 1005 · (1920) 3 U. B R. 251

——when the husband deserts his wife and for three years neither contributes to her maintenance nor has any communication with her, the marriage automatically dissolves, 105 I. C 393: 1927 Rang. 294 5 Rang 537 F B. such desertion entitles the wife to a divorce but not necessarily to a divorce with possession *i e* forfeiture of all the husband's interest in the properties 54 I A 403 · 46 C L. J 406 1927 P C 234 32 C W N 173 : 106 I C. 17 · 5 Rang 841 P C But see 1928 Rang. 125 . 6 Rang 1.

——unless both the conditions *viz*, desertion on the] one side or the other and failure on the part of the husband to provide the wife any maintenance for the specified period of one or three years as the case may be, are satisfied, the text gives the wife no right to remarriage and the marriage subsists 108 I. C. 345 : 1928 P C 8 6 Rang 79 32 C W. N 429 P C.

——in the case of divorce the Burmese law is to be determined by the *Manugye* or *Damathats* of the Laws of Menoo, with the assistance of other *Damothats.* 32 C. W. N. 429 · 108 I. C. 345 . 47 C L J 577 1928 P. C 8. P. C.

(5) **Ecclesiastical Law.**

——by becoming a monk a person divests himself of all earthly ties of relationship and property and dies a civil death The old status can be gained only by overt acts recognised by law. 1 R. 430 . 75 I. C 672 : 1924 Rang 101

——in the case of gift by a monk delivery of possession is not necessary. 2 Bur. L. J. 266

——a monk can appropriate the property of the fellow monk if certain conditions are satisfied 23 I. C. 157 7 Bur L T. 27.

——a building erected on the monastery ground becomes ecclesiastical 24 I. C. 465 . 7 Bur L. T. 63

——Burmese Buddhist Ecclesiastical Law allows the dedication of a religious property to a group of two three or four *ponghyis* among whom title passes by survivorship until the last]survivor gets the whole property as his poggalika On the death of one of

Ecclesiastical Law—*contd.*

such number a new member may be admitted to joint ownership. 13 Bur L. T 147 ; 61 I C 779.

——the ecclesiastical authorities in Burma have no jurisdiction to settle a dispute between *apongyi* and a layman relating to private land 1 R 494 76 I. C 807.

——where a claim of the plff for restoration of property dedicated to the monostery was recognised by Thathanbang against the decision of the Revenue authorities, the plff, could invoke religious rules in his favour and the decision of the Revenue Officer was no bar to the decision in question. 10 I C. 996 · U. B R. (1910) 178

——a Member of a Buddhist Priesthood dies a civil death when he enters the priesthood and does not possess any property except such as is necessary for his religious life and which is held under conditions which do not make it available for any other purpose such as maintenance of a child 72 I. C 974 24 Cr. L. J. 510 1922 U. B 151

——a man's interest ceases when he is ordained as a monk though some texts permit the receiving of gifts after ordination There is a strong presumption that he has no property over which he has rights of disposal 30 I C. 112 , 8 Bur. L T. 237.

——a Buddhist monk cannot enter into a valid contract for his own personal benefit nor can he buy, sell or mortgage land or sue for redemption. 29 I. C. 613

——persons in charge of Kyaung and its precints are called Ayanzoungs and such persons have a right to sue for possession of land forming part of Kyaung. 56 I. C. 939 : 12 Bur. L, T. 261.

——Buddhist Ecclesiastical Law must be interpreted with reference not only to the text books of *Vinaya* but also with the aid of the Attagtha and other commentaries. 45 I. C. 923, 49 I. C. 317 · 9 L B R 220

——Civil courts in Lower Burma have jurisdiction to decide suits of a civil nature in which points of ecclesiastical law arise *above.*

——Saduthanthaka property is property belonging jointly to four *pangyis* among whom the title passes by survivorship until the last survivor gets the whole property. 61 I. C. 778 : 13 Bur. L. T 147.

(6) Gift.

——gifts made to grand children are an exception to ordinary rule of Buddhist Law under which, to validate a gift an actual delivery of poss[illegible]
remains abs[illegible]
rules for su[illegible]
but as betw[illegible]
partition of [illegible]
is to secure [illegible]
might fare [illegible]
shall receive such share of the Inheritance as the grand parents consider fair. (1920) 3 U. B. R. 218 : 59 I. C. 999.

Gift—*contd*

——oral gift fails when it is not of religious property. 3 Bur. L. J. 7.

——though possession is unnecessary under the Buddhist Law to constitute a gift, it is now governed by s. 123 Tr. P. Act, 1924 Rang 13, I R. 351, 75 I. C 166.

——a gift by a monk is invalid 1 R. 494 : 75 I. C. 807 : 1924 Rang. 141.

——testamentary disposition in the guise of gift is invalid. 75 I. C. 166 : 1 R. 351 1924 Rang. 13

——Buddhist ecclesiastical Law permits a monk to make a gift by delivering possession without declaration He can make a death-bed gift. 2 Bur L. J 266

——under Buddhist Law an actual delivery of possession is necessary to validate a gift 59 I C 999 (1920) 3 U. B R. 228; 42 I. C. 68 : (1917) 3 U B R 23.

——a gift made in contemplation of death and intended to [illegible] void. 29 I. C. [illegible]

[illegible] the death of [illegible] ed into at the time of a re-marriage between a father and his sons by the first marriage, is valid 105 I. C. 598 5 Rang. 576.

——a gift made in an unfit state of mind is null and void 6 L. B R 77 · 18 I. C 466 : 5 Bur. L T. 291 F. B.

——a Burmese Buddhist religious gift of a Kyaung is invalid unless registered. 45. I. C 926 · 9 L. B. R 258.

——a death-bed-gift without delivery of possession is invalid even though it is made through trustees. 50 I. C 522 ; 11 Bur. L. T 234

——a gift by parents to their son on his entering priesthood is where possession is delivered over to the donee, irrevocable. 4 Bur L. T 195 11 I. C. 862.

——where a donor made a gift to his relatives on condition of their agreeing to buy an yearly allowance and on the donee failing to do so the donor sued for recovering the properties, the suit was mantainable. 101 I. C 590 . 6 Bur. L. J 31

——execution of a will under the guise of a deed of gift or trust in order to defeat the operation of the ordinary laws of inheritance is invalid, 105 I. C. 51 ; 1927 Rang 271 · 5 Rang. 371.

(7) Husband and wife.

——the Dhammathats [illegible] adulterous [illegible] y the cloths [illegible] rtition and [illegible] r. L. J. 65 : [illegible]

——[illegible] be presumed [illegible] nd manages [illegible] nan who has [illegible] association

Husband and wife—*contd.*

with the lesser wife and the elder wife keeps exclusive control over her property, her consent to the mortgage could not be presumed. 13 Bur. L. T. 129: 61 I. C 701 : 10 L. B. R. 257

sband with rest in the 3 : 12 Bur.

——where the husband sued for divorce on the ground of misconduct and the wife denied the misconduct and subsequently abandoned her defence and a decree was passed, a subsequent suit for partition of joint property was not barred and the shares of the parties depended on the grounds of divorce. 38 C. 629. 15 C W. N. 766 : 10 M. L. T. 479. 4 Bur. L. T. 153 : 11 I. C. 497 P. C.

——property acquired by the husband or wife by inheritance during coverture is *Lettlepwa* property and not *Hnapazona* and both husband and wife have a vested interest in such property where they are living together. The rule of *Nissayo and Nessito* applies to such cases 57 I. C. 950: 13 Bur. L. T 35.

——so long as a Burman Buddhist husband and wife are alive, their property from whatever source derived, forms one estate in which all members of the family have an interest but which is under the control of husband and wife. 1 Bur. L. J. 267 : 1923 Rang. 110.

——a house built during coverture on the *Payin* property of the husband or wife is their joint property and neither can oust the other from possession. 58 I C. 225: 12 Bur. L. T. 202

——in deciding what is joint property all payments of money, the obligation for which was undertaken during coverture must be debited to the joint account though the actual payment was made by the survivor after the death of one of the parties to the marriage. 12 Bur. L. T. 228. 56 I. C. 972.

——property inherited by wife from her parents becomes joint and the husband acquires a vested interest therein. But when a husband having two wives dies, the junior wife does not inherit a port wife merel 247: 1927

l wife borrow money there is a partnership between the two for which money is borrowed. 54 I. C. 513 : 3 U. B. R. (1919) 189.

——mere physical re-union with a divorced wife is not sufficient to revive the status of a marriage. 54 I. C. 575 : 3 U. B. R. (1919) 182

——there is no such thing as judical separation in Buddhist Law but an order under s. 488 C. P. C. has the practical effect of judicial separation. 46 I. C. 620 (L. B.)

——after a husband's ... for restitution of conjugal rights has been d[illegible] wife l[illegible] 10 Bur

Husband and wife—*contd.*

——when the parties to a divorce re-unite after separation, they stand in the same position as if there had been no divorce. In a case of divorce between a man married before and a woman not so married the woman must be looked upon as in the same position as if her husband had not been previously married and the partition of property should be regulated accordingly. 38 I C 405: 11 Bur. L. T. 89. (1916) 11 U B R. 127

——a single instance of ill-treatment would not entitle the wife to stay away from her husband and staying away for more than one year amounts to desertion on her part 39 I C 114.

——but a single instance of cruelty of the husband entitles the wife to insist on a divorce 20 I C 674.

——after the suit for restitution of conjugal rights has been dismissed, the husband is bound to maintain his wife specially where the wife lives apart on account of the husband's cruelty. 41 I. C 143: 10 Bur L T. 212 9 L B R 442.

——the chief wife can object to second marriage of her husband and may claim divorce on that ground but she cannot do so if she is barren or has borne female children or is suffering from disease. 45 I. C. 953. 11 Bur L T 236

——joint property of husband and wife becomes the sole property of the husband as soon as he validly divorces his wife. 33 I. C. 118: 9 Bur. L. T 74

——property given by the bridegroom to the bride at the time of marriage for the joint purpose of the married pair is a gift and must be in writing and registered under s 123 T P Act otherwise in case of divorce the property will revert to the husband as *payin* property. 33 I C 129 9 Bur L T 87

——subject to any claim by the eldest son to a certain specified property such as father's elephant, pony, etc and to a quarter share of the joint property, a widow has an absolute right of disposal over the whole of the joint property of herself and her husband as against their children 30 I C 588 8 Bur. L T. 203.

——where *payin* property changes its character during a marriage, the presumption is that it has become *utetpaza* of that marriage 21 I. C. 277. 6 Bur L T. 174

——a Buddhist wife and *eindaungyi* may alienate her *payin* property in any way withou[illegible]
she does not give it to a para[illegible]

——under the Buddhist [illegible]
does not lie. The decision of [illegible]
18 does not affect the ruling [illegible]
11 U. B. R. 32

——where the wife left her husband for 6 years and in the meantime there were suits for divorce both by the husband and wife and 17 months after separation the husband took a second wife, it effected a dissolution of marriage. 25 I C. 95: 7 Bur L T. 197.

——a man sentenced to imprisonment is not regarded as having deserted his wife. 23 I. C. 940: 7 Bur. L. T. 240.

Husband and wife—*contd.*

——in the absence of special circumstances it is presumed that the affairs of people divorcing and remarrying are settled definitely at the divorce or re-marriage, 23 I C 948. 7 Bur L T 83

——mere desertion for the statutory period does not of itself dissolve a marriage tie without a further and expressed act of volition on the part of either party. 22 I. C 945 (L B) but see under "*divorce*".

——where there is mutual abandonment for more than the statutory period and both party remarry and start homes the marriage tie is dissolved 19 I C 85: 6 L. B R. 167 · 6 Bur L. T 75.

——connivance amounts to a willing consent to conjugal offence or a culpable acquiescence in a course of conduct likely to lead to the offence being committed. 11 I. C. 779 4 Bur L. T. 161.

(8) Joint property

——there is no presumption that ancestral land must be presumed to remain undivided until the contrary is proved in the Buddhist Law. The burden of proving division of ancestral property lies upon the party asserting division 33 I. C 985 9 Bur. L T 164, 74 I. C. 9 : 1923 Rang 92. 1 Bur L J 174

——no general rule can be laid down as to the burden of proving jointness or separation without regard to the facts and circumstances of each case. 74 I. C. 9 1923 Rang. 92 · 1 Bur. L. J. 174

——a claim to share in a deceased parent's estate should be promptly made. Unreasonable and unexplained delay defeats the claim 38 I. C. 147 (L. B)

——the property of the marriage of a Burmese Buddhist huband and wife is not partible so long as the marriage subsists 104 I C. 516 1927 Rang 274 . 5 Rang 478

——when the husband purchased a piece of land with the money which was his *payin* and the purchase was made in the joint names of the husband and wife the property did not lose its character of *payin* and become *lettetpwa* 105 I. C. 470 : 1927 Rang. 318. · 6 Bur L J 219

(9) Legal authority.

——of the various *dhammadats* usually reckoned as 36 in number and considered more or less authoritative, the *Mangya* or *Manukyay Dhammadhat* (Alomprai Code of 1756) is and has been accepted by the British courts as the most authoritative 41. C. 887 7 Bur. L. T. 195 : 16 M. L. T. 142 8 L. B. R. 1 : 23 I. C. 433, P. C.

(10) Marriage.

——marriage in Burma is ordinarily a permanent bond which subsists until it is actually broken which should be proved by the person alleging it. 2 Bur L. J 67 1923 Rang 155 · 74 I. C 1037,

——under the Burmese Buddhist Law free consent of the parties to a valid marriage is necessary Consent reluctantly given under pressure is not such free consent. 13 Bur L. T 105 : 59 I. C. 555.

Marriage—*contd.*

——The law of the place where the marriage is contracted determines the validity of a marriage *above case.*

——consent of guardian is necessary to the marriage of a minor girl except perhaps when the girl is steadfastly determined to marry against the wishes of the guardian. 34 I. C. 81 : 12 Bur. L. T 136, 45 I. C. 831 (L B).

——there is nothing in Burmese Buddhist Law to prevent a minor from contracting a valid marriage without his parent's consent at any time after he is physically competent for marriage. *46 I C 421 · (1918) 3 U B R 75.*

——where there is divergence between the personal laws applicable *to the parties to a marriage, the proper principles to act* on are that the *Lex Loci contractus quoad solemnitates* determines the validity of the marriage and the Lex domicilii the question of the capacity of the parties to marry. 9 Bur. L. T. 179 : 34 I. C 159.

——a Buddhist minor girl of the age of 16 may marry without the consent of the guardian. Where she openly lives and co-habits with a person for several years till her death it is right to hold that the parties lived as man and wife 1923 Rang. 76 1 Bur. L. J. 144

——a Burmese youth of over 16 years can enter into a contract of valid marriage. 1926 Rang. 88 : 95 I. C. 53 . 4 Bur. L J. 238, there is nothing preventing a youth from contracting a valid marriage at any time after he is physically competent for marriage. 6 Rang 340 · 1928 Rang 209

——the Burmese Buddhist Law must determine the competancy of a Burmese Buddhist youth under 18 years of age ; to make a contract of marriage and a promise of marriage of the minor is voidable and the marriage of the minor youth or of a girl under 20 years of age requires the consent of the parents, unless the parties are steadfastly determined to marry. 52 I. C 653 10 L. B. R 28 : 12 Bur L T. 219

——Polygamy is lawful under the Burmese Buddhist Law. As to claim of inheritance the junior wife's position should be considered, for a lawful marriage, no ceremony is essential 1 R 1 : 73 I. C. 1044 : 1924 Rang. 37.

——in Burma no ceremony is essential for a marriage. Mutual consent is all that is
may be inferred from .
reputation. 39 C. 492 ;
475 P. C. 12 I. C. 191 : 4 Bur. L. T. 235.

——as polygamy is lawful, it is not illegal to marry a wife's sister though it is not a respectable thing to do so during the lifetime of the wife *above case.*

——eating in the same pot is a sign of social equality rather than a proof of matrimony. *above case.*

——to constitute a valid marriage elopement with the intention of marrying and consummation of the marriage is sufficient. 95 I. C. 53 : 27 Cr. L. J. 725 : 1926 Rang. 88.

Marriage—*contd.*

—there must be free consent of the parties for a valid marriage under the Buddhist Law and a consent reluctantly given under pressure is not such free consent as is required by that law. 59 I. C. 555 : 13 Bur. L. T. 105, 49 I C. 59 : (1918) 3 U. B. R 106.

—where the parents promise to give a boy in marriage, no damages for the breach of the promise can be recovered either against the son or against the parents. 49 I. C. 59 : (1918) 3 U. B R. 106, 23 I. C. 376 : 7 Bur L. T. 14.

—Burmese Buddhist Law of marriage is not applicable to the marriage of non-Burmese no-Buddhists celebrated in the time of the Buddhist Kings of Burma. 51 I. C. 542 12 Bur. L. T 48 : 10 L. B. R. 77.

—the Burmese Buddhist Law regarding marriage is *prima facie* applicable to Chinese Buddhists as the *lex loci contractus*, [illegible] prove custom. 104 I C [illegible] F. B, *105 I C 244 : 1927*

[illegible] s are very peculiar but if [illegible]ey profess Buddhism they may marry according to the Buddhist [L]aw. 25 I C. 342 . 15 Cr L J 590 (Rang)

—the woman marrying a married man with knowledge, cannot [b]e presumed to be mistress and not a wife under the Burmese [B]uddhist Law. 12 I. C. 191 4 Bur. L T 235

—among Burmese Buddhists when the mother dies and the [f]ather marries again, it is usual to make a family partition and [s]ettle on the children of the first marriage 74 I C 47 . 1 Bur L. J. 11 : 1923 Rang. 57.

—on the re-marriage of the surviving parent not only the [e]ldest child, if he or she has not already taken a quarter share [o]f the joint estate as *aurasha*, becomes entitled to a quarter [s]hare of that estate, but the younger children also would as a [b]ody be entitled to a quarter share in the joint estate 98 I. C. 4 : [1]926 Rang 211

—when after the death of the husband or the wife, the wife [o]r the husband, as the case may be, partitions the property with [h]er or his children and marries again on her or his death the [c]hildren of the former marriage cannot claim from their step-father [o]r step-mother. 51 C. 375 : 80 I. C. 1031 : 1924 P. C. 88 . 5 Rang 75 P. C. 1923 Rang. 139 : 6 Rang. 355.

[illegible]). Minor and guardian.

—n [illegible]
hip of t [illegible]
nother o [illegible]
ls *to the* [illegible]

—v [illegible]
s man [illegible]
Buddhist faith, there was a valid marriage and the child of that [u]nion should be in the custody of the father. 104 I. C. 348 : 1927 Nag. 280 : 6 Bur. L. J. 158.

(12) Partition.

——there is no presumption under the Buddhist Law that ancestral lands are undivided until the contrary is proved. 74 I.C. 9 : 1923 Rang. 92.

——a partition can be claimed during the step father's lifetime. 31 I. C. 875 : 9 Bur. L. T. 58

——there can be separate suits for a claim of a share in *Anapazon* property and separate property as the claims are distinct. 1 Bur. L. J. 206

——whether between the children of two marriages or between children of the first marriage and their step mother, the division is always *per stirpes* and not *per capita* during the lifetime of their mother. 35 I. C. 423 . 10 Bur. L. T. 41.

——a partition between father and daughter is not invalid merely because the father assigns to the daughter a larger share than she could ordinarily claim, even if the whole of the joint property is given to her. 11 I. C. 855. 4 Bur. L. T. 185.

——the courts cannot recognise a preferential treatment in partition on the ground of service to the deceased. A first born child is not the auratha son until he attains majority. 18 I. C. 455 : 6 L. B. R. 77 : 5 Bur. L. T. 291 F. B.

——the cut-of time grand children by a deceased *orasa* son are not entitled to claim partition against the surviving grand-father on his remarriage, in the joint property of the grand-parents. 100 I. C. 323 - 1927 Rang. 111. 5 Bur. L. J. 203

——where a Burman Buddhist dies leaving children by the first wife and also second wife and children by her, and then the second wife dies and since her death, one of the children of the first marriage puts forward a claim for partition of the inheritance, held that the children of the first marriage were entitled to one third of the property acquired during the second marriage. 1928 Rang. 225. 6 Rang. 427, F. B.

(13) Pre-emption

——the Buddhist Law of pre-emption applies to a sale by one of several co-heirs of his share of undivided ancestral property. 3 Bur. L. J. 21

——a Burmese Buddhist co-heir has a right of pre-emption in respect of the unseparated interest of any particular co-heir in undivided property. 53 I. C. 455 : 3 U. B. R. 154, 39 I. C. 257 : 10 Bur. L. T. 1.

——the right of pre-emption can be enforced only against the person inheriting jointly with him and is not available against his heirs after the co-inheritor's death. 31 I. C. 512. 8 Bur. L. T. 167.

——there is no right of pre emption among co-sharers who took part in the partition of ancestral immoveable property, after the partition of such property. *above case.*

——the right of pre-emption must be asserted promptly, there is no allowance for want of knowledge. 20 I. C. 343 : 6 Bur. L. T. 115, 39 I. C. 257 : 10 Bur. L. T. 1.

(14) Religious offerings.

—verbal declaration or delivery of possession is sufficient to render a Buddhist religious offering irrevocable. 24 I. C 465 : 7 Bur. L. T. 63.

(15) Seduction.

—seduction does not give any cause of action if there is absence of promise of marriage 42 I C. 539 (L. B.)

— in a suit for damages for breach of promise of marriage the fact of seduction must be taken into account. 57 I. C. 815 : 13 Bur. L. T. 6.

(16) Succession.

—the eldest son has no right to a fourth share in the joint estate on the death of his mother, unless the father remarries and he has to perform the duties of the father. 13 Bur. L T. 207

—grand-children whose parents are dead succeed to their grand parents of their own right and not as representing their parents. The property is divided *per stripes* and not *per capita*. 1 R. 316 1924 Rang. 73.

—great grand-children are entirely excluded by children or grand children from inheritance 1928 Rang. 139 · 6 Rang 355, 1926 Rang. 4 *Rel. on*

—for the purposes of the special law by which on the death of the husband and wife within short interval of each other the surviving parents of the two share the jointly acquired property any period over one month should not be regarded as a short interval 63 I C 715, 1923 Rang. 136.

—when the mother dies and the father remarries it is usual to make a *family partition and settle on the children of the first* marriage. 1923 Rang 57 : 74 I C 47

—where there are more wives properties inherited by one of those wives during marriage descends to the children by that wife. The children by other wives cannot lay any claim 63 I. C 814

—the son from a second marriage is entitled to a one-eighth share in the *hnapazon* property of the first marriage, and this share is independent of the share of his mother and can be sued for during her life time 63 I. C 28

—in a case when there is an issue of the last marriage the step child or children collectively take one-eighth and the step parent seven-eighths and in a case where there is no issue of the last marriage the former takes one-sixth and the latter five-sixths. 3 Rang. 549 . 1925 Rang 340.

—mere separate residence does not prove or even set up an inference of breach of filial relations. It must be proved by the person alleging it 13 B L T. 216

—a step son succeeds to the separate property of his step-parents in preference to the parents and other collateral relation by blood. *above case.*

—the rules of succession under this law have reference to the state of affairs in existence at the time of death of the propositus.

Succession—*contd.*

cannot be divested. A *nungyi* cannot inherit

, C. 161.

ther wife does

Where there

the share of

f the marriage

between the mother and the step-father is one-fourth The same

the step-father during his

But the step child has

step-father jointly with

7.

——the Buddhist law does not say that ancestral land must be *presumed to remain undivided until the contrary is proved.* 1923 Rang 92 : 74 I C 9

——half brothers and sisters succeed in preference to grand parents. 1923 R. 124 72 I. C. 4, 12 B. L. T. 103, 8 L. B. R. 1, 10 L. B. R 107, 4 U B R. 20 *Ref.*

and

on the vi-

lege

of

succes is

invalid as defeating the Buddhist Law of inheritance but is valid as a disposition *inter vivos.* Held also that there is no estoppel when parties act in ignorance of law. 95 I. C. 879 : 1926 Rang 131 : 5 Bur L J. 56.

——*if a first born son dies in infancy, the next eldest son* can be *orasa* provided he is unaffected by any disabilities mentioned in the texts 10 I C 778 · 4 Bur L. T. 74

——the right of the eldest son (*orasa child*) to claim a quarter share from father on the latter's remarriage after the mother's death is not a vested one. 1 Rang. 363 : 2 Bur. L. J. 109 1923 Rang. 239.

——the wife's living apart from her husband for 8 years on *constitute misconduct disentitl-*

preference to the grandson,

: 200.

between the father and his

——under the Burmese Buddhist Law an eldest son on the

Succession—*contd.*

——where the daughters are living apart from the father and one of the daughters dies, the surviving sister inherits her estate in preference to his father. 41 C. 887 : 7 Bur. L. T. 105 : 23 I. C 433 P. C.

——the daughter can acquire rights only in respect of the property acquired by the father during the course of the marriage of her mother and father and she is entitled to inherit on partition only if she is of the age of 18 years. 101 I. C. 634 : 1927 Rang 143 : 6 Bur. L. J. 55

——there is no provision in the Dhammathats enabling a father to disinherit his child except by giving him away in adoption to another, though a child who behaves as an enemy towards his parents is debarred from inheriting 74 I. C 100 : 1 Rang 42 1923 Rang. 206, 55 I. C. 258 12 Bur. L. T. 207.

——the mere fact that a wife has lived apart from her husband by mutual consent on account of incompatibility of temperament does not constitute misconduct or undutifulness entitling the husband to a divorce. 75 I C 200 : 2 Bur L. J. 58 : 1923 Rang 150

——inheritance shall not ascend and half brothers and sisters succeed in preference to grand parents. 1 Bur L. J. 263 : 72 I. C. 4 : 11 L B. R 460 1923 Rang. 124.

——step grand children in the absence of real ones or heirs in the direct line exclude collaterals, except in regard to a share in undivided ancestral property which they share equally with collaterals. 70 I C 855 : 1922 L. B. R. 29.

——*a single act of disobedience, however gross, does not disqualify* from inheritance 70 I. C. 904 : 4 U. B R. 104.

——succession of *orasa* children, who is *orasa*. 68 I C. 49 : 11 L. B R. 220 F. B.

——an eldest son cannot claim the one fourth share of the joint property of his parents where his father survives and does not remarry 64 I. C. 23 : 13 Bur. L. T. 207.

——an *orasa* son becomes entitled on the death of his father to a definite one-forth part of the estate and he can recover it with mesne profits 67 I. C. 769 : 11 L B. R. 292.

——the younger child, although the eldest son, does not acquire the status of *orasa* and does not become entitled to the privileged position allotted to the eldest or first born son. 1924 P. C. 238 : 51 I. A. 334 · 48 M. L. J. 1 P. C.

——in the absence of natural children a *kittima* child if it be the eldest of adopted ones, has a a right to claim immediate partition with its adoptive mother in respect of a fourth share in the joint estate of her adoptive parents. 1926 Rang. 146 : 5 Bur. L. J. 70. 1924 P. C. 238, *fol.*

——a daughter may be *orasa* child but there cannot be *orasa* daughter as well as *orasa* son in the same family. 29 I. C. 756 : 8 L. B. R. 113 : 8 Bur. L. T. 140.

Succession—*contd.*

——a step-son can succeed as an heir to the separate property of his step-mother as well as their collaterals. 64 I. C. 415 : 13 Bur. L. T. 216.

——where a woman marries twice the sons of her second husband from the previous wife are the heirs of her son from her first husband and should be preferred to the deceased's mothe's sister. 63 I C. 841 · (1921) 4 U. B R. 20

——the step child of a divorced wife is not an heir under the Burmese Buddhist law of inheritance. 99 I. C 387 : 1927 Rang. 40 : 4 Rang 412.

——where husband and wife die childless simultaneously of within a short interval of one another, their property is to be considered as retaining its joint character and is to be divided accordingly. 30 I. C 594 8 Bur L T. 145.

——two [illegible]
constitute a "[illegible]
apply namely [illegible]
whether the h[illegible]
deaths of bot[illegible]
1923 Rang 136 [illegible]

——where a husband and wi[illegible]
surviving parents of both share [illegible]
former Short interval, for this [illegible]
one month 63 I C 715 · 10 L. B. R [illegible]

——a step-child gets one-fourth in the property jointly acquired by his mother and step-father where there are no children of that marriage nor any other children of the father by any other marriage, though the property is acquired during the continuance of the marriage or the step-father has married another wife. 60 I C 7 · (1920) 3 U B R 287

——in matters of inheritance among elder or younger brothers and sisters the youngers are preferred to elders. The principle of propinquity is limited to full blood relations 58 I. C. 488 : 12 Bur L. T. 103

——a daughter taken away by her mother on divorce loses her rights of inheritance in her natural father's family. 56 I. C. 631 : 13 Bur. L. T 3

——on the death of a husband or wife without children the survivor succeeds to the whole of the deceased's estate including the right of the deceased to share in undivided ancestral property. 53 I. C. 939 ; 12 Bur. L. T. 79.

——the surviving husband of person who ex-hypothesi is the then surviving daughter is treated as one of the heirs of the father 94 I. C. 916 ; 1926 P. C. 29

——an *apathitha* child takes half the estate of the adoptive parents equally with the co-heirs of the adoptive parents. 50 I C 524 : 11 Bur. L. T. 221.

——the mere fact that kittima adopted son lives away from his adoptive parents for five years before the death of the surviving

Succession—*contd.*

adoptive father does not disentitle him from inheritance. 100 *I C. 1007 : 1927 Rang. 195 : 6 Bur. L. J. 10.*

——in the case of three marriages, children of the marriage subsisting at the acquisition of property get half of it and children of other marriages divide the rest among them. 42 I. C, 950 : 11 Bur. L. T. 252.

[illegible]
not [illegible]
share [illegible]
time [illegible]

——mere non-attendance on the deceased during his illness is not sufficient ground of exclusion 44 I C. 239 (L B)

——a child begotten in pleasure whose parents do not live together *openly is not entitled to share the father's estate with his* widow. 33 I. C. 171 9 Bur. L T. 15 : 9 L. B R 1.

——whether the mother remarries after death of the father or not the eldest son is entitled to get one-fourth share and the mother and the younger children three-fourths 30 I. C, 640 · 8 L B R. 189 : 8 Bur. L. T. 154.

——all *heirs related in the same degree to the propositus* takes *per capita* and not *per sterpes* 107 I C. 167 : 1928 Rang. 67 : 5 Rang 747.

——under the Burmese Buddhist Law of Succession the paternal and maternal aunts succeed to their nephew's estate *per capita* and not *per stirpes.* 30 I C. 63 : 8 Bur L T. 141.

——the *paternal and maternal uncles and aunts of a deceased* nephew or niece should, in the absence of any nearer relation and in spite of the father of such nephew or niece having predeceased the mother, share equally in the estate There is no preference of the paternal over the maternal side 18 I C. 497 . 5 Bur L T. 283.

——when a Burmese Buddhist dies leaving as his nearest relatives (1) nephews and nieces, the children of his brother and (2) uncles and aunts, the brothers and sisters of his mother, the former class is entitled to succeed in preference to the latter class. 95 I. C. 918 . 1926 Rang 113, F. B.

——if the eldest son attains his majority and fulfils the prescribed conditions and then dies before his parents, his position as *orasa* remains unfilled and the next younger brother does not succeed to it. 29 I. C. 706 · 8 Bur L T 196.

——the texts giving the *orasa* daughter the right to claim a quarter share after her father's death do not authorise her to claim one-fourth from her mother at least where her mother has not married again 28 I. C 806 : (1924) 11 U B R 40.

——there is no written law of inheritance among Burmese Buddhist *Under s. 13 Burma Laws act, Buddhist law should be* applied to them. 24 I C. 367 : 7 Bur. L T. 246 . 8 L B. R. 222.

——where no divorce is proved and the separation is entirely the act of father, the children cannot be deprived of their right to

Succession—*contd.*

inherit which they lose only by proof of some filial neglect. 23 I. C. 915 : 7 Bur. L. T. 80

——where the husband and wife separated though there was no formal divorce and subsequently the wife remarried but the husband did not, the daughter who lived with the mother but was on affectionate terms with the father was entitled to succeed to her father's estate. 105 I. C. 45 · 1927 Rang. 250.

——property inherited by a parent during marriage becomes his or her separate property. On his or her death the surviving parent has merely a life interest in it with power to sell in case of necessity. 20 I C 346 . 6 Bur L. T. 119.

——the share of a person who is insane or otherwise incapable of managing his affairs, should go to the co-heir who had maintained and looked after him during his lifetime. 14 I C. 843 : 5 Bur. L. T 61.

——to clai[illegible]
of successfully [illegible]
lesser wife falls [illegible]
if she happens [illegible]
L, T. 235.

——if after the [illegible]
property with her [illegible]
her, on her death [illegible]
from their step-fat[illegible]
marriage 51 C 37[illegible]
1031 : 1924 P C, 88.

——under the Burmese Buddhist Law of succession a younger half broth[illegible]
brother. [illegible]

——a [illegible]
defective [illegible]
130 : 6 Ra[illegible]

(17) Widow.

——a widow has an absolute power of disposing of her property. 31 I. C. 948 : 9 Bur. L. T. 56.

——a widow's interests to *hnapazon* property is one-half with life interest in the remaindar She cannot mortgage more then half of such property without necessities of the family. 17 I. C. 956 : 5 Bur. L. T, 170.

——widow owning half the joint property during her husband's lifetime, inherits this half as her own when he dies. 50 I. C 545 : 11 Bur. L. T. 258.

——the childless widow of a man who had died after his parents' death succeeds to his share of the ancestral property in question provided the property in question is not held on some feudal tenure or is not appurtenant to some hereditary office. 30 I. C. 601 : 8 Bur. L. T, 155.

BURDEN OF PROOF, see *Evidence Act, Burden of proof.*

CALCUTTA RENT ACT (III of 1920.)

Applicability.

——where a lease comprised properties in Calcutta as well as outside Calcutta and the rent Controller refused to fix a standard rent for the Calcutta property on the ground of want of jurisdiction, held that the order was wrong as it was evident there was no intention on the part of the lessor to put the tenant in possession of the property outside Calcutta but it was included in the lease solely with the object of evading the Rent Act. 30 C. W. N. 114 . 53 Cal. 115 : 91 I. C. 417 : 1926 Cal. 250.

——the Calcutta Rent Act of 1920 was by subsequent amendments prolonged until 31st March 1924 The proviso in the Calcutta Rent Amendment Act, 1924, substituting the date 1927 for 1924, has the same effect as if the words therein had been inserted in the original Act and must be so read. 54 C. 508 : 31 C W. N. 646 : 46 C. L J. 341 101 I. C. 38 · 1927 **P C.** 97 (52 C. 551 29 C. W N. 281 : 86 I C. 139 : 1925 Cal 571) *Reversed,*

S. 2 (e).

——the fact that the premises consists of different blocks does not take it out of the meaning of the "premises" as defined in the Act. 53 C 479 : 30 C W. N 308 : 95 I. C 289 : 1926 Cal 681.

——a workshop does not come within the definition of "premises" in sec. 2, although the Engineer has a retiring room or that a particular room is used as office room. 26 C. W. N. 102 : 68 I C. 907 (c)

——it depends on the intenti[illegible]

of the agreement to be gathered [illegible]

as fans and lights are intendec [illegible]

premises or building demised. 30 [illegible]

——a flat or house is certainly within the definition of "premises" but furniture is not The Controller has no power to fix the hire of furniture 28 C. W N 774 : 81 I C. 853 · 1924 Cal. 868

——it depends on the intention of the parties and on the nature of the agreement to be gathered from the same whether electric [illegible] he premises or building

[illegible] rent in respect of two [illegible] ding on bustee land was rightly rejected by the rent Controller on the ground that the rooms forming portions of huts did not fall within the definition of premises within s. 2 cl. (e), 69 I C. 976 (c).

Ss. 2, 5, 15.

——where the Controller of rents has enquired into the question whether the building was let for residential purposes or for the purposes of a shop or an office and he has come to the conclusion on ample evidence that the letting was not for the purposes of a factory, the decision must stand. 28 C. W. N. 467 : 1924 Cal. 629

S. 2. (f) (ii) and 15.

——standard rent means rent for which the premises were originally let. Consequently if a tenant subjets a portion of the premises, the standard rent of the portion so sublet is to be determined according to s 15 and not under this sec. 27 C. W. N. 569: 1923 Cal. 553, 37 C. L J 101.

——"standard rent" means the rent as per clause (i) or clause (ii) or clause (iii) of sec. 2 (f) of the Act. 30 C. W. N. 152.

S. 2 (G) and 11 (5).

——the term "tenant" includes a person whose tenancy has expired even before the Act came into operation. Such tenant is entitled to the benefit of the Act even if the suit for ejectment was instituted before the Act came into operatian But the tenant is not entitled to the benefit of sec 11 if he does not pay rent provided in s. 11 sub. sec 5. 25 C. W N. 967: 49 C. 369: 68 I. C. 361.

——where the benefit of the Act is claimed the deft. must show that he has paid arrears within three months of the Rent Act coming into force and subsequently made regular payments. Where there is an agreement to extend the time of payment before the rent is actually due under the lease the times referred to in sec 11 (5) is such time. 26 C. W. N. 678 1923 Cal. 227: 70 I. C. 494.

S. 4. sub-sec. 3, cl. 4.

——where there was option for renewal for a further period of three years after the expiration of the terms of three years for which the lease was executed shortly before the passing of the Rent Act, it did not make the lease one for five years and upwards within the meaning of this sec 26 C W. N. 711 49 C. 928, 39 C. L J 85 1922 Cal. 514.

——where the deft. a monthly tenant held the premises at a

Cal. 57.

S. 5.

——the definition of "landlord" includes a tenant who sublets any premises, so the person from whom a sub-lessee takes his lease is his landlord although he may himself be a tenant of a third person. 53 C. 479: 30 C. W. N. 308: 95 I. C. 289: 1926 Cal. 681.

S. 8.

-d rent
esident
W. N.

S. 9.

——the meaning of this sec. with its sub-secs. and proviso is that if a grant of a tenancy is made after the commencement of the Act and if a fine or premium is required as the consideration thereof and if it has been paid after the date of the commencement of the Act, the tenant can recover it from the landlord, unless the payment was made in accordance with the agreement entered into before the 15th March, 1926, 53 C 492 . 1926 Cal. 927 : 97 I. C 376.

S. 10.

——*bona fide* requirements of landlords, refusal by the landlord to accept rent fixed by the Rent Controller, deposit of rent with the Rent Controller 1923 Cal. 223 : 69 I. C. 963 26 C. W. N. 499.

S. 11.

——a landlord who has premises sufficient for his requirements should not be allowed to eject tenants because he chooses for his own convenience or profit to deprive himself of the use of the premises which he is occupying, and then to say to his other tenants "having deprived myself of the use of the premises which I have hitherto occupied, I therefore require the house in which you live for my own occupation and I now propose to eject you" It is not enough that a plff. in order to defeat a plea under this Act should merely say that he desires the premises *bona fide* for his own occupation. The word in this Act is not "desire" but "require", this involves something more than a mere wish and involves an element of need, to some extent at least. 26 C. W. N 699.

——where in suit in ejectment the benefit of the Rent Act is claimed the deft must show that he has paid arrears within three months of the Rent Act coming into force and subsequently paid his rent regularly. 28 C. W N 678. 70 I. C 494 1923 Cal 227.

——the legislature in enumerating in the proviso to this sec the grounds upon which a landlord can successfully claim an order for possession did not intend to limit the claim to those grounds but merely enumerated those grounds for the purpose of indicating the grounds upon which a landlord would be entitled to possession as of right, leaving it open to the court to exercise a discretion in his favour upon any other ground which might apper to the court to be satisfactory. 25 C W. N. 1012 · 68 I C 417

——decree for possession in case of monthly tenant 69 I. C. 938 : 49 C. 383 1922 Cal. 380.

——the Act gives to a mere monthly tenant considerable fixity of rent upon a condition namely, that he is a tenant paying and not a defaulting tenant. *above case.*

S. 11—*contd*

——when the day on which the rent was to be deposited being holiday the deft went to the Controller's office to deposit it on the next working day but due to pressure of work the recovering clerk directed him to bring the money next day when it was paid, the payment was a good one 29 C W N. 636 : 88 I. C 589 : 1925 Cal 791.

——the intention is to give the tenant the benefit of the section if he complied with two conditions. 30 C W N. 152 : 92 I. C. 1001 : 1926 Cal 481

——a landlord waives his right of re-entry on the breach by the lessee of a condition not to sub-lease, by accepting the rent subsequent to his knowledge of such breach. 30 C. W. N. 199 : 94 I. C. 857 1926 Cal. 624

——a breach of covenant on the part of the lessee such as by removal of some fixtures is not sufficient to disentitle the lessee to the protection of the Rent Act 29 C W N 636 1925 Cal. 791 : 88 I C 589

S 14

——s 14 is intended to give relief to any person who, having been a tenant, comes within the period of limitation to claim the excessive rent paid, whether at the time he claims he is actually a tenant or not 1928 P C 227 1925 Cal. 708. *reversed.*

S. 15

——It is suggested by the language of the second part of the proviso to sec 15 that where rent has not been increased since 1st day of November 1913, as in the present case, the rent must be unduly low, but whether suggestion is well founded in any particular case is purely a question of fact The rent at which premises were let on 1st November 1918 cannot be treated as "unduly low" merely on the ground that the premises would have been let at a higher rent on that date if the repairs of the premises had not been previously neglected. 28 C W. N 467 1924 Cal 629

——sub-sec (3) is ungrammatical, the first limb of the sentence should read "where by reason of any premises having been let-in-parts any difficulty arises in giving effect to this Act" where the premises are first let as a whole, the Controller has Jurisdiction to determine whether there is any difficulty to fix the standard rent under Cl. 3 (a), 1928 P C 227

——where a woman of the town applied to the Rent controller under this sec. for standardisation of the rent of the premises occupied by her and it was dismissed on the ground that she had no *locus standi*, while the opposite party raised no such objection, held that under the circumstances of the case the Rent Controller should have entertained the application ; held also that an application in revision against the order of the Rent Controller under this sec. lies in the appellate side of the H. C. 64 I. C. 709, 26 C. W. N. 52, 78, 845.

S. 15—*contd.*

——where the tenancy has been legally terminated by a valid notice the tenant cannot subsequently apply for fixing the standard rent under s. 15 as it cannot be said that they were tenants on that date. 30 C. W. N. 236 : 93 I C. 56 : 1926 Cal. 708.

——where a decree in ejectment is once passed against a tenant the Rent-Controller cannot thereafter fix a standard rent as no tenancy exists 92 I. C. 392 : 1926 Cal. 697.

——the controller has power to fix the standard rent so as to operate retrospectively. 1928 P. C 227 P. C.

——rejection of application for standardisation of rent on the ground that there was no satisfactory evidence to prove the *Municipal number of the premises is illegal.* 26 *C. W. N.* 845 . 49 C. 931 : 1923 Cal 169 : 70 I. C. 371

——the H. C. has the general power to revise the order of the Rent Controller. 26 C W. N. 52, 78, 845, but the President of the Improvement Trust Tribunal cannot revise the Rent Controller's order when the latter does not fix a standard rent. 26 C. W. N 78 : 49 C. 528 : 68 I C 274.

——there is nothing to prevent the Rent Controller from fixing the standard rent during the currency of the lease. 26 C. W N. 78 : 49 C. 528 : 68 I C. 274.

——the Rent Controller has jurisdiction to make an enquiry as to the rent of even a portion of the premises forming part of larger premises. 87 I. C. 796, 1926 Cal. 372

——where in a rent standardising case the landlord objected to the jurisdiction of the Rent Controller on the ground that the subject matter of the proceedings could not come under the term premises and it was overruled and the landlord applied to the President of the Improvement Tribunal for revision of the order, held that the landlord was entitled to a decision of the question, and the fact of his objection to jurisdiction did not disentitle him to his remedy under s 18. 27 C. W. N 287 : 1923 Cal. 180 · 73 I. C. 47

——improvements by landlord cannot he taken into account in a proceeding under this Act between the tenant and the sub-tenant. 53 C. 479 : 30 C. W. N. 308 : 95 I. C 289 : 1926 Cal. 681

——the Act contemplates fixing of standard rent by the Rent Controller even in cases not coming under s. 15 but coming under s. 2 (1) such order is therefore liable to revision under s 18. 37 C. L. J 101 : 1023 Cal. 33 72 I. C 221 27 C. W N. 50

——s. 15 contemplates a decision of the Rent controller fixing the standard rent. 31 C. W N 308 : 100 I. C. 781 : 1997 Cal. 305.

——where a tenant applied for standardisation of rent and before the matter came on for hearing was ejected by decree of court the proceedings under the Rent Act do not determine. The new tenant who has come in is not a necessary party ; he can apply to be heard in fixing the rent. 29 C. W. N. 30 : 78 I C. 874 : 5 I. C. 577 : 1924 Cal. 715.

S. 18.

---- relating to a Act does not

91 I. C. 1011:

S. 19.

——this sec. must be directed against a person who knowingly receives a sum in excess of the standard rent or a fine, premium or any other like sum in addition to the standard rent, in contravention of the provisions of this Act 53 C. 492: 1926 Cal 927: 97 I C 376.

S. 20

——sec. 23 is not *ultra vires* of the Local Legislature which passed the Act, but r 5 framed by the Governor in Council is *ultra vires* 25 C W N 661 33 C L J 551 61 I. C 210

——the President is competent to hold the summary enquiry referred to in s 20 of this Act under the provisions of Chapter 22 of the Cr P C 37 C L J 298 1923 Cal. 339 71 I. C. 611.

Miscellaneous.

——the President of the Calcutta Improvement Tribunal is a Civil Court to make an order for costs and to execute such order. 26 C W N 33 65 I C 177

——the Rent Controller's court of Civil jurisdiction. 26 C. W. N 30 26 C W, N 78 49 C 528 68 I C 274

CANCELLATION OF DOCUMENT, see, '*Specific Relief Act, S 39*'

CASTE.

——it is settled that as regards the racial claim maternity is of no importance 23 M L J. 1016 49 M. L J 821 **P. C.**

CAUSE OF ACTION, see C P C. "*cause of action.*"

CENTRAL PROVINCES TENANCY ACT (1 of 1920).

S. 2

——the term agriculture is not confined to the cultivation by annual tilling, ploughing and sowing of that which yields an annual crop, cultivation of betel is an agricultural purpose. 33 I C. 497: 12 N. L R. 57.

——holder of land let out for the purpose of growing vegetable crops is a tenant within the Act; the mere circumstance that he holds the land for a part of the y[illegible] no difference. 97 I. C. 694: 1927 [illegible]

——a village tank which is l[illegible] (singhora) is not let or occupied [illegible] R. 122: 31 I. C 291: 11 N L. R. [illegible]

——the term "landlord in a village denotes the whole body of landlord, therefore anything required or authorised to be done under

S. 2—*contd.*

the Act must be done by the whole proprietory body or an agent acting in their behalf. 12 N. L. R. 24 ; 33 I. C. 758.

——there is no warrant for the proposition that the rights of a tenant cannot be joint family property. 57 I. C. 339.

——a tenancy cannot be acquired by prescription. 8 N. L R 163 ; 17 I. C 605.

——there can be no tenancy in respect of a fractional share of a field or fields not divided by metes and bounds and a suit for joint *possession* by the *lessee* of such a share is not maintainable. 78 I. C. 636.

S 5

——an absolute occupancy tenant is not entitled to bequeath any right in his holding *82 I C 1038 : 1925 Nag 190.*

——a Hindu widow on whom an absolute occumpancy holding has *devolved* under s *38 (11) of the C. P T Act, 1898* obtains an interest analogous to that of a Hindu widow sobject only to the provisions of the statute as to surrender and alienations *8 N. L. R* 154 : 17 I C. 366

——the Hindu Law of succession by survivorship and as to the vesting of a son's interest by birth is not applicable to a tenency governed by the C P. Tenancy Act. 78 I. C. 63 : 1924 Nag 372.

——before the introduction of the Tenancy Act of 1920 a person could get no vested right by birth in the absolute occupancy land. 104 I. C. 291, 4 N L R 9, 5 N L R 103, 1926 Nag 433 *fol*

——so far as the right of a reversioner to challenge the transfer by a female occupancy tenant is concerned it stands on the same footing as a surrender by her. 105 I. C. 559 . 1928 Nag 32

[illegible] der her tenancy holding [illegible] to defeat the right of [illegible] for her husband 103 [illegible]

S 6

——where there was a transfer of an absolute occupancy holding while the Act of 1898 was in force the right of the landlord to sue [illegible] en away by the new Act of [illegible] fore this new Act came into [illegible] ion after the Act came into force, suit for ejectment was to be governed by this Act 101 I. C. 284 1927 Nag. 127 23 N L R 50.

——when the part of an absolute occupancy holding is transferred the landlord cannot re-enter on the holding. *58 I C 112*

[illegible]

15 N. L. R. 48 · 43 I. C. 907.

S. 9—*contd.*

tenant must pass by inheritance in accordance with her personal law. The words "kindred" and "collaters" in proviso (2) s 11 C P. Tenancy Act must not be construed literally as under the Indian Succession Act as meaning "persons descended from the common stock or common ancestor" but should be held to include all kinsmen recognised by the personal law of the parties. 9 N. L. J 221; 1927 Nag. 68.

——the word "inheritance" does not include succession by survivorship and in the case of a joint family holding standing in the name of the manager the holding passes by survivorship. 1926 Nag 277 92 I C. 916

——omission to mention the word 'survivorship' in this section seems to have no more meaning or effect than the omission to state that the interest in that sec is the interest in the holding. 102 I C 711; 1927 Nag 272.

——the personal laws of the Hindus are to be administered in dealing with the cases of inheritane to occupancy holdings, but the rule of Hindu Law that a "joint" son exncludes a "separated" son will not hold good when the separation consists only in mess and residence and not in estate. 97 I C. 730, 1927 Nag. 107 9 N. L J 163.

——an occupancy right is an extremely limited right and is in some respects even more limited than the right of a life tenant. 89 I C 477, 1925 Nag 449.

——on the death of an occupancy tenant his right in the holding devolves as if it were land 7 N L. R. 36, 10 I. C 733

——where an occupancy holding inherited by Hindu widow is willed by her the landlord can sue to eject the devisee in ordinary Civil Courts 90 I C 247 1926 Nag 222

——a surrender of occupancy holding by a Hindu widow cannot be challenged by the reversioners on the ground of want of legal necessity 102 I. C 888 1927 Nag 362, (1927 Nag 11, 9 N L R. 126, 5 N L R. 172) *fol* 1925 Nag 306 *expl*

——where a Hindu widow succeeding to the property of her husband has surrendered to the landlord an occupany holding for no legal necessity, the reversioner cannot impeach it 99 I C 187 1927 Nag 129

——a *malguzar* is only the last reversioner to a tenant and cannot sue in ejectment so long as there is the remotest heir alive 92 I C. 926; 1926 Nag 265

S. 12.

——it is doubtful if Ss 46 and 47 of the Act of 1898 apply to a mortgagee in possession of property under a foreclosure decree. 1 Pat. L. J. 525; 38 I C 98.

——mortgagee foreclosing the mortgage and entering into possession of the tenancy may be said to become a tenant A mortgage of occupancy holding with the consent of one of its landlords cannot be avoided. 50 I. C. 274.

S. 12—*contd.*

——occupancy holding is transferable under s. 46 (3) of the Act of 1898 but the lar[illegible] [illegible]enue Officer within two [illegible] In such case the Civ[illegible] 621 : 17 C L J. 646 . 18 [illegible]

——under s 46. of the Act of 1898 no sale decree of occupancy rights can be passed on an unregistered mortgage, even though the deed was executed before the Act. 10 N. L. R, 42 : 23 I. C. 888

——where a transfer of tenant's right would be valid in the absence of prohibition under s 46 or 70 of the Act of 1898, it cannot be avoided except in the manner and to the extent provided by that Act. 8 N L R 22 . 13 I C 909

——where the suit is one for possession of an occupancy tenancy and not to set aside an alienation made by the former tenant in contravention of the Act, the Civil Court has jurisdiction to entertain the suit 44 I C 1001.

——the Registration officer is not expected under s 46 (5) of the Act of 1898 to decide as to the soundness of the recitals in a deed presented for registration. 52 I C 744.

——fraudulent recitals in a deed to get it registered vitiates the document 1 N. L. R 112, 8 N. L R 22 *Expl*

——nothing in s. 46 (5) of the Act of 1898 justified a Registering officer to admit to registration, after the Act, an instrument executed before that date and falling within the prohibition contained in the section. 42 I. C 384 : 13 N. L R. 165

——a lease of occupancy land for more than a year being in contravention of this Act is not required to be registered and is admissible to prove the factum of the lease. 93 I. C. 633 : 1926 Nag 335

——where originally the *malik makbuza* has been treated by the holder as his tenancy for more than 12 years he cannot claim any rights greater than those of a tenant and his rights cannot be attached and sold. 103 I. C. 697 : 1927 Nag. 230.

——where a co-sharer of a patti who had ceased to be a co-sharer surrendered the tenancy and the surrenderee leased out the tenancy to another, and the sole landlord of the patti brought a suit for possession against the lessee, it was cognizable by the Civil Court. 107 I. C 671 : 1928 Nag 221.

——no landlord can sue in a Civil Court to evict a person to whom an occupancy tenant has made over his holding unless that person is one of those mentioned in sec. 12 (1) (ii) of the C P. T. Act, or holds under a lease for not more than one agricultural year granted not more than 2 months before the beginning of that year without any covenant for renewal being attached to it : in other cases he must apply to Revenue officer under s. 13. 87 I. C 826 : 1925 Nag. 442

——a surrender by a tenant to a landlord and a lease by the latter to a third person is not illegal. Such transfers are not absolutely void. 87 I. C. 1043 : 1925 Nag. 375.

S. 12—*contd.*

——where an occupancy tenant surrenders his land to his co-sharer for valuable consideration it is not *ab initio* void but is voidable and the *lambardar* can get joint possession only on payment of contribution to the co-sharer who acquired it 94 I. C. 941 : 1926 Nag 345 . 22 N. L. R. 86 · 9 N L. J. 90.

——where the property mortgaged was fruit trees in occupancy fields and where the mortgagors were proprietors of the trees, the mortgage-deed was validly registered. 8 N L. J. 163 : 1925 Nag. 414 : 93 I C. 850

——in using the words 'without mere heirs" it was intended to give to an occupancy tenant a wide right of transfer. 21 N. L R, 144 : 1225 Nag 421.

S. 13.

——when a tenant surrenders, the subtenancy is determined and suit to eject the subtenant is a suit against a trespasser. 1923 Nag 1 : 6 N L J 224 73 I C 15

——the question of avoidance of transfer of occupancy or dinary holding is cognizable by Revenue courts, but the question illegality of document of transfer is cognizable by civil courts 50 C. 681.

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a st

im, the *lambardar* cannot apply under s. 13 to set aside the ansaction nor can he be put into possession by the Revenue ourt. 103 I C 818 1927 Nag 325

——when a co-sharer buys an occupancy holding he does it for is own benefit and is an outsider for the purpose of ejectment and in be ejected only on the application to the Revenue Officer nder this sec by the whole proprietary body. 100 I. C. 27 1927 Nag. 161

——the provisions contained in s 188 C. P. L. R Act are only nabling and it is perfectly clear that a transaction of the kind contemplated in s 13 of this Act enures until it is set aside in the method id down in the said provision and the following section. 108 I. C 878.

——when an occupancy tenant makes an unauthorised transfer f his holding the landlord's remedy is to apply to a Revenue fficer under s. 13, s. 105 bars a suit in civil court 89 I. C. 231 . 1926 Nag 177.

S. 15

——occupancy holding under this sec (old sec 49) is subject to ny contract between the parties and to conditions settled under s. 2 of the Land Revenue Act 42 I C. 292 . 13 N L R 179

——ss. 49 and 51 of the Act of 1898 must be read together and heir united effect is that private agreement, not inconsistent with the Act as to the rent payable is valid until the next settlement, when he rate of rent agreed upon is superseded by the rate fixed by the S. O 7 N. L. R 17 : 10 I. C 697.

S. 21.

——the mere purchase of standing crops by a stranger does not give rise to any cause of action to the landlord unless it comes to his notice that the purchaser was appropriating the crops. Some overt act is necessary [illegible] of appropriation 7 N

——a sub-tenant [illegible] reaped crops in such [illegible] village for arrears of r [illegible]

S. 25.

——planting orange trees is not a diversion of the holding to non-agricultural purposes so as to justify ejectment of an occupancy tenant, 15 N. L. R 60 50 I C. 987.

S. 28

——an ejectment of a tenent on legal grounds is binding on a sub-tenant and the sub-tenant is not entitled to any remedy not open to the tenant 11 N. L. R 105 29 I C 836

S. 30

——a tenant who makes an improvement, within the knowledge of his land-lord under a *bonafide* belief that he is a permanent tenant and the improvements are also beneficial to the other holdings of the landlord, the tenant is entitled to get compensation on ejectment 26 I. C 476

S. 33.

——a munsiff at the time of assessing compensation for an improvement of a holding should under rules of sec 33 take some assessors and if he does not take them, he commits an irregularity which however could be waived 26 I C 476

S 35.

——where an occupancy tenant [illegible]

[illegible]

the heir 14 N L R, 125 · 46 I C 32

——the object of sec 36 of the Act of 1898 is to defeat an expropietory tenant of sir who tries to circumvent s 45 (1) of the Act of 1898, which gives him occupancy rights 2 N L R 126 20 I. C. 920

——when a tenant transfers his occupancy holding and abandons possession of the same he must be taken to have abandoned his holding. 8 N. L. J. 52, 87 I. C. 115 . 1925 Nag 259

S 35 (4).

——an ordinary tenant is deemed to leave the holding uncultivated and the rent unpaid when he transfers the holding and leaves the village although it is cultivated by the transferee who is not a subtenant or the malguzar of any body else and the rent is paid in full. The act of the tenant is clearly an implied surrender. 1923 Nag 4.

S. 36.

—where an occupancy tenant surrenders the holding to a female Hindu heir who pays the surrendering tenant's liablities, she does so in her position as a Hindu heir and not independently of it. The tenancy right does not become her *stridhan*. 89 I. C. 44 · 1925 Nag. 306.

S. 37.

—the status of a person cultivating the proprietor's *sir* land
nger that of an
g. 35
Consequently a
id under the old
Act does not become a sub-tenant after the Act, 109 I C. 543

—the lessee of Malik Makbuza does not acquire the status of an occupany tenant under this sec. if he is not recorded as such in the papers of the settlement proceeding under the Tenancy Act. 107 I. C. 661.

S. 38.

—under s. 60 of the Act of 1898 an occupancy and ordinary tenant cannot grant a permanent lease and a sub-tenant of such tenant cannot acquire title by prescription. *53 I. C 212.*

—a sub-lease of an occupancy land cannot be made from year to year but it can be made for a term of one year only. 48 I. C. 948

—there is no presumption that a sub tenancy for a single year continues after the expiration of that year 103 I. C 713 1927 Nag. 320 · 23 N L. R. 148

—a sub-tenancy from year to year of a field of an absolute occupancy tenant does not create a presumption if there is no express agreement *and hence it cannot be terminable 14 N L R. 3:* 43 I C 392

S 41

—a lessee of an absolute occupancy holding if ejected by landlord can app[illegible] otherwise his tenancy expir[illegible]

—where [illegible] and time is fixed for the [illegible]rd, the Court can extend th[illegible] L R 114

—duty of the land-lord who is given notice of transfer, exercise of right of pre-emption 91 I C 290 . 29 N. L R 19 · 1927 Nag. 110

—the term premium means a payment made in lump when a lease is granted or renewed and should not be pressed so as to make it include what is ostensibly a merely periodical payment 59 I. C. 419

S. 45.

——if a covenant to relinquish *sir* lands is part of an alienation, the agreement to surrender will be void and unenforcible. 86 I. C. 515 ; 1925 Nag 302.

S. 45 (b).

——a Bhumak in the Chanda District of the Central Provinces is no longer a village servant but one who renders service to the Malguzar alone and his rights are not governed by Ch V. of the Act 14 N L R 152 46 I. C. 779.

S 45 (3)

——this sec. has no application to a case of devolution by death and, therefore sub sec 3 does not forbid the registration of a will by which *sir* land is bequeathed. This sec. does not take away the proprietary right to alienate the cultivating right in his *sir* land, it merely lays down a condition precedent 62 I. C. 246.

S 45 (5)

——where a renewed lease was granted to take effect after the expiry of the term of the lease for 5 years in respect of *sir* lands, in a suit for possession by the lessee after the expiry of the period [illegible] the Tenancy Act [illegible] nds on the loss of [illegible] lease could not be

S. 46

——effect of landlord's consent on partition of holding, surrender 69 I C. 359

——where the registration of a document is brought about by fraud the transfer is ineffectual. 97 I. C 1015 : 22 N. L. R 128.

——an oral sale of property of less than Rs 100 in value is not prohibitted 96 I C 353 1926 Nag 432 · 9 N L J 123.

——a holding granted to a *Mukaddam Gomastha* in lieu of service is village service holding. 101 I C. 693 : 1927 Nag. 208

S. 46 (1).

——the word "occupy" is not restricted to occupation in the the capacity of an occupancy tenant but extends at least to occupation of *sir* by a proprietor. 103 I. C. 178 : 1927 Nag 245

S. 46 (3).

——Mortgagee of trees in occupancy holding 70 I. C. 34.

S. 46 (5).

——where the deed of mortgage draws an explicit distinction between the occupancy land and the trees standing thereon, it implies that the trees are held under a different title from the land and the mortgage deed is not wholly invalid. 104 I. C. 843 : 1928 Nag. 41 : 23 N. L. R. 174

S. 47.

——where in 1903 the deft. started to cultivate an absolute occupancy holding belonging to and in exchange for his own but the record remained unchanged and each paid rent for the land he cultivated in the name of another till in 1917-18 the Settlement officer recorded each of them as the occupancy tenant of the land he was actually cultivating, held that if the arrangement was an out and out exchange it could not be set aside and if it was only an arrangement by each tenant for the cultivation of land by the other, it could not be interfered with 1923 Nag 144 83 I C 946.

S. 48

——a suit to enforce a charge created by this sec is not maintainable at the instance of a person who, at the date of the suit, was neither the sole landlord nor the representative of his co-sharers as well as himself for collecting rent. 63 I C. 352

S 49

——the mortgagor is entitled to remain in possession as occupancy tenant of all the land that is *sir* at the time of the passing of the final decree and not merely of that which was *sir* at the date of the mortgage 76 I. C 637 : 1924 Nag. 155.

——transfer of cultivating rights in *sir* lands can be effected only after obtaining sanction of the Revenue authorities and a sanction for sale does not exclude a mortgage, and a sanction by the Revenue authorities cannot be questioned by the Civil Court 94 I. C 829: 1926 Nag 343.

——on the transfer of a village under a mortgage the mortgagor becomes an occupancy tenant and is entitled to remain in possession as such of all the lands that were *sir on the date of the sale.* 105 I. C. 420 1928 Nag 100.

——where *sir* lands are mortgaged without sanction to transfer cultivating rights the mortgagor becomes on foreclosure occupancy tenant of the *sir* lands. The *lambardar* after surrender has no power over the same 78 I C 730 1924 Nag 281.

S 49 (1).

——where by two deeds of 1881 and 1884 some malguzari villages *including sir lands were mortgaged and in 1899 the mort-* [illegible] procee-
ed the
[illegible] irbitra-
within
[illegible] whole
of his rights under the deeds of 1881 and 1884 against seven of the mortgaged villages mentioned in the award the rest of the mortgaged properties being released, and default in payment having occurend a final decree was made in 1910 and the mortgagees claimed possession of the *sir* lands, held that the award of 1905 was a fresh origin of rights between the parties and the mortgagors had occupancy lands in the *sir* lands, of seven villages. 46 C. 76 : 24 M. L. T. 345 : 14 N. L. R. 165 : 43 I. C. 141 P C.

S. 49 (1)—*contd*

——an ex-proprietor whose rights in a village are sold in execution of a decree has only the status of an occupancy tenant of *sir* land unless the decree expressly directs the sale of his rights therein. 55 I C 573

——the combined effect of ss. 49 and 51 is to make the occupancy tenant liable for the rent fixed at the settlement for the term of the settlement 89 I C. 741 1925 Nag 452.

——a permanent lessee of thikadar is not a proprietor within s 49 and does not retain any interest as an occupancy tenant in the *sir* land on the termination of the lease. 8 N. L J 44. 21. N. L. R. 133 : 87 I C 253

——a mortgagor is entitled to remain in possession as occupancy tenant of all the land that is *sir* at the time of final decree. 76 I C 637

——where the defendants sold to the plff their share in a village *reserving the occupancy rights in the sir lands and on the same day* executed another deed by which they surrendered their occupancy rights in the *sir* land accrued to them by virtue of the sale, held that the mere fact of possession having been delivered to the plff. did not suffice to separate the transaction of surrender from that of sale and the surrender was void 54 I C 794.

——the provisions of sec 49 (1) relating to the lapsing of tenancy rights granted by an ex-proprietor in the *sir* land cannot have retrospective effect on the tenancy rights created by him before the passing of the Act. 89 I C. 752 1925 Nag. 249

——the latter portion of sub-sec 1 of sec. 49 cannot have retrospective effect 6 N. L J. 227 19 N. L R. 110 1923 Nag. 227. 72 I C. 438.

S 49 (2)

[illegible] case of [illegible] does not [illegible] thed. 4 N. L J 44, [illegible] I C 450

——a relinquishment in favour of reversionary heir by a Hindu widow of the whole estate inherited from her husband including *sir* without reservation of the cultivating rights does not require permission from the Revenue officer and its registration cannot be refused for want of that 102 I C 30. 1927 Nag 394

S. 49 (3).

[illegible]

——a mortgage decree for sale should expressly direct the sale and not leave this to be inferred. 57 I. C. 177

Ss. 50 and 70.

——when a sale of a holding is prohibited under s 71, the alienee in possession is entitled to claim compensation from the

Ss. 50 and 70—*contd*

plffs. before the ...
sion and sough ...
deration paid

——uncondi
in sir by Financial commissioner can be used in favour of any man. 58 I. C, 28.

S. 60.

——under this sec. a lease for a period exceeding one year granted to a sub-tenant by an occupancy or ordinary tenant is invalid even if it was consented to by or on behalf of the landlord Such lessee is not entitled to notice to quit. 59 I C 461

——sec. 60 does not apply to contracts entered into before the passing of the Act. 18 N. L. R. 85 · 1922 Nag 227

S 62.

——it is not incumbent only on the tenant whose lands have been acquired under the Land Acquisition Act to take initiation in having the rent reduced under this sec It is also open to the landlord to do that, so a decree for whole rent cannot be passed against the tenant 106 I. C. 665 : 1928 Nag 143

S. 65.

——this sec. does not apply to sub-tenants and the tenure of the sub-tenant is governed by the terms as settled between him and the tenant from whom he holds the land 108 I C 881 1928 Nag. 149.

S. 67, 97.

——a suit to eject a tenant under s 67, is triable by the Revenue Officer only under sec. 97 A civil court has no jurisdiction. 61 I. C. 593

S. 68

——where there are two rival claimants to the title of the landlord and the tenant entertains any genuine doubt as to whom the payment should be made, an easy way of escape is provided for him by s. 68. 1927 Nag. 237 101 I C 647.

S. 75.

——a decree for arrears of rent is not an arrear of rent within cl. (3) of s. 75. 96 I C. 1027. 1926 Nag. 352 22 N L R 63

S. 83

——the test of determing whether an appeal lies from a decree under s. 81 of the Act of 1898 is the nature of the suit as originally framed and not the form it may assume subsequently 56 I C 845

——to have a right of second appeal in a suit for rent for less than Rs. 100 there should be an adjudication between persons impleaded as parties to the suit and having conflicting interests. 47 I. C. 610

S 89

——a surrender by a Hindu widow operates only on the widow's interest in the holding and the surrendering Hindu female should be treated as dead as it were by a fiction of law unless the surrender may be deemed to be in the best interests of the estates which she represents 8 N. L J 14 . 1925 Nag 124.

——a suit by a reversioner to set aside a surrender by a Hindu widow is maintainable only on the ground of frand In the absence of frand the only remedy of the reversioner is to attack the surrender as a transfer under s 13, 103 I C 801 1927 Nag. 330

——a claim for partition of a holding and for separate possession of the share of the tenant based on the allegation of abandonment or implied surrender of an undefined share of the holding is not sustainable. 13 N L R 175 42 I C 270.

——there is no abandonment or implied surrender where a person has either paid rent or tendered it *above case.*

——s 89 (1) provides only for the case when the tenant wishes to put an end to his tenancy without reference to the wishes of the landlord, but the tenancy may be terminated otherwise at the desire of the contracting parties. 105 I C. 495 1928 Nag 70 · 24 N L. R. 3, 103 I C 713 1927 Nag 320 23 N L R 148.

——the doctrine of implied surrender in s 34 (4) of the Act of 1898 is intended to apply to normal circumstances where the landlord of the person put in by him, holds adversely to the tenant, 48 I. C 623

——there can be no implied surrender according to s. 35 (4) of the Act of 1898 without the knowledge and intervention of the landlord 43 I C. 180, 7 N L R 8 10 I C 692

——if an occupancy or ordinary tenant abandons his land or dies the landlord need not wait for two years before introducing some one else as tenant 49 I. C. 219.

——s. 35 (4) of the act of 1898 has no application where the case is not one of voluntary inaction on the part of the landlord *48 I C 188 14 N L R 178*

——a mortgage of the tenancy right is annulled by operation of law on the extinguishment of the tenancy right. 14 N L. R. 107 · 46 I C 224.

——sec. 94 of the Act of 1898 has no application to a case where the deft. took possession in 1909 *qua* mortgagee and not *qua* lambardar. 45 I. C. 184

——a lessee of the ordinary tenant right in *sir* lands has no right to will away the tenancy right and s. 94 of the Act of 1898 is not applicable where the ouster by the lessee from the holding is not at the instance of the landlord. 47 I. C. 28.

——surrender of undivided share by co-tenant is valid when the co-tenant's sons succeed and are accepted by the landlord. 1925 Nag. 124 · 22 N L. R. 17

——the surrender of an absolute occupancy tenure by a Hindu widow cannot be questioned by a reversioner. 9 N. L. R. 126 : 20 I. C. 920.

S. 89—*contd*

——a Hindu widow can surrender a tenancy without the consent of the next reversioner. 95 I. C. 456 : 1926 Nag 431, (1925 Nag. 306, 21 N. L. R 62) *fol*

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I. C. 759.

——where an occupancy co-tenant surrenders his portion of the holding and the landlord recognised his sons as tenants the arrangement is valid 80 I C 734

——a surrender made to two of the co-sharer without the intervention of the *lambardar* is only a transfer and is not a surrender. 89 I C 51 · 1926 Nag 178.

——when a co-sharer takes a transfer of an occupany holding for consideration, the other co-sharers can ask for joint possession without contribution 93 I C 106 · 1926 Nag. 310

S. 92.

—— ne a tenant of the pr us Where there has and suit for wrongful

——where a landlord ejects the plff who is a tenant and the latter sues the landlord as a trespasser, the form of the pleadings does not alter the real nature of the case and it is open to the court to take notice of the true portion of the pleadings of the parties. 58 I. C. 966

S. 95.

——the right of a tenant to the portion of the trees in his holding cannot be acquired by *malguzar* by prescription. 109 I. C. 53

S. 97.

——the prohibitions of attachment of trees apart from the land does not apply where the trees and the land belong to different persons 19 N. L. R 150 : 77 I. C. 620 1924 Nag. 42.

Ss. 100 and 105

——a village service tenant cannot maintain a suit for possession in the civil court alleging that he had been ejected by the landlord. 5. I. C. 1920, 1923 Nag. 51 : 71 I. C. 48

——civil court's jurisdiction is not ousted by ss. 100 and 105. 18 I. C. 126 : 1925 Nag 383.

S. 104

——the special period of limitation prescribed by s. 94 (1) of the Act of 1898 applies only to cases in which the ejectment is by the whole body of proprietors or by the Lambardar representing it and not to cases of ejectment by fractional cosharer in the village acting on his own account 28 I C. 250, 7 C. W. N. 542, 28 C 127 *Ref.*

——"ejectment" means a dispossession that is to say, a loss of possession through some act of deft 11 N L R 8 : 27 I. C. 864

——the proviso to sec 93 (3) of the Act of 1898 is retrospective and governs all claims for arrears of rent to which its terms are applicable from the moment of its passing, as the right to arrears of rent does not accrue under the Tenancy Act but under the general Law of Contract, 7 N L. R 125 : 11 I. C 912

——s 104 and sch II Art 1 apply to suits by person claiming to be a tenant whether against the landlord or any other person. 92 I C 708 1926 Nag. 289

S. 105

——a suit for possession of land of which plff. is occupancy tenant, by operation of law, upon the sale of the proprietary rights in sir, is a suit between landlord and tenant and cognizable by a Revenue Officer, though plff has not obtained possession of the land as tenant and has not been recognized as such by the landlord. 54 I C 827

——a suit for possession on the allegation that the possession of the landlord is due to a sale by an unauthorised guardian of the tenant, is cognizable by the ordinary Civil Court. 19 I C 759 : 9 N. L R. 54

——a suit based on trespass does not fall under C P. T. Act and is cognizable by Civil Court, 1 Pat. L J 625 · 3 Pat. L. W. 77. 39 I C. 98

——the nozorana paid or agreed to be paid as price for the grant of a lease is rent and a suit therefor is not cognizable by Small Cause Court 9 N L. R 94 : 20 I C. 261.

——where the land has been recorded rent free and held without payment of rent and the tenant claims it to be held rent free s. 105 (2) applies and the suit is removed from the cognizance of the civil court. 1922 Nag 207.

——the Revenue Court has the exclusive jurisdiction in case of transgression of special provision under ss 12 & 13, but where the transfer is bad under the general law the jurisdiction of the Civil Court is not excluded. 101 I C. 822 : 1927 Nag 226.

S. 106.

——a suit for recovery of possession by tenant illegally ejected

[illegible]

S. 106—*contd.*

——under s 106 suits for arrears of rent are to be heard by a Judge who is also a Revenue Officer. 90 I C. 279 : 1926 Nag. 212.

S. 109.

——the rights of tenants to sue in Civil Court under specific Relief Act s 9 for possession or to apply to a Revenue Officer are alternative remedies 88 I. C. 126 . 1925 Nag 383.

Sch II Art 1

——the word "tenant" does include an absolute occupancy tenant. 1926 Nag 61 92 I C 62.

——the words "possession" and "person" do not comprise a claim for "joint possession" nor do they include a dispossession or exclusion from possession by a co owner or co-tenant, 1928 Nag 96 ; this Article is applicable to the lessee of an absolute occupancy tenant 108 I C 785 1928 Nag 178.

——the word "holding" means "holding" or portion thereof. 93 I. C. 110 1926 Nag 305 · 22 N L. R. 46 ; 92 I C 824 : 1926 Nag. 387.

——there is no reason for holding that Art. 1 of sch II refers only to an entire holding and not to a part of a holding It applies to cases of dispossession of either part 78 I C 214.

——where in a suit in ejectment regarding an occupancy holding the plff admits that he had no possession within two years his suit is barred. 80 I C 355.

——a suit to enforce a mortgage does not come within the purview of this Art 9 N L J 229 : 99 I C. 445 1927 Nag 119.

——adoption by a Hindu widow,-inference of abandonment of holding,-no dispossession or exclusion. 98 I. C 537 1927 Nag. 76.

Sch. 11 para 1.

——*the words "by any person" in sec. 11 para 1 are not* confined to a person claiming under the landlord and are wide enough to include a trespasser. 78 I. C. 743 : 20 N. L. R. 103 : 1924 Nag. 249

——where the license has been granted by a tenant and then the tenant surrenders to the landlord, the license comes to an end. 87 I C. 823.

——the period [illegible]
applies to a suit [illegible]
part of the holding [illegible]

——Art 1. [illegible]

——Art 1 applies to dispossession of a tenant by any person whether landlord or not. 1925 Nag 127.

CERTIFICATE, see "*admissibility*"

CHAKRAN LANDS.

——where the service tenure-holder refuses to perform the services he is liable to be ejected however long he might have held the land. 4 C. 67

——tenant holding a service-tenure cannot acquire a right of occupancy. 4 C. 67.

Chakran lands—*contd.*

——service tenure may be resumed when services are no longer required or the tenant refuses to perform the services 22 C 938, 22 C. L. J 403, 22 B 422. But when the grant is for services of public nature Zamınder cannot at his option put an end to it 10 C. W. N 161 : 3 C L J 1 P C.

——s 155. B T Act does not apply and is liable to be ejected without notice 1 C L J 16 n 2 C. L. J. 403, 3 C. L. J 274 : 33 C. 339

——service-tenure-holder can be ejected otherwise than in execution of decree, 25 C. 131

——co sharer cannot eject partly. 31 C. 786 : 8 C W. N. 325.

——right of occupancy cannot be acquired under service tenure. 23 C W N 136, 11 C W N 46 . 5 C. L. J. 53, so no notice to quit is necessary 2 C L J 403

——right of occupancy may be acquired in choukidari chakran land. 31 C. 1021.

——resumed choukidari chakran land being transferred to the proprietor, old estate continues and the zaminder is not competent to make a new settlement ignoring the putnidar's right 28 C L J 160 , this case follows 25 C L J 499 P C which *overruled* 33 C. 596 5 C L J 299 which was doubted in 34 C. 109 : 5 C L J 33 and 13 C L. J 102

——when service tenure-holder repudiates title of the landlord, he is liable to be ejected without notice and the suit comes under Tr. P. Act But before suit, the landlord must do some act showing intention to determine lease 33 C. 339 3 C. L J 274, 2 C. L J. 403 *ref*

——chakran or service tenure does not cease to be so by the fact that some wages are paid, in addition, to the tenant, 31 C. W. N 552 : 103 I C 542 : 1927 Cal. 561

——when the service tenant renouces his character as such and denies the title of the landlord to resume the land the lease is determined and no notice to eject is necessary So also no notice is necessary in Bengal when the grant is proved to have come into existence before the T. P. Act. *above case.*

——in case of a grant of private or personal service the zaminder is entitled to resume when the service is not required or when the grantee refuses to render service *above case.*

See other cases under "Choukidari Chakran lands"

CHAMPERTY

——the English law of champerty is not in force in India Agreement to share the subjects of litigation, if recovered, in consideration of supplying funds to carry it on, are not in themselves opposed to public policy. But if they are extortionate and unconscionable, effect should not be given, reasonable compensation for work done and expenses properly incurrred should be awarded 20 C. 843 : 20 I. A. 127, P. C., 2 C. 233 P. C. (15 A. 352 . 20 I. A.

Champerty—*contd.*

127 P. C., 11 C. L J. 268. 3 P. 402, 8 B. 323, 9 A. 476, 11 A. 57, 23 M. 449 *Ref* I. L R 1 Lahore 124.

——though the rule of champerty and maintenance does not prevail in this country in its entirety, still a conveyance of property, which tends to foster and promote gambing in litigation is void as being clearly unconscionable, speculative and opposed to public policy 31 C 433 8 C W N. 408.

——Champerty is not void in India unless the transaction is not a *bonafide* one for the acquisition of an interest in the subject of litigation but an illegitimate transaction got up for the purpose merely of spoil, or of litigation, disturbing the peace of families and carried on from a corrupt and improper motive 59 I. C. 10

——when the assignor is out of possession, needy and unable to prosecute his claim against trespasser, the sale is valid and not gambling in litigation 9 C W. N. 477. 27 A. 271: 32 I. A 113, P C.

——champertor may apply to be made party with the object of preventing his interst from being prejudiced. 3 C. W N 754

——an agreement, providing that some portion of the purchase money was to be paid in advance and the balance when the property would be recovered, was generally of a champertous character, but was not void on that account nor was it opposed to public policy and void as such 12 C. W. N 393, P C.

——agreement with champertor not to compromise suit, is enforcible 14 C W N 191. 32 I C. 113 · 9 C. W. N. 477, P. C. *Fol*

——transfer by person of a share of his claim with respect to property of which he is not in possession is valid and operative. 14 C W N 191

——in India there is no law of champerty and indigent persons can make over property to which they lay claim to some other person who is prepared to pay the costs of litigation. If after such an arrangement the vendor backs out, the vendee can only sue making the vendor a deft. 80 I C. 285.

——an agreement to finance a litigation in consideration of getting a share out of the property, if recovered, is not, in all cases opposed to public policy. But if the value of the share to be got is out of all proportion to the money spent or to be spent for litigation the bargain becomes unconscionable and he cannot get any relief. 89 I. C 229.

——legality of champerty. 48 M. 230: 1924 I. C. 162 P. C.

Charge, see *T. P. Act, s. 100*

CHARITABLE AND RELIGIOUS TRUSTS ACT
(14 of 1920)

S 3

——the Ch[illegible]

a case w[illegible]
claiming[illegible]
not prop[illegible]
produce t[illegible]

——persons who are not liable under s. 3 are not proper parties. 1925 Cal 537

——in an application under s 3 notice must be given *to all the* true trustees 84 I C 733 (1924) 17 M. W. N. 515

——this Act is intended to provide more effectual control over the administration of charitable and religious trust and provision is made for obtaining an order calling on the trustee to give particulars of the object of the trust and if the trust is denied to file a suit There is no such provision in the Mussalman wakf *Act. of* 1923. 101 I C 207 1927 Pat 189 8 P L T 233.

S. 10.

——under this section the deft has the option either to deposit money or to furnish security 69 I C 658.

CHASTITY, see '*Hindu Law and Mahomedan Law of Inheritance*'

CHELA, see '*Hindu Law Chela*

CHOTA NAGPUR ENCUMBERED ESTATE ACT.
(VI of 1876).

Scope and applicability of the Act.

——the statute having no application to lands situate outside the limits of Chota Nagpur cannot prevent a mortgagee from enforcing his rights in courts of Ordinary Civil Jurisdiction, Political or Administrative considerations determine the scope of the Act. A statue of this description must be strictly construed 16 C. L. J 527 17 C W N 754 17 I C 957.

——this Act has no application to immovable property outside the limits of Chota Nagpur. So a manager appointed under the Act has no power to reduce the rate of interest provided by a mortgage of land not situated with Chota Nagpur 46 C 1: 16 A L J. 569: 5 P. L W 04 28 C L J. 165: 22 C W N. 1009: 45 I. C 827 P. C. 49 C. L J. 331 82 I. C. 886 1925 Cal. 116.

——the language of the Act is obscure 40 C L J. 331: 82 I C. 886: 1925 Cal. 116.

——the object of the Act is to relieve embarassed landholders in Chota Nagpur. 40 C. L. J. 331. 82 I. C 886. 1925 Cal 116.

——the amending Act of 1922 merely relates to procedure, so it cannot have retrospective effect. 99 I. C. 959: 1927 Pat. 105: 8 Pat L. T. 189.

S. 2.

——a vesting order under this section has not the effect of barring the institution of suit against the estate: 105 I. C. 643: 1928 Pat. 179 · 7 Pat. 109.

Ss. 2, 3 and 21.

—s 21 B, does not restrict the provisions of sec. 3. It refers to suits and not to proceedings referred to in s. 2 A. 1923 P. 85 : 6 Pat L J. 685 65 I. C. 283

Ss. 2, 12.

—when in a mortgage suit against several defts, one is struck out under s. 2 the plff. can revive his claim as against that person, if under s 12 he is restored to possession and enjoyment of the estate 63 I C. 743 6 Pat L J. 328.

S. 3.

—the liability in respect of which protection is accorded under the Act, is a liability to which the holder of the property or his heir is subject. If the proprietor is not the holder of the property then he does not come under the Act. To be holder of property [illegible]

Pat. 480 1928 Pat. 457.

—the word "barred" in sec. 3 means "stayed" 6 Pat L. J 328. 63 I C 743.

—s 3 contemplates the existence of an heir of the holder of the property under management under the Act. Any contract by an heir during the life-time of the holder involving either of them in pecuniary liability is bad 32 I. C. 937.

—when usufructuary mortgagee from proprietor gets a decree for rent against tenant the decree cannot be executed after the estate is vested in the Manager. 96 I C 587 : 1926 Pat. 524. *But this decision has been reversed in* 1928 Pat. 153 : 6 Pat. 742.

S. 3, Cl (1)

—the effect of clause (1) disappears when the order passed under s 2 itself is cancelled by a subsequent notification. 94 I. C. 624 · 1926 Pat. 260 5 Pat. 404.

S 3 cl (3) (c).

—in an application under the Act, it does not matter if the particular liability has not been mentioned as debt and liability, as sec. 3 means all debts and liabilities' of the holder of the estate taken charge of other than the debts or liabilities incurred to Govt. 7 C. L J 578, 20 C. 609, 33 C. 1065

—contract by person subsequently declared to be owner of encumbered estate is void. 7 C L J. 578

Ss. 3, 7, 18

—an agreement to lease which is not assented to by the manager of an estate cannot be enforced in a court of Law, though other offices in the estate have negotiated the same. 3 Pat. 625 :

CHARITABLE AND RELIGIOUS TRUSTS ACT (14 of 1920)

S 3

——*the Charitable and Religious Trusts does not cease to apply to* a case where a trustee has parted with all the trust property. Persons claiming adversely to the trust and who are not liable under s 3 are not proper parties to an application for directing the trustee to produce the accounts 78 I C. 174

——persons who are not liable under s. 3 are not proper parties. 1925 Cal 537

——in an application under s 3 notice must be given to all the true trustees 82 I C 733 ; (1924) 17 M W. N. 515.

——this Act is intended to provide more effectual control over the administration of charitable and religious trust and provision is made for obtaining an order calling on the trustee to give particulars of the object of the trust and if the trust is denied to file a suit There is no such provision in the Mussalman wakf Act, of 1923. 101 I C 207 1927 Pat 189 . 8 P. L. T. 233.

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[illegible] and pecuniary l [illegible] and liabilities t [illegible] y debts and liabilities included in the statement in writing of the proprietor. 7 Pat. 480: 1928 Pat. 457.

——the word "barred" in sec. 3 means "stayed." 6 Pat L. J 328: 63 I C. 743

——s 3 contemplates the existence of an heir of the holder of the property under management under the Act. Any contract by an heir during the life-time of the holder involving either of them in pecuniary liability is bad. 32 I. C. 937.

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Ss 3, 7, 18.

——an agreement to lease which is not assented to by the manager of an estate cannot be enforced in a court of Law, though other offices in the estate have negotiated the same. 3 Pat. 625:

S. 41

——an under raiyat is distinct from non-occupancy raiyat, provisions dealing with tenants generally can be applied to under-raiyats. Under-raiyati tenancy being ordinarily from year to year no notice in writing is necessary. 40 C. 858 ; 17 C. W. N. 810 : 19 I C. 588.

——a *thikadar* is entitled to make an ordinary settlement with tenants under the Act and confer the status of non-occupancy raiyat on them. On the surrendar of *Thika* the landlord can eject a raiyat on the ground stated in sec. 41 and on no other ground 3 Pat L W 333 : 39 I C. 521

——where a tenant is admitted into the Land under a registered lease for a term, he can be ejected upon the termination of that period 110 I C. 494 · 7 Pat. 675.

S 46

——inspite of prior sale or mortgage by a raiyat he is free to exercise his right of surrender of his holding in favour of the landlord, for under cl. (2) of sec. 46 no transfer by a raiyat of his right in his holding or any portion thereof is binding on that landlord unless it is made with his consent in writing. A fraudulent surrender confers no right on the landlord 2 Pat 898 ; 75 I. C. 209. 2 Pat L. T. 562.

——a surrender for valuable consideration is valid. 75 I. C 601 · 1924 P. 793

——inspite of prior sale or mortgage by a raiyat he is free to exercise his right of surrender of the holding, for under s. 46 (2) no transfer by a raiyat is binding on the landlord unless it is made with his consent in writing. 2 Pat. 898. 4 Pat. L. T. 562 ; 75 I. C. 209.

——an application for the ejectment of an under tenant is cognizable by the Deputy Commissioner and not by the Civil Court 97 I. C. 175 ; 1926 Pat. 403 ; 1926 P H. C C. 288 ; 6 Pat. 69 If the claim made by the landlord is such that he cannot ask the Deputy Commissioner to intervene then the jurisdicton of the Civil court is not ousted. 108 I. C. 887 ; 1928 Pat. 232. (9 W. R. 513, 14 C. W. N. 237, 23 I. C. 407) *fol.* 1926 Pat. 403 *Dist*

——s. 46 of the Act as amended by Act of 1924 shews that it is intended to have retrospective effect except as regards transactions after 1903. 1928 Pat. 109 . 8 Pat. L T 850 ; 105 I. C. 33.

Ss. 46, 47.

[illegible] ..o, 1909
ex [illegible] ended
th [illegible] Pat.
53.

——the house and homestead land of an insolvent cannot be sold by the official receiver owing to the provisions of ss 46 and 47 of the Act. 1927 Pat. 353 ; 8 Pat. L. T. 669 ; 106 I. C. 298.

S. 47.

—when between the dates of a preliminary and final decree of a mortgage of properties situ... Tenancy Act is extended to ... gaged property in execution by ... C 117.

—this sec. is not retrospective and a suit can be brought to enforce a mortgage by sale of a raiyati interest executed in 1906 4 Pat L. J. 411 : 50 I C. 515.

—an objection to the sale of raiyati right in execution of a mortgage decree may be taken after the passing of the Act and the executing Court must determine the question. 1 Pat. L. J. 33 · 34 I C 733 : 3 Pat. L. W. 399. 40 C. 534 Ref.

—application by the Jt. Dr. to set aside a mortgage sale after the lapse of one year is barred by s. 231 of this Act if not under Art. 166 of the L Act. 20 C W. N 1243 : 32 I. C. 683 · 3 Pat. L. W 57.

—the sale of the raiy... invalid even if the deft di... effect in the suit. Such obj... proceeding. 7 Pat. 178 · 107 I...

S. 50

—where the application of the landlord under s 50 is rejected but the denial of the relationship of landlord and tenant is not the ground thereof a mere denial by the tenant does not make him liable to forfeiture of his holding, 97 I. C. 123 . 1926 P. H. C C. 332 : 1927 Pat. 57 : 8 Pat L. T. 171

Ss 51. 177.

—when the tenant pleads payment to third party he should be made party under s. 177 and the suit should be decided after going into the question of the *bonafide* payment by the tenant. 41 I. C 191 . 2 Pat. L. J. 286 . (1917) Pat. 189.

Ss. 52, 234.

—under these secs. rent falls due on the last day of each quarter of the agricultural year. A suit for arrear should be brought within three years from the end of the agricultural year. In case of apportionment of rent by co-sharer landlord the right to recover rent is deemed to be held in suspense till a decree is passed. 59 I. C. 314

Ss. 59, 79

—Ss. 59 and 79 do not apply to cases of permanent tenure and therefore a stipulation therein that the lease will be cancelled for non-payment of rent, is valid one. 17 C. W. N. 1068 20 I. C. 294

Ss. 63, 215.

—an order under this sec. comes under s. 215 and an appeal from such an order lies to the officer named therein. 7 Pat. 421 : ... Pat. L T 496 : 108 I. C. 556 : 1928 Pat. 370.

S. 64 (3)

——a suit by the maliks and mundars khunt kathidars of a village to eject the tenants of adjacent village from the lands in the former village reclaimed by the tenant must be brought within 2 years from the date of reclamation, 105 I. C. 58 : 1928 Pat. 87.

Ss. 64 (3), 67

——under s. 67 a raiyat who cultivates or holds lands which have been converted into *korkar* by him or any member of his family, has a right of occupancy therein. 2 Pat. L. T. 635 : 63 I. C. 783

——deft. wrongfully
the plff by the Govt
over for more than 20
from Govt becomes occ
plff. 38 I. C 478.

S 68.

——the word "decree" in this sec. should not be read with the expression passed under the Act. 23 I. C. 408

Ss. 71, 139, 139 A

——sec 139 A of the Amending Act has no retrospective effect barring the Civil Court to take cognizance of a suit by tenant to recover possession when the cause of action arose before that Act 97 I C. 608 1926 Pat 561 · 1926 P H. C C. 293 8 Pat. L. T. 397.

——ss. 139 A and 139 (5) of the Amending Act VI of 1920 have
of purely possessory
ivil Courts and restore
1927 Pat 203 : 6 Pat.
[illegible]

Ss 71, 217

——where the landlord turned out a transferee of a nontransferable holding as a trespasser and he was restored to possession by Deputy Commissioner and the landlord moved the High Court, held in cases falling under s. 217 of the Act where the Legislature has deliberately placed the power of revision in the hands of the Revenue authorities the H C. should not usurp that power until it has been shown to be abused 43 I. C. 933 3 P. L. J. 143 : 3 Pat. L. W. 281.

S 72.

——in case of surrender by tenant the landlord takes it free from incumbrance under s 2 of the Act. 75 I C. 209.

——this sec leaves the power of surrender unhampered by the existence of any incumbrance over the property. 1924 P. H. C. C. 117.

——sec. 72 is similar to sec. 86 of the B. T. Act with the exception of Cl. (6). 1924 P. H. C. C. 117, 2 Pat. 898 : 4 Pat. L T. 562 : 75 I. C. 209.

S. 74.

—sec. 74 has no retrospective effect, as it affects substantial rights of parties. 82 I. C. 988 : 1924 P. H. C. C 307 : 6 P. L. T 144 : 1925 Pat 297.

—surrender of land by the raiyat entitles the landlord to enter on the land without bringing a suit against the under-raiyat. 110 I. C. 98.

Ss. 77, 218.

—where the right of nomination of the ghatwals rests with the Govt. and not with Raja, a ghatwali tenure cannot be sold in execution of a decree for arrear of rent. 1 Pat. L J 601 . 36 I. C. 963 : 2 Pat L. W 427.

—a person in possession of ghatwali lands for 10 years prior to the passing of Act VI of 1908 does not acquire occupancy rights as s. 77 prevents such acquisition. 1924 P. H C. C. 304 : 84 I C. 383 6 P. L T. 534.

Ss. 80, 127, 132.

—entries in Record of Rights are correct until disproved if the Record is made by notification under s 80 but they are conclusive if the Record is made by notification, under s 127. The rights and obligation of tenants, once they are ascertained cannot be questioned by any civil court 1919 Pat 147 . 50 I C. 454, 99 I C 492 1927 Pat 97 . 9 Pat L T. 239.

S. 81.

[illegible] mortgagee is usual to in evidence.

S. 81 cl. (4).

[illegible] mine not yet which may L J. 239 : 17

Ss. 81, 83, 87, 254.

—under sec. 83, the Settlement Officer has jurisdiction to decide [illegible] to whether the latter [illegible] ry to the effect. When [illegible] t came into operation [illegible] r of the tenant being [illegible] er execution purchase.

S. 83.

—the presumption of correctness arises only with the finally published record of rights, but to rebut the presumption the proceedings which resulted in the final record such as *draft records* of what took place after attestation stage, are admissible in evidence. 2 Pat. 814 : 1924 P. 248.

Ss. 83, 87.

——a Settlement officer has jurisdiction to record a tenant as Mundari Khuntkatidar in a settlement proceeding on deciding a dispute between the tenant who claims to be Mundari *khuntkatt* tenant and the landlord says he is not 20 C. W N. 583 ; 34 I. C. 385

S. 84.

——an entry in the Record of Rights has only a presumptive value under s. 84 Cl (3) and an appellate court is not bound to receive in evidence the record of rights published after the institution and decision of the trial court. 3 Pat L. T 104 : 1922 P. 28.

——where the *khewat* entry is non-resumable *doami thika* and it is not proved that the tenure is not a cultivating tenancy in which *doami* may arise or where it is proved that it is such a tenancy, there is no presumption that it is non-permanent and resumable like a tenure of the farming class and the plff. is to rebut the entry in the Record of Rights. 9 Pat L T. 379.

Ss. 87, 224 (2), 264 (3).

——'decision' in sec. 87 is not synonymous with 'decree' and therefore s 100 C P. C. does not apply to the decision of an appeal under s 87. No second appeal lies from decision in a suit under s 87. 5 Pat L J. 697. 1 Pat L. T 705 : (1920) Pat. 302 : 58 I. C. 434. 1923 P. 135, *contra* 40 I C. 891.

——there is no second appeal from a decision under sec. 87. 1923 Pat. 135, 39 C 261 · 16 C W. N. 294 ; 15 C. L J. 145 · 13 I. C. 193. 1 Pat L. T. 705 : 58 I. C 434 . 5 Pat. L. J 697, *contra*. 40 I. C 892.

S. 87, 258, 264 (6).

[illegible] appointment [illegible] within [illegible] Revenue [illegible] rial of a [illegible] rty who [illegible] of the [illegible] 591.

——though sec. 258 has the object of securing to some extent finality for any order or decree of any Deputy Commissioner or Revenue Officer in any suit or proceedings under s. 87 the section does not say, as it might have done that no court shall try any issue already decided by such a decree so as to bar a deft. in a suit brought against him, from raising the issue. 70 I. C. 232 : (1921) Pat. 369.

S. 88.

——an ijaradar cannot claim any sort of tenancy in the *man* lands and on the expiry of the lease he is not entitled to retain possession of them and no notice is necessary to eject him. 64 I. C. 695 : 2 Pat. L. T. 777.

S. 89.

——all orders whether by *Khanapuri* or Attestation Officers passed before the final publication of the Record of Rights are subject to revision under s. 89 and subject to that the order is final. 90 I. C. 489 : 1926 Pat 64.

S. 91 (1).

——a plff. can obtain relief under s. 91 (1) only when waste or damage has actually been committed and even then he can only prohibit the commission of further waste or damage and cannot obtain an order for injunction or for the appointment of a Receiver. 17 C. L. J. 239 . 17 C W. N. 408 17 I. C. 490

Ss. 127, 128, 132, 133, 178

——a decree for ejectment for non-payment of arrears of rent passed under s 178, against a raiyat who has *Khunkutty* right, is without jurisdiction. Record of *Khuntkutty* in the survey khewat means that the person is a tenure-holder and not a raiyat A person seeking to set aside a decree on the ground of want of jurisdiction must produce the requisite materials A record of right duly published under s 128, is conclusive evidence under sec. 132 2 Pat L. T. 638 63 I. C 764.

S. 132.

——the provisions of sec. 132 relate only to *Khuntkutti* lands and under s 83 (3) a record of rights is not a conclusive proof of any tenancy right. 3 Pat. L. T. 107 . 1922 P 28.

Ss. 135 (5), 139.

——sec. 139 draws distinction between suits and applications The word application in the sec. refers to certain summary procedure. How to construct a tenure discussed 1928 Pat 131

S. 139

——*Prodhan* is neither occupancy raiyat nor non-occupancy raiyat. He is a *quasi* service tenure-holder. Deputy Commissioner has no jurisdiction under the Act to try a suit to eject a *prodhan* brought by the landlord. S. 139 cl. (b) provides for suit between rival claimants 1918 Pat. 65 5 P. L. W. 199 : 45 I. C. 72

——the words 'suit and application' in this Act are not interchangeable A suit under sec. 9 Sp. R Act to recover possession of land from which tenant has been unlawfully ejected by landlord is not barred by sec. 149, 13 C L. J. 250 · 15 C. W. N. 387 : 9 I. C. 478.

——under s. 139 a suit to oust non-occupancy raiyat holding over after the expiry of a lease is not cognizable by any civil court but by the D Commissioner. 2 Pat. 746 . 77 I C. 587 : 1924 P. 267.

——s. 47 of the C. P. C. does not apply to decrees passed and executed and sales held under the Rent Act. 4 Pat. L. J. 715 : 52 I. C. 711 ; (1919) Pat. 354.

S. 139—*contd.*

——s. 139 (2) and (4) do not bar jurisdiction of civil courts in a suit under the provisions of general law for ejectment of an under-raiyat by a raiyat. 23 I. C. 407.

——under cl (2) a suit will lie in a Revenue court for apportionment of rent against a tenure-holder who is not an agricultural raiyat but the rent should be payable for agricultural land 97 I. C. 789 192 6Pat. 527 : 7 Pat. L. T. 641 : 26 Pat. 48

——In the finally published Record of Rights it was entered that rent was payable in kind and also small cash payments in addition. Jurisdiction of the Revenue Officer commuting the rent could not be ousted by a suit in the civil court. 23 C. W. N. 372.

——under cl (23) of s 3 rent includes cess, so a suit for recovering cess is cognizable by the Deputy Commissioner under s. 139 Cl (3), 103 I C. 464 · 1927 Pat 266 6 Pat. 317

——a suit for ejectment of an under-tenant is to be brought before the Deputy Commissioner and not in the Civil Court. 101 I. C. 64 1927 Pat 402

——s. 139 (4) only applies to the ejectment to persons to whom blouses (*a*), (*b*), (*c*) and (*e*) qs 41 are applicable. 110 I. C. 497: Pat. 675.

——the provisions of s 139 (4) refer only to a suit against a tenant and do not apply to a suit brought by a landlord on the *allegation that the deft. had no tenancy right 7 Pat. 82:* 1928 Pat. 198.

——where a tenant in possession gave up his possession of

——s 139 (5) does not contemplate a case of dispute as to title but only the cases where possession only is asked for. 96 I. C. 452 : 1926 P. H C. C. 246

——s 139 (6) of the Act bars only a suit which relates to agricultural land and is instituted by the headman of a village as such but has no application in a suit for recovery of possession on declaration of title. 19 C. W. N. 578 · 21 C. L. J 629 : 27 I. C 538.

——s 139 applies only to ejectment suits wherein the relationship of landlord and tenant is admitted to exist and then alone is the jurisdiction of the Revenue Court ousted. 90 I C. 489: 1926 Pat. 64

——s. 139 (6) evinces the intention of the legislature to place it beyond any possibility of doubt that save in the case excepted the

forrum for all suits by or against a village headman in respect of his title in and possession of his office or land comprised in his village headman's tenancy shall be the Revenue Court. 1928 Pat. 515, 9 Pat. L T. 544.

S. 139 A.

——s 139 A is not retrospective and consequently it does not apply to a cause of action before 1920 105 I. C 33: 1928 Pat. 109. 8 Pat. L. T 850.

——a suit for declaration of the status of occupancy tenant and for possession is barred by this sec. 96 I. C. 1036; 1926 Pat. 363. 6 Pat. 64

——this sec. bars the Civil Court to try a suit for the recovery of possession of land instituted under s. 9 Sp R Act., but not a suit for declaration of title in which possession is claimed as consequential relief 105 I. C. 561: 1928 128. 9 Pat. L. T 340.

S. 157.

——to come within s 157, it is not necessary that a decree should appear on the face of it to have been passed *exparte* It is sufficient if it is shown to have actually been passed *exparte*. A rent decree passed on the admission of one of the tenants is an *exparte* decree within this sec. against the tenant not appearing, (1921) Pat 345 : 2 Pat. L T. 734. 62 I. C. 886.

S. 164.

——(amending Act V of 1905 B. C.),—when a purchaser of certain tenures under sec. 123 used to have a declaration that certain entries in Record of Right are incorrect, sec. 164 applies. The 'particulars' in sec 164 have a very wide application 13 C W. N. 111

S. 117.

——in a suit for rent when tenant sets up the pleas of no knowledge of plff.'s title and of [illegible]
procedure is that of sec. 177 [illegible]
disbelieves payment to third p[illegible]
intervenor will not be permitted [illegible]
69 I C. 858 : 1 P. 255 : 1922 P. 480.

——a right to receive rent can only be claimed by or on behalf of the person entitled to receive it and not by a person who is under an obligation to pay it. 1923 P. 55. 3 Pat L. T. 131 6 Pat. L. J. 603 ; 84 I. C 1003

——s. 177 does not bar a suit where the tenant sets up the right of a third person as landlord nor is plff. bound to implead such a person 57 I C 28. 2 U. P. L. R (Pat.) 190

——an appeal from rent suit in which no question of title is [illegible]

[illegible] Judicial Commissioner. 1924 [illegible]
——the law h[illegible]
amendment of sec [illegible]
whom the tenant [illegible]
made party. 2 P. I[illegible]

Ss. 117, 218, 224

——title to land in a suit for rent of the value of less than one hundred rupees—intervenor made a party. 84 I. C 286 : 1924 P. 807.

S. 178.

——the court is competent to entertain an application for enlargement of time under sub-sec (3) of s 178, after expiry of period prescribed in the decree and even after the D. Hr. has applied for execution Whether the application should be allowed depends upon the circumstances of the litigation. But an executing court cannot extend the time although it can entertain such application if it has tried the suit 16 C. L. J 520 : 16 C. W N. 1099 : 15 I C 689

Ss. 178 (2) and (3), 215 and 224.

——an order under s 178 (3) relates to execution of the decree within s 215 (3) and an appeal from that order lies to the court to which the decree is appealable The power vested under s. 178 cl (2) and (3) is exerciseable by the Deputy Commissioner only so long as the decree is not fully executed After the execution of decree and delivery of possession the decree ceases and the Deputy C. cannot extend the time under s 178 1921 Pat. I95 6 Pat L. J. 300 63 I C 779, 1921 Pat 195.

S. 181.

——under s 181 the period of limitation of the execution of a rent decree runs from the date when the decree is signed 2 Pat. L R. 7 · 78 I. C. 224 5 Pat L. T. 374

S 181 A.

——a transferee of a rent decree and not of the interest of the landlord in the land cannot execute the decree 6 Pat 807 : 103 I C 432 1928 Pat 144

Ss. 184, 191 (2), 208 (2), 210.

——a landlord obtaining a rent decree may proceed at once against the person of the tenant. S. 191 (2) has no application to such a decree, 20 C W. N 111 : 34 I C 22.

S. 190

——notice under this sec. is necessary not only where the execution is taken out against the person or moveable property but also where the warrant of execution is as against the immoveable property belonging to him 9 Pat. L. P 627.

S. 191 (1)

——a landlord who has obtained a decree for rent of a tenure under the Act may proceed at once to execute it against the person of the tenant. 20 C. W. N. 111 : 34 I. C. 22.

S. 208.

——a sale under this sec. passes only the interest of the judgment-debtor in respect of the tenancy. 106 I. C. 563 : 1928 Pat. 243 : 9 Pat. L. T. 372.

S. 210.

—s. 210 of the Act applies to a sale under s 26 of the Certificate Act. 3 Pat. L. R. 37.

Ss. 212, 215 (3)

—the word 'claims' used in sec. 212 is used in the sense of asserting that a thing is one's own. The court is bound to inquire into the truth of allegation made in a petition under sec. 212, 2 Pat. L. J. 153 37 I. C. 891 · (1917), Pat. 97.

—*Durmukaraidar* applying to set aside a sale of tenure in execution of rent decree on depositing decretal amount under sec. 212—Deputy Commissioner rejecting application—Judicial Commissioner allowing,—appeal lay 1917 Pat. 97 · 2 Pat L.J 153 37I C. 891

—if the landlord has once accepted the decretal amount deposited by the part purchaser of an occupancy holding he cannot subsequently refuse to recognise the part purchaser 1924 P. 669 · 1924 P H. C. C 281 : 6 Pat. L. T, 220 : 83 I. C 203.

S. 213.

—in the execution of a rent decree the court cannot order, that a portion of the holding shall be exempt from sale, as sale in pursuance of such order is liable to be set aside at the instance of the Jt Dr 1 Pat. 750 : 1923 Pat 64 : 4 Pat. L. T. 439 71 I. C. 345.

Ss. 213, 215.

—sec. 215 of the Act is wide enough to make an appeal competent in the case. 1919 Pat 60 49 I C 389 : 4 Pat L J. 371

Ss. 213, 265, 230.

—limitation for application of substitution in case of the death of the applicant to set aside rent sale 1923 Pat 29 ; 4 Pat L. T. 367 1 Pat L. R 55 · (1922) Pat. 368.

Ss. 214, 258.

—ss 214 and 258 do not confer a right to sue to set aside a sale of a holding but only restricts the right under the general law to cases where there is fraud or want of jurisdiction. 90 I. C 325.

Ss. 215, 212

—'relating to the execution thereof' includes order about payment for getting a sale set aside A person merely claiming a lawful title may apply to have a sale set aside unders 212. 36 I. C 829.

Ss. 217, 227 and 228.

—there is no provision under this Act for the restoration of an application to set aside an *ex parte* decree which has been dismissed for default and the Deputy Commissioner has, therefore, no jurisdiction to hear an appeal from an order dismissing such application. 3 U P. L. R (Pat.) 13 ; 60 I C. 175.

S. 218.

—suit for rent for sum not exceeding Rs. 100/-, deft. setting up title of third person who is not brought on the record, no 2nd apeal lies. The sec. is alike sec. 153, B. T. Act as to the question of appeal. 1917 Pat. 183 : 2 Pat. L. W. 154 : 42 I. C 790.

S. 224.

——if the amount claimed in a single suit for rent against ral tenants exceed Rs 100, s. 224 applies and an appeal lies t Judicial Commissioner irrespective of the fact that the an claimed against the particular tenant appellant or respondent not exceed Rs 100, (1921) Pat 345 : 2 Pat. L. T. 734, 62 I. C. 886.

——forum of appeal in case of order passed by sub-divis officer under s. 178 (3). 1921 Pat. 195.

——a decision under s. 87 is not open to second appeal 6 L. J. 634 : 65 I C. 285 . (1922) Pat 109

——when the Judicial Commissioner makes an appellate d within s 224 (2) there is a second appeal from his decree t H C The word "decree" in s 224 (2) means nothing more decision 40 I C. 891

S 225.

——5 rent suits were brought, one valued above Rs 100 others below Rs. 100/-, and there was no question of title ; appe to the former was filed before Judicial Commissioner and a others were first filed before the Deputy Commissioner and transferred to the Judicial Commissioner, it was valid and appeal to High Court lay 1917, Pat 287 1922 P. 182 (1922) Pat

S. 231.

——Mortgaged property was sold in execution of decree or 21st Dec 1917 and purchased by D. Hr and sale was confirme 15th Feb 1913 , on the 25th August 1914, the Jt Dr. applied to aside the sale on the ground that under sec 47, sale was null void The application was time-barred under Art, 166 L. Ac under this sec 20 C. W. N 1243.

S 237.

——"application" in s 237 does not refer to a suit. Sec has no application to a suit when plff alleged that he was eje by the landlord or any person claming under or through him seeks in the Civil Court to recover possession from deft. as t passer. 16 I. C. 418.

——a suit for declaration of title and recovery of posses against persons who are tresspassers upon the land is not an a cation for recovery of possession of a holding under s 327. 105 I 561 1928 Pat 128 9 Pat L T. 340

S 258.

——this sec. does not bar a deft. to raise an issue decided D Commissioner or R. officer, 70 I C. 232

——this sec is no bar to a suit for possession by one s[illegible] 50 I C. 454; 1919Pat.

the statu

ipromise de

rought a su

104 I. C.

[illegible]

——neglegence however gross does not amount to fraud, ur fraud is established s 258 is a bar to a suit to set aside the exp decree passed against a minor. 96 I. C. 437 ; 1926 Pat. 528 : 5 Pat.

S. 258—*contd.*

——under the amendment a suit to set aside a fraudulent sale after its confirmation is not maintainable. 1927 Pat 382; 8 P. L T. 688: 106 I C 430

——the words "directly or indirectly" in s 258 apply to the machinery used for the purpose of altering the decision and not to the result 1928 Pat. 244: 7 Pat. 388

S. 270.

——it provides for giving certain powers of control both to Commissioner and to the Deputy Commissioner over acts performed by their subordinates. 1923 P. 83 (1922) Pat 3

Miscellaneous

... f assessing the value lecree-holder gives an here may be material

CHOWKIDARI CHAKRAN LAND

——resumed Cowkidari Chakran land when is transferred to the proprietor old estate continues 28 C. L J. 160: 22 C W N 560: 46 I C 435; 21 C. W N 609: 44 C 841 32 M. L. J 565 2 Pat. L W 1 40 I. C 981 25 C. L J 499 P C. *F* (34 C 109: 5 C. L J. 33, 13 C. L J 102), *Ref.* (14 C W N 527 37 C 57, 14 C. W N. 995. 1049). *not followed*, 27 C L J 491, 560.

——the expression "Cowkidari Chakran Lands" means lands on service tenure by chaukidars or village watchmen who also rendered acts of personal service to the Zemindar 44 C 841 21C W N 609. 25 C. L J 499 19 Bom L. R 462 2 Pat. L W. 1 40 I C 981 P C

——the onus of proving that certain lands in a zemindari are choukidari chakran lands is on the Govt. 43 C 1104 20 C W N. 1245. 24 C L J 296 31 M L. J 745 37 I. C 223 14 A L J 1009. 18 Bom. L R 838 P C.

——from time immemorial it has been customary in India to remunerate officers charged with certain public or quasi public duties by grants of land to be held either rent free or at a reduced rent The lands known as Chowkidari Chakran lands were granted in lieu of wages to individuals who were charged with the performance of police duties in rural areas. 42 C. 710: 19 C. W. N. 65 17 M L. T. 1: 21 C. L. J 31 17 Bom L R 32 P. C

——zemindar incurs a liability to pay additional revenue to the Govt in respect of this land. 27 C L J 560.

——*simanadars* lands in the District of Bankura are chakran lands ... B.C. of 1870 20 C. W N. 404 ... of Govt to maintain *Paiks* ... to the executant, 20 C. W. ... M. L. T. 235. 18 Bom. L R. ... A L J. 1008. 37 I. C 223 P C.

——sec. 1 of the Choukidari Chakran Act does not govern cases in which there might be definite and conclusive evidence to satisfy the court as to what was the nature of the service required from the service tenure holder 28 C L J. 281, 43 C. 227, *Dist.*

Chowkidari Chakran Land —*contd.*

...profits of choukidari chakran ...he putnidar will not be liable ... lands when they come into

——*the possession of choukidari chakran* lands *by a zemindar* may become adverse to the putnidar in a variety of ways, *e. g*, when the lands are settled by the zemindar with tenants or when the putnidar after being invited to come and take the lands does nothing and the zemindar thereafter makes other arrangements either for *holding the lands in khas or for setting the same with ijaradar* or the like 28 C W N 114. 74 I. C 153. 50 C 577: 1923 Cal. 734

... dari *land is to make* the ... right previously created ... C. L J. 532: 46 I C 187 ... at a revenue sale of the original estate where the Collector treated the enfranchised choukidari *chakran land as constituting by themselves a separate estate* subject to the payment of separate assessment. 27 C. L. J. 491: 45 C 765 41 I. C 894

——choukidari chakran lands are lands which at or before the Permanent Settlement have been appropriated or assigned for the *maintenance of the Police force and by reason of such appropriation* excluded from the zemindari assessment The zemindar is precluded by Bengal Regulation 1 of 1793 and XIII of 1805 from utilising choukidari chakran land for remunerating persons who are his personal servants but the onus as to that is on Govt. 24 C. L J 296 · 43 C 1104. 20 C. W. N. 1245. 31 M. L J. 745: 37 I. C. 223. 14 A. L J 1009 P. C

——where t... the rent payab... is entitled to s... choukidari fun... 34 C. L. J. 275: ...

——where ... resumed, the zemindar is not entitled to a share in the profits derived from the settlement of such lands by the patnidar. 26 C. W. N 943: 36 C. L. J. 145: 67 I. C 440: 1922 Cal. 473 44 C 841, 46 C. 173 *fol.* 34 C. L. J. 275, *not fol.*

——if choukidari chakran lands are resumed by Govt. and are settled with a zemindar all rights created in such lands by the choukidar in favour of third person comes to an end, although if a transfer has been made by the zemindar before the resumption the

Chowkidari Chakran Land —*contd.*

transferee becomes entitled to the benefits of the settlement with the zemindar. 35 C L J. 185 : 69 I. C. 67 · 1922 Cal. 193.

——when the tenancy of the lands is terminated by the resumption of the *choukidari chakran* lands the tenant cannot rely on payments of rent prior to the resumption to prove that he was a tenant at fixed rent and that the rate of rent was not enhancible 91 I. C 734 : 1926 Cal. 661.

——the choukidari chakran lands which formed part and parcel of the permanently settled estate of the zemindar vested in the putnidar subject to the rights of the choukidar. 32 C L. J 15 58 I C. 841, 44 C 841 P. C. *fol*

——the zemindar's interest to choukidari chakran lands which are resumed by the Govt. and transferred to the zemindar passes by virtue of such transfer to the holder of the patni lease in the village within which such lands are situated 53 I C. 1004

——choukidari Chakran lands situate within the ambit of a patni *belong on their resumption to their patnidar 47 I C 840*

——choukidari chakran lands included within the patni belong to the patnidar after they are resumed and zemindar's settlement of those lands, after their resumption, with third person cannot affec[illegible]

In

not

Govt order 46 I C 833

——where a Patni is granted in respect of a whole *mouza* unless there is contray provision in the patni lease, the choukidar's chakran lands in that *mouza* must be held to be included in the patni, 22 C. W. N. 487 44 I. C. 526.

——the question whether certain resumed chakran lands are choukidari lands of one mouza or of another is a question of parcel or no parcel and is a question of fact. 21 C W N 238 : 32 I C 545.

——in the case of choukidar's chakran lands resumed by the Govt. and transferred to the zemindar the latter is entitled to levy rent from the patnidar if at the time of the inception of the lease the profit from the lands was not included in the assets on which rent was assessed 29 C W N 328 : 86 I C 781 52 C 576

——in a suit to recover possession from the zemindar of certain villages in Patni settlement of choukidar's chakran lands which had been resumed by the Govt under the provision of Bengal Act 6 of 1870 and were transferred to the zemindar subject to the payment of rent assessed on the lands, held that the pltfs were entitled to obtain khas or actual possession of the lands in suit but that they could *not do so without paying an additional rent to the* zemindar. 53 C. 6 : 30 C. W N. 553 1925 P C. 226 42 C. L J 227 : 90 I. C. 607 49 M L. J. 722 . 1925 M W. N. 724 P. C

——where lands are resumed under the Choukidari Act the patnidar is entitled to possession of the lands thereafter. 41 C. L. J. 295 : 87 I. C. 529 . 1925 Cal. 807.

For other cases see "*Bengal Choukidari Act.*"

CIVIL PROCEDURE CODE.

Applicability.

——the provisions of the C. P. C. are not exhaustive. 2 Pat L.W 240 1921 Pat. 205 : 61 I C 922, 36 C 193, 5 C. L. J. 913, 2 Pat L. J 306 · 39 I C. 779 : (1917) Pat 137, 2 P. L. J. 361 : 1 Pat. L W. 561. · 39 I C 763

——as the Code is not exhaustive when a particular point has not been specifically dealt with it must be determined upon general principles. 2 Pat. L J. 306 · 39 I. C. 779 . (1917) Pat 137, 1 Lah 134 · 56. I. C 254 1 Lah. L J 10.

——the Code provides generally for the mode in which the High Courts should exercise their jurisdiction except the Original Civil Jurisdiction The Orders and Rules apply to High Courts unless the Code contains something inconsistent with them. They apply to Letters Patent Appeal 48 C. 481 : 25 C W N. 557 : 33 C L. J 307 · 40 M L. J. 308 23 Bom. L R. 681 : 60 I. C. 274 **P. C**

——the body of the Code creates jurisdiction and the rules indicate the mode [illegible] therefore the body [illegible] as existing or as a [illegible] W N 877 26 C. L. [illegible] **P. B**

——the forms given in the schedule cannot control the clear words of the Code itself 21 C W. N. 1147 40 I C. 816, 22 I C 690

——the body of the Code is unalterable except by the legislature and is expressed in more general terms and has to be read in conjunction with the rules. 43 C 143 32 I C. 329.

——the sections lay down general principles and the rules provide the means of applying them and they cannot be otherwise applied The rules restrict the sections. 41 C. 108 : 18 C L. J. 618 · 20 I C 39

——the procedure of the Code does not apply to a sale held under an administration order and not in execution of a decree. 40 P L R 1922 , 69 I C 718.

——the provisions of the Code do not apply to Land Revenue Court, 18 I C 119 : 21 O C. 220 nor to village Munsiff's Court 18 M L. T. 377 : 31 I C 59 . (1915) M W N 765

——a Municipal election tribunal should be guided wherever possible by the provision of the C. P. C, 91 I. C. 450 : 1926 Mad 1043, **F. B.**

——a Magistrate exercising his power under s 202 is not engaged in a criminal proceeding and as no procedure is prescribed by the sec, it would not be wrong to adopt the provision of this Code. 52 C 670 : 41 C. L. J. 611 : 29 C. W N. 817 : 88 I. C. 662 : 1925 Cal. 934.

——this Act and the Limitation Act both should be interpreted together. 3 Pat. 371 : 5 P. L. T. 145 : 78 I. C. 200 **F. B.**

S. 2, DEFINITIONS.

Cl. (2) "Decree"

—a decree may include not only a Civil Court decree but also a Revenue Court decree. 85 I. C. 660 1925 All. 264.

—an order dismissing an appeal for default does not amount to a decree. 4 Pat L. T 405 · 1923 Pat. 213 : 75 I. C. 284

—an order dismissing for default an application to set aside a court sale is not a decree within this sec 53 C 679 30 C. W. N. 570 : 1926 Cal 773 96 I. C 705

—an order declaring that an appeal has abated is not a decree and is not appealable 20 A. L J 214 : 1922 All. 113 . 64 I C 838, (17 A 172, 12 A L J 1113) *fol.*

—when a legal representative is brought on the record, there is no abatement within the meaning of Or. 43 R 1 (k) of the Code, nor is there any decree within this definition, 79 I C 860 1924 Mad 622 · 1924 M W N. 58, but an order dismising the application for setting aside the abatement was appealable under Or 43 R 1 (k) C. P. C 86 I C. 104 26 Punj : L. R 32 : 1925 *Lah* 456.

—an order finally deciding that a particular defendant is not liable for mesne profits is a decree and is appealable. 1923 Cal. 308, 67 I. C. 93. (35 A. 159, 20 C L J 476, 480) *Ref*

—an order filing or refusing to file an award in an arbitration without the intervention of the court is not a decree, 107 I C 756 : 1928 Lah 137, (1926 Lah 403 and 29 C 167 **P. C**) *Dist.*

—a finding in a judgment remanding a case which clearly adjudicates the rights of the parties in regard to certain matters has all the force of a decree and is appealable as such. 105 I C 567 : 1928 Nag 68

—an order striking out the names of defts. is not a decree and is not appealable. 69 I C 961 · 45 M. 194 . 1922 Mad 332

—an order granting leave to withdraw a suit with permission to bring fresh suit is not a decree and is not appealable. 65 I. C 719, 108 I C 539 1928 Mad 416

—an order to the effect that "the appeal being time-barred is not admitted" amounts to dismissal of the appeal and is a decree from which second appeal lies 30 C W N 926 , 44 C L J 44 , 1926 Cal. 1105 98 I C. 748

—an order dismissing an appeal for deficiency in court-fees should be treated on the same footing as the rejection of plaint and hence an appeal lies, 18 N. L. R 15 67 I C 225 . 1922 Nag 62, 98 I. C 663 : 1927 Nag. 100

—the dismissal of an appeal under Or. 41 R 11 is a decree and the expression of opinion dismissing the appeal is a judgment. 30 C. W. N. 314 ; 93 I C 909 1926 Cal 638

—where the first court decided the suit on all the issues but the Appellate Court reversed the decision and remanded the suit

S. 2, Cl. (2) "Decree"—*contd.*

the order of remand is not a decree, 97 I C. 105 : 7 Pat L T. 535 : 1926 Pat. 457.

——but a finding in a remanding judgment which clearly adjudicates the rights of the parties in regard to certain matters has all the force of a decree and is appealable as such. 105 I. C 567 1928 Nag 68

——an order in a proceeding taken by the Jt. Dr. for the recovery of the loss caused by a resale owing to the default of the prior purchaser in depositing the perchase money is a decree and is appealable. 44 A 226 : 65 I C. 813 1922 All 200 : 22 A L. J. 105.

——where an objection was taken against the execution of a mortgage decree that execution could not proceed without the payment of an additional court fee and it was megatived, an appeal lay as it was a matter in execution 3 Pat L. T. 146 : 1922 Pat 59

——when both the claimants are parties to the suit, an order rejecting the application of one of them is not a decree and is not appealable. 1924 M 813 47 M. L J 3, 43 M. 812, 39 M. L. J. 218 *Dist*, 39 M. 488 : 28 M. L. J 491 *fol*

——it is not every order in execution proceedings that is appealable The order may relate to the execution, satisfaction or discharge of the decree, it must be of such a nature as to come within the word "decree" under this sec 99 I. C. 455 · 1927 All. 208.

——an order dismising a suit under Or 17 R 3 is a decree and not an order of dismissal for default within s. 2 (2) (b) C. P. C. 101 I C. 618 : 1927 Rang. 148 6 Bar L. J 77

——the words "order of dismissal for default" in Sub-clause (b) referes not only to dismissal of suit for default but also to an order of the execution court dismissing the objection for default. 94 I C. 1 · 1926 All 401.

Preliminary decree.

——an order deciding one issue and remanding the case for the disposal of another issue, amounts to a preliminary decree and is appealable L. R 4 A. 124

——where in an account suit the Court after passing the preliminary decree for accounts passed a further order fixing the [illegible] it was to be [illegible] an appeal lies ordinarily only [illegible] one in appro- [illegible] 255.

[illegible] status of a person [illegible] king accounts from [illegible] 25 Bom. L R 826. [illegible] R. 324 and 23 Bom

S. 2, Cl. (2) "Decree"—*contd.*

——then can be only one preliminary decree in a partition suit and where after the passing of such preliminary decree the Court directs the Commissioner to take a valuation of certain property it is an interlocutory order, from which there is no appeal, 65 I. C 983 : 24 O C. 366

——when after the passing of the preliminary decree in a [illegible] the [illegible] not a [illegible] sion.

——proceedings subsequent to the decree are not proceedings in suit but in execution, so any order passed therein cannot be a preliminary decree 90 I C. 789 : 1925 Mad. and 1276 22 L W. 347.

Cl. (3) "Decree-holder"

——a decree for the specific perforance of an agreement for the sale of an immoveable property may be executed either by the plff or the deft both being decree-holders in such a case 46 B 990 : 67 I. C 667 1923 Bom 26 24 Bom L. R. 496 , 67 I C. 667.

——an attaching creditor is not a decree-holder within the meaning of sec 2 (3), 80 I. C 947 L R 5 A 629 : 1925 All. 123.

——but an attaching decree-holder of a degree is an assignee within the meaning of Or. 21 R 18 and he is subject to the same equities as the decree-holder under s 49 C. P C, 28 C. W. N. 988.

——the determination of any question under s. 144 C. P C. comes within the definition of a decree. 28 C W N. 988.

Cl. (4), "District Court."

——though the Word "district" in this Act does include the local limits of a H. C. in its Ordinary Original Civil jurisdiction, still it is not legitimate to construe the words "District Court" whenever they appear to mean and include a High Court in its Ordinary Original Jurisdiction 45 C L J. 71 100 I. C 331 1927 Cal 290, 12 C W N 446 *Dist*

Cl (9) 'Judgment."

——the decision of the trial court on preliminary issue is a "judgment" 97 I C 780 ; 27 Puj L R. 701 1926 Lah 638.

——the expression of opinion dismissing an appeal under Or. 41. R. 11 is a decree 30 C. W. N 334 - 93 I C 909 1926 Cal 638.

Cl. (11), Legal Representative.

——when a person is in possession of the estate of the deceased person he is the legal representative of the deceased person within this clause and execution taken against him is legal. 69 I. C. 179.

S. 2, Cl. (11) Legal Representative—*contd.*

——in substituting a person as the legal representative of the deceased Jt Dr. the court cannot leave the question open and undecided and make an order of substitution 1923 Pat. 149.

——a major who is entitled to appear to the exclusion of the guardian appointed during the minority is not within the definition of legal representative under this sec. 78 I C. 12.

——a member of a joint family succeeding to a deceased member is a person who "represents" the estate of a deceased person when "the estate" means a joint family estate. 86 I C 178: 1925 Mad 456.

——when the legal representative within the primary meaning of the word is in existence an executor *de son tort* should not also be added as a party to the suit in addition to such legal representative 30 C W. N 565 96 I C 695 1926 Cal 825

——a decree against a wrong person as legal representative is not binding on the estate 37 C L J 90; 70 I C 886.

——but where a decree is passed for a debt due by a deceased debtor in a suit brought against a person in possession of the deceased's estate, but who is not the heir thereof the decree and proceedings in execution of such decree bind the interest of the real owner 96 I C 963 1926 Nag 476 9 N. L. J 183, 38 M. L J. 106, *fol*

——a person sued in representative character is the "legal representative" and he is the person on whom the estate of the deceased devolves. It is not necessary that for his character as legal representative he should be in possession of any property of the deceased It is only when a third person intermeddles with the estate of a deceased person that he can be treated as a legal representative *and it is then alone that the question* of possession arises S. 52 also shows that there may be a decree passed against the legal representative of a deceased person without showing that the deceased left any property and the legal representative got that property. 49 A 615 · 101 I. C 507 · 1927 All. 459, 25 A L. J 359

——an intermeddler is included in the definition of legal representative but he is not the representative so far as succession to the property of the deceased is concerned 1924 A. 717.

——a decree against a manager of a shrine cannot be executed against another as his legal representative. 77 I. C. 585 : 1924 Lah. 251 5 Lah. L. J. 459.

——a trustee who is elected in the place of another who has retired is not his legal representative within this sec. 92 I. C 520: 1926 Mad. 540.

——a person who is added as a legal representative of a deceased deft. cannot and need not set up his personal pleas 1925 Mad. 59.

Cl. (12), Mesne profits, see, *under the heading "Mesne profits"*

Cl. (17), Public officer.

——the Official Assignee is a public officer within sec 2 (17) 49 B 638 : 87 I. C. 1011 1925 Bom. 344

S. 6. Pecuniary Jurisdiction

——in a suit for recovery of possession of land and mesne profits both past and future it is the value of the land plus mesne profits upto the date of the suit that determines the pecuniary jurisdiction of the court. Mesne profits after the date of the suit do not form part of the cause of the action on which the suit is brought The form of appeal also is determined by the value of [illegible] 29 C W N 869 · 89 I C. 726 C. 1701, 40 C 56 : 15 I C. 252, 9, 2 Pat L J 394 . 41 I C. 286 23 A. 97 : 7 I. C. 385 31 C 550.

——the proceedings before the President of the Calcutta Improvement Tribunal is not a suit and this sec. does not apply to an order passed in such proceedings 94 I C 170 . 1926 Cal 853

§ 9 SUITS OF CIVIL NATURE.

——the party who seeks to oust the jurisdiction of the ordinary civil court is to establish his contention 1928 Lah 121 : 108 I. C. 748 · 29 Punj L R 396

——claim for temple honours, no duties having to be performed is not a claim of a civil nature. 41 M L. J. 287 1921 M W N. 395 . 63 I. C 115. If this is at least one duty and there are also emoluments it must be regarded as an office 1928 Mad 377

——*Yajman Vritti* is immoveable property and the owner has a right to sue against the undue interference with his right by the caste provided he has not acquiesced in any decision of the latter. 45 B 234 ; 22 Bom L R. 1202 · 59 I C. 271. *contra* A claim to realise *birt* from the *Jajmans* is not property as that term is understood in legal parlance and therefore a suit to establish that right is not entertainable by the civil court 10 Lah L J. 242.

——the claim by a person as *jagatguru* to go in procession is not a suit of civil nature 45 B. 590 23 Bom L R 75 60 I. C. 907.

——a suit by a *pujari* for share of offerings in a temple is a suit of civil nature although the offerings may be voluntary and uncertain 45 B 683 23 Bom L R 125 60 I 924, 45 A 437 1923 A 425 : 71 I. C 1026, 1925 Bom 209.

——suit to establish a claim to perform the terms ceremonies and to appropriate the offerings is a suit of civil nature, 50 B 148 · 1926 Bom 161 : 93 I C 127

——a suit for declaration by a class of Brahmans that they have a right to recite the Prabandam and Vedas in a temple is a suit of civil nature. 1927 Mad. 131 : 98 I. C. 229.

S. 2. Suits of Civil Nature—*contd.*

——suit for establishing the pliff's. possession as shebait for the carrying on the worship of the Goddess Durga every year and the suit for the office of a shebait although no emoluments were attached to the said office, is entertainable in the Civil Court. 54 C. 614 105 I C 188 · 1997 Cal 783, (15 C. 159, 27 C. 30, 12 C. L. J. 74) *fol* 10 B. 233 *disapproved.*

——no right to property is conferred when a caste has appointed a man to a mere priestly office His continuance or removal is exclusively in the power of the caste and it is a caste question But it is different where the office of hereditary priest is created in certain families, for the performance of religious ceremonies 36 B. 94 13 Bom L R 1171 12 I C 928

——the protection of law in religious matters is confined to the protection of religious property or religious office. The Court will not decide mere question of religious rites or ceremonies nor will it pronounce on any religious doctrine unless it is necessary to do so in order to determine rights to property. 84 I. C 759.

——the recogniti[illegible]
tion with exclusive [illegible]
extended to Christia[illegible]
and anomalies of a [illegible]
657 . 19 M. L T. 249

——refusal to invite on auspicious occasions does not give a person a cause of action unless his rights as a member of the caste are violated. 1912 M W N 1220 17 I. C. 527

——civil courts may discuss and deal even with a caste question where the membership and character of a member have been unjustly injured. 26 I C 460 17 M. L. T. 369 28 M. L. J. 58.

——when the question at issue in a suit is not a matter relating to the external administration and affairs of the caste but to the property of the caste the civil court has jurisdiction to entertain such jurisdiction 27 Bom L. R. 1503.

——a civil court can declare a *pat* marriage to be invalid. 1926 Nag. 488 9 N L. J. 160 . 22 N. L. R 134.

——temporary exclusion by the panchayat from social intercourse with other families is not contrary to natural justice and the matter is not one for the civil court. 12 A. L. J. 553 : 23 I. C 801.

——jurisdiction to decide questions of franchise, 52 Cal. 943 : 90 I. C. 700.' 1926 Cal. 279

——as a result of a departmental inquiry a Railway servant was dismissed, fined and the fine was taken out of the Provident Fund, held that the civil court could enquire into the validity of the dismissal and if it was found improper the fine should be refunded. 3 Pat. L. R. 84 : 6 P. L. T. 762 : 87 I. C. 739 : 1925 Pat. 487.

——a suit by a minor with next friend for possession of property from the hands of the guardian does not lie under the Act but

S 9, Suits of Civil Nature—*contd.*

must come under the Guardian and Wards Act. 89 I. C. 55 : 21 N. L. R. 75 : 1925 Nag 328.

——where the rights alleged had existed only by sufference or delegation and the resumption of these functions by Government was a thing legitimately done in the exercise of its Sovereign powers, an action was maintainable in a civil court with regard to such resumption. 39 C 615 : 16 C W. N. 362 : 15 C L J. 633 : 13 I. C. 965, 14 Bom. L R 812 : 9 A L. J. 585 . 1912 M W. N. 657 P. C

——where the Chairman of the Municipality acted in contravention of the rules framed under the bye-laws in the matter of the Municipal election the question was of a civil nature and the civil court had jurisdiction to try the case. 48 C 378, 57 I. C. 960.

——it is only when the action of the Municipal Committee has been exercised in conformity with powers conferred upon it by the Municipal Act that the jurisdiction of the Civil Court is ousted When the Action of the Municipality is *ultra vires* or not covered by the authority of the Act Civil Court has power to interfere. 93 I C 827 . 1926 Lah. 461.

§ 10 STAY OF SUIT.

——this sec. does not apply to a claim relating to a period subsequent to the claim in the former suit 4 Pat. L. J. 557. 24 C L. J. 514

——this sec does not apply to application under s 47 22 M. 256.

——this sec. does not dispense with the institution of suit within the proper time when the law requires such institution 22 B. 640.

——rent suit cannot be stayed, 24 C L J 514.

——the court is not bound to stay a rent suit claiming cesses pending the decision of appeal in which the question of cesses for previous years is in issue, 27 C W N. 772 75 I C. 231 1923 Cal. 716. 24 C. L J. 514 *fol*

——the word "suit" includes appeal. 75 I. C. 231, 36 I C. 641 24 C. L J 514.

——an appeal pending in the Dt. Judge's Court is to be stayed on account of the connected first appeal pending in the H. C., 8 Lah. L. J 76 : 1926 Lah 304 · 27 Punj. L. R. 185

——this sec. does not apply unless every matter in dispute is directly and substantially in issue in two suits and the parties are the same. 61 I C. 830, 70 I C 682, 29 Bom L. R. 352 : 102 I. C. 229 · 1927 Bom. 245.

——where the suits are for distinct and different debts, for instance when the suit is for the recovery of successive rents the sec. does not apply. 75 I. C. 231, 11 A. 148 : 1899 A. W N 42

S. 10, Stay of Suits.—*contd.*

——an order refusing to stay cannot be reviewed, 75 I. C. 101, 69 I. C. 1111 33 P. W. R. 1922, 67 I. C. 870· 4 A. L. J. 425, 63 I. C. 151: 43 A. 564, 19 A. L. J. 558 F. B. *Relied on.* 75 I. C. 101.

——a suit cannot be said to be premature if there is a valid cause of action 1925 Pat 201

——if a party is ordered by a Revenue Court to file a suit in the Civil Court within three months he is not at liberty to ignore the restriction although the suit in the Revenue Court may be pending 88 I. C. 684 23 A. L. J. 529, 1925 All 615 47 A 904

——the proper course in cases where a civil suit is pending on a mortgage and where the Official Receiver applies to the Insolvency court for a declaration that the mortgage is bad under s. 53, would be to have proceedings in the suit stayed till the disposal of the application under s. 53, 48 M. 750 1925 M. W. N. 672 ; 88 I. C. 934 · 1925, Mad 1051.

——the words "the matter in issue" denote the entire subject in controversy between the parties 103 I. C. 274, 26 L. W. 241

——the expression "matter in issue" has reference to the entire subject in controversy between the parties and the mere fact that one of the issues in two suits is common is not sufficient to attract the operation of s. 10 88 I. C. 421 48 M. L. J. 251, 1925 Mad 574, 103 I. C. 274, 26 L. W. 241 1927 Mad 1132 · 7 Lah. L. T. 4

——identity of reliefs is not necessary as under the old Code. But the mere identity of one or more issues apart from their importance and bearing does not suffice 102 I. C. 229 1927 Bom. 245 : 29 Bom L. R. 384

——proceedings under the Probate and Administration Act in courts subordinate to High Courts,—stay of trial,—submission to jurisdiction,—effect 85 I. C. 852 . 6 Pat. L. T. 540 . 1926 Pat 171.

——as the Revenue court cannot partition the buildings at all so the pendency of a suit for perfect partition in a Revenue court is no bar to a suit in a civil court for possession of a certain share of a house by partition thereof 89 I. C. 186 · 23 A. L. J. 585 · 1925 All 677 47 A. 915.

——when the matter in issue is also in issue in an appeal pending in the High Court between the same parties the H. C. is competed to order stay of subsequent suit. 96 I. C. 958 1926 Lah 692

§ 11, RES JUDICATA

Sub-headings of notes.

(1) **General principle.**
(2) **Application of the doctrine to appeal**
(3) **Application of the doctrine to matters out of court**
(4) **Arbitration and award.**
(5) **Competent court.**
(6) **Connected suits and common judgments**

S. 11. Res Judicata.—*contd.*

(7) Directly and substantially in issue,—Expl IV. constructive *res-judicata.*

(8) Decision based on compromise

(9) Decision based on two or more grounds.

(10) Decision of unnecessary issues.

(11) Decision on question of law or fact.

(12) Formal defect.

(13) Judgment obtained by fraud or collusion.

(14) Matters finally decided.

(15) Public matter, Expl. IV.

(16) Representative capacity.

(17) Widow and reversioners.

(18) Same cause of action.

(19) Want of jurisdiction, erroneous decision.

(20) Res judicata when suing or being sued in different capacities

(21) Res judicata between co-plffs. and co-defts. and against pro-forma defts

(22) Res judicata in rent suits and under B T Act

(23) Res judicata in the execution proceedings

(1) General Principle

——both ss 10 and 11 apply to issues arising out of the existing cause of action and not to issues arising out of some future cause of action 80 I. C 710 (P).

——the binding force of the plea of *res judicata* depends not upon the C P C. s 11 but upon the general principles of law If it were not so there would be no end to litigation. 33 C. L J 405 48 C. 499, 25 C W. N. 915. 40 M L J 423. 1921 M. W N 313 29 M L T 336: 23 Bom L R 648 14 L W. 221 19 A. L. J 366 P C

——the plea of res judicata is not confined to s. 11 but may be invoked under general principles of law 96 I C. 1002 1926 Lah. 683 27 Punj L R. 504, (48 C 499 P C. 45 M 331, P C *fol*)

——the sec is not exhaustive on the matter of *res judicata* 9 O & A L R 1061, and this section does not cover all cases of estoppel by judgment, 36 M. 141

——plea of *res judicata* may be raised apart from s 11. 25 C. W N. 915 P. C.

——it has been observed by the Privy Council that the essence of a Code is to be exhaustive on the matters in respect of which it declares the law and it is not the province of the a Judge to disregard or go outside the letter of the enactment according to its true construction 29 C 707· 6 C W. N. 825: 4 Bom. L R. 793 P. C. *followed* in 18 C. W. N 954 p. 958 but it has been held that s. 11 is

S. 11. Resjudicata (1) General Principle.—*contd.*

not exhaustive and a decision against one Hindu reversioner binds another though the second does not claim through the first. 27 M 390 P C.

——this section being exhaustive the general principles of *res judicata* cannot be extended to cases which are within the terms of s 11, 96 I C 910 1926 Lah 670, 29 C 707 P C, *Rel. on*

——where the case is within the terms of this sec. the court cannot travel outside it 1928 Mad. 840. 1928 M. W. N. 336 · 28 L W. 82.

——the decision in an administration suit operates as *res judicata, above case* and 27 C. W N 174 : 37 C. L J. 469

——it is a rule of estoppel by record. 44 M 514.

——the doctrine applies to issue of law as well as of facts 2 Pat 771 : 74 I C 781 5 Pat L T 7.

——the question as to *res judicata* should be decided with reference to sec 11 only 85 I C 979 · 1925 Cal. 1046

——the principle applies both to the trial of suits and the trial of issues 28 A 727, 7 A 615.

——a point of law may constitute *res judicata*, 32 C 749 · 9 C W. N. 446, (5 M 304, 22 B 669, 1 M 339, 1 C. W. N 687, 28 C 318), *Ref* (10 C 1087, 15 A. 327) *Dist* but an erroneous view of law cannot have the force of *res judicata* in a subsequent suit for different relief 16 C L J. 154, and the above case.

——decision as to abstract question of law as opposed to concrete question such as the construction of a document, does not operate as *res judicata* 23 Bom L. R 749.

——an erroneous decision on a pure question of law in a previous suit may operate as *res judicata*. 1 C W N. 687, *Contra*. 30 M. 461 17 M. L. J 250

——an erroneous decision operates as *res judicata* as regards the matter in controversy 7 O L J. 524 · 23 O C. 269. 2 U. P L R 163 60 I C 404, 15 C. 600

——an exparte decree operates as *res judicata* 97 I C. 601. 1926 Mad 1144. 24 L. W 260

[illegible] construed with [illegible] production of [illegible] 1926 Cal. 698 [illegible] C. W N. 337 : [illegible] 173. 15 I. A [illegible]

——the rejection of applications under sec. 107 and 311 C P. C. (old) does not operate as *res judicata* against regular suit on the ground that the whole suit was fraudulent. 6 C W. N. 473, P. C But see 23 C. W. N. 845, P. C.

——where there are two inconsistent decisions binding on both sides the right under the later decree will prevail. 41 M. L. J 54 : (19[illegible]) M. W. N. 487 : 14 L. W. 85 : 63 I. C. 730.

——claim refused will operate as *res judicata*. 21 C. 232, 692, 25 B. 115; 14 M. 428, 17 C 968, 21 A. 425, F. B., 19 C. 532, 32 C. 118,

S. 11. Res judicata (1) General Principle.—*contd.*

21 A. 433, F. B. 1 A. 187, it should be an independent claim. 13 B. 242

——suit for redemption being brought by second usufructuary mortgagee without the claim of mesne profit. second suit for mesne profit is barred. 17 C. W. N. 224n. (34 C. 223 5 C. L J. 192, 34 C 636 : 5 C L. J. 550 31 B, 527), *Ref.*

——dismissal for default of both the parties does not operate as *res judicata*. 24 I. C 17, 10 C W. N 40.

——judgment should be looked to and not the decree 2 C W N 337 : 21 M. 334 . 25 I A. 102, P C., 9 C. W. N. 679, *Ref.*

——where all the parties in the present suit were not parties in the previous suit the rule will not apply 27 C. W. N 280 37 C. L. J. 17 71 I C. 378.

——plea of *res judicata* may be waived. 31 M. L J 219 ; 36 I C 289.

——plea of *res judicata* though not specifically raised by the parties may be gone into by the court. 25 C W N 881,

——the law of *res judicata* does not apply where the parties in the two suits are not the same. 103 I. C 858, 9 Lah L. J. 270, 32 C. W N. 281 · 47 C. L J 136 . 1928 M. W N 20 · 30 Bom L. R. 220 26 A. L. J. 371 107 I. C. 237 P C , 10 Lah L. J 239 1928 Lah. 493

——the rule of *res judicata* so far as relates to the trial of an issue refers not to the date of the commencement of the litigation but to the date when the court decides the issue. 99 I C 299 : 1927 All 189 32 A 67 *Rel.*

——it cannot be said for the purpose of this sec that a decision on a plea of *jus tertii* is a decision between the parties litigating under the same title when the *jus tertii* is put forward and actually relied on in a later suit by the third person 50 M 877 104 I C 468 1927 Mad 844 . 53 M. L. J 864

——where there are two decrees operating as *res judicata* the earlier decree must prevail 49 A. 606 : 101 I. C 501 : 1927 All. 717 . 25 A L. J. 387.

——successive application for amendment of clerical or arithmetical mistakes in judgments or decrees are maintainable, provided the court will not, except in exceptional circumstance, entertain a subsequent application for substantially the same relief. 107 I C 390 1928 Lah. 244.

(2) Application of the Doctrine to Appeal.

——the doctrine applies to all stages of a suit till it is finally decided; it is not confined to the court of first instance Former suit [illegible] the same rule applies to [illegible] ment of the action is, to be [illegible] should be looked to. 37 C. [illegible]

——*res judicata* applies only to trial by original court and not to trial by appellate court, 16 C. 233, *Contra*, 11 A. 140, 10 A. 123, 42 M. 350.

S. 11, Res judicata, (5) Competent court—*contd.*

——the decision by a Revenue Officer in a s 106 B T. Act case to the effect that the deft who was a purchaser of a holding was a tenant under the plff. operates as *res judicata* in a civil suit for ejectment on the ground that the deft. was trespasser. 71 I C. 307.

[illegible]

——where the former court had no jurisdiction over the subject-matter although the decision was upheld by the appellate court, it will not operate as *res judicata*. 1923 Lah. 141 : 73 I C. 874, 6 C L J 621, 14 C. L J. 220, 7 I C 781 *Dist*, 54 P. R. 1912 *fol*.

——the decision of S C C Court is not binding on a superior court trying a subsequent suit between the same parties. L. R. 4 A 149.

——the decision of the S. C. C as to the question of title is not *res judicata* in another suit involving the same point, but as to the actual subject matter it is always *res judicata*. 98 I C. 176 : 1927 Mad. 96.

——the decision of a Rent Court on a question of a tenancy is not *res judicata* in a subsequent suit in the civil court for declaration of title 21 A. L J 476 . L R 4 A 428, 89 I. C. 810.

——in order to make the decision of one court final and conclusive in another court, it must be the decision of a court which would have had jurisdiction over the matter in the subsequent suit so where the prior decision was that of a munsiff's court which could not try the subsequent suit in the subordinate Judge's Court no plea of res judicata could apply 49 M. L J 430 : 1925 Mad 1270 : 91 I. C 497

——the court which decided the issue must have jurisdiction to try the issue. L. R. 6 A. 157 (*Rev*), 89 I C. 379 · 1926 All. 34.

——where a Revenue Court gave a decision on a question of title which was cognizable only by a civil court or by a Revenue officer sitting as civil court, a subsequent suit for the same relief is not *res judicata*, 91 I. C. 528.

——the finding of the court in a proceedings under the Probate [illegible]

(6) Connected Suits, Common Judgments.

——where two suits are decided by a common judgment and appeal is preferred in one case only the decree made in the other case operates as *res judicata*. 37 C. L. J. 184 : 1923 Cal. 496 : 74 I C.

S. 11, Res judicata, (6) Connected Suits, Common Judgments—*contd.*

591, 74 I. C 583, 70 I. C 6, 93 I. C 1014 : 27 Punj. L R. 203 : 1927 Lah. 98, *Contra.*

——there is no bar against the maintainability of the appeal. 92 I. C 352 : 1926 Mad. 378, 8 Lah. 384 : 104 I. C. 849 : 1927 Lah. 289 F. B. case laws and principles have been elaborately discussed in the F. B. case. 29 Punj. L R. 902 : 1927 Lah. 821.

——where the claims are different in the two suits decided by the same judgment and appeal is preferred in one only the decision in the other does not operate as *res judicata.* 1923 Lah. 8.

——when decision in a suit is not appealed from but it is in effect reversed by the decision of the H C. in an appeal from another proceeding in the same suit, it does not operate as *res judicata* 1923 A. 456, 29 A. 730, 26 A L. J 253 : 1928 A. 274.

——two suits are brought by A and B, against each other for damages and are tried together upon the same evidence, the ques-

8 Lah. L. J. 136

——when two suits are tried together or two appeals are heard together and appeal or second appeal, as the case may be, is preferred against one only nothing unfavourable being in the other, it is not barred by the rule of *res judicata* as the appeal against one is sufficient, he being under no obligation to appeal against the other. The ultimate rights of the parties must be adjusted and regulated

506 :

44

(7). Directly and substantially in issue,—Expl. IV. constructive *res judicata.*

——the question should have been directly and substantially in issue in the former suit. 2 C L. J 540, 27 A 59 and real matters of controversy in the previous suit is to be looked to 24 C. 504.

——issues collaterally or incidentally raised will not be *res judicata* 21 W. R 189, 13 C 17, 18 C. 647, 6 C. W. N 66, 4 A. 491, 7 A. 464, 26 C 423, *contra.* 69 I C. 570.

of rent the question of rate of in issue and a decision of that 9 I C. 752.

way of estoppel as regards all sustain the judgment. 62 I. C. ... 42 C. L. J. 501 : 95 I. C 1011 : 1926 Cal. 1003.

——if a question is raised by the pleadings and argued and if both the parties invoke the opinion of the court on the point the decision

S. 11, Res judicata, (7) Directly and substantially in issue.—Expl. IV. constructive *res judicata*.—contd.

will not be *ultra vires* merely because a formal issue has not been framed on the point Regard must be had more to the substance than to the form. 62 I. C. 491 (C)

——the decision in a rent suit as to the length of the deft's possession where the main issue was whether relationship of landlord and tenant existed, does not operate as *res judicata*, in a suit for ejectment where the plff's possession within twelve years is the main issue 59 I C. 316

——the decision in a rent suit when the lease continues does not operate as *res judicata* in a subsequent suit brought after the surrender of the lease 44 M 514 : 29 M. L. T. 322 : 41 M L. J. 283 : 63 I C 205.

——it cannot be said of any matter that it ought to have been set up as a ground of attack in a former suit, if its introduction could have been incongruous to the matter of that suit. 107 I C. 110.

——to constitute an incidental finding as *res judicata* it is essential that the issue in the second proceeding should have been raised and decided clearly in the first. 41 M L J. 427 · 1921 M. W. N. 754. 14 L W 702

——prior mortgagee need appear only when he has a subsequent mortgage, also. 19 C W N 942, 947, 991 P. C, 16 C W N 505, 39 C 527 P C. or when his prior mortgage is impugned. 25 C. W N. 417 P. C.

——where an application to set aside an *exparte* decree on the ground of non-service of summons is dismissed a regular suit on the same ground is barred by the rule of *res judicata*. 1 Rang. 500 2 Pat 833 74 I. C 825. But if the suit is brought on some other ground of fraud it is maintainable 2 Pat 833 74 I C, 825

——where the properties that were the subject matter of the two suits, were different but the prior suit could not be determined without deciding the genuineness of a sale-deed, it was *res judicata*, 45 A 515 1923 A. 613 · 21 A L J 421 L. R. 4 A 512

——decision of the court as to the particular date of death rely [illegible] 8 Evi. Act while it [illegible] rson was dead at the [illegible] 45 A. 466 : 1923 A.

[illegible] (Here the issue on easement) the other issues (on ownership) are not *res judicata* 1923 A. 15.

——the finding of a Court on a point or some points in controversy in a previous suit when there were more issues in the suit and disposing the suit on that finding operates as *res judicata* in a subsequent suit *brought on the same grounds but with some more reliefs added to them.* 107 I. C. 674 : 1928 All. 62, 106 I. C. 861 : 1928 Nag. 112.

S. 11, Res judicata, (7) Directly and substantially in issue.— Expl. IV constructive *res judicata*—contd

—prior suits being dismissed subsequent suit on similar ground is barred. 1923 A 231, 70 I. C. 635.

—decision on a previous title suit is *res judicata* irrespective of nature of possession 46 M. 525: 1923 M. 88: 70 I. C 994. 1923 A 554

—a decision that a will was wholly valid does not bar a question as to validity of its provision regarding succession to the shebaitship where the only question in the previous case was about the extent of the bequest that operated under the will. 40 C L. J. 564. 29 C. W. N 17 85 I C. 875 1925 Cal. 225.

—a decision in a prior suit of pre-emption bars a subsequent claim 86 I C. 133: 1924 All 663 L R 6 A 296

—where no set-off was formally claimed nor such plea was explicitly recorded in the previous suit against the plff the subsequent suit was not barred 1923 Lah. 146. 81 I C 382.

—where a person appeals against a finding that a mortgage is genuine and the appeal is dismissed on the ground that it is incompetent but a finding is recorded to the effect that there was no consideration for the mortgage, the finding will be *res judicata* in a subsequent suit between the parties 90 I C 622: 1925 P. H. C 338.

—some co shebaits of a deity filed a suit against others for better management of the debutter property and one of the defts denied the debutter character of the properties, held that the decision of the question of debutter was only incidental to the suit and did not amount to *res judicata* 41 C L J 396. 88 I. C 616: 1925 Cal 996.

—where the subsequent suit to set aside an *ex-parte* decree contained *matters which could not have been raised in an application* under Or 9 r. 13 which had been dismissed, the question of non-service of summons was not to be precluded by *res judicata* in a regular suit. 41 C L J 281, 29 C W N. 325 86 I C 779: 1925 Cal. 663.

—decision in a previous suit for share of profits and declaration of right to a *Jagir* by a female in contravention of the terms of the grant does not in a subsequent suit for partition, bar objection thereto 88 I C. 347. 23 A L J 667 1925 M W N 535 1929 P. C 184, P C

—when a suit by heirs against a Mahomedan widow for possession of property is dismissed for non-payment of dower debt ordered by the court to be paid by the plff to the widow, a second suit for possession by the heirs is not barred 30 C W. N. 678: 47 A. 250. 86 I. C 579 27 Bom L. R. 796 · 48 M. L J. 667: 1925 P. C 63. P. C.

—where in the previous suit a kabulyat is found to be not genuine in a subsequent suit the plff is not entitled to rely on admissions made in the Kabulyat 97 I. C. 291. 1926 Cal. 1228

Directly and substantially in issue.—Expl. IV constructive *res judicata—contd.*

——a prior suit on mutual account for a certain period, though decreed *exparte* bars a subsequent suit by the deft. in the former suit to recover a sum due during the same period. *103 I. C 365 : 25 A. L. J. 711.*

Expl. IV. Constructive *res judicata.*

——the plea which might and ought to have been raised in a prior suit will not be allowed to be raised in the subsequent suit. This rule applies also to a plea which was actually raised in the previous suit but was rejected as being too late. 91 I. C. 683 : 1926 Cal. 511.

——an alternative defence which ought to have been raised in the former suit and which is inconsistent with the previous decision cannot be raised in the subsequent suit. 1923 Rang 239 : 2 Bur. L J. 109 1 Rang. 363. *Contra.* 2 Pat L T. 285 ; 60 I C. 393, 8 Lah. L. J. 251 72 I. C. 91

——but where the alternative claims are so dissimilar that their union would have led to confusion and great disadvantage to proper inquiry the doctrine of *res judicata* does not apply. 3 Lab L. J. 215 . 63 I C. 717, 25 B 189, 34 B 416, 8 B. 174, 9 M. 251, 22 M. 323, 29 M. 153, 34 C 922, 68 P. R 1915, 4 P R 1889, *Ref.*

——where there was no formal set-off claimed or decided in the first suit plea in the subsequent suit was not barred. 1925 Lah. 146, 97 I C. 488 · 1926 Mad. 1020.

——a person who has lost a case cannot by adding to the claim re-agitate the same question in a higher court 1923 Lah. 146.

——changing of value of subject-matter does not cease to operate as *res judicata.* 19 C. W N 1280

——a point which might have been but was not raised in a suit, *might be res judicata in a subsequent execution proceeding,* 27 A 68, 26 M 760, 5 L. L. J. 163 : 74 I. C. 577, the principle does not apply where the subject-matter of two suits are different 24 C. 83, 714.

——the plff should make alternative claim 2 Bur. L. J. 34 : 1920 Rang. 122 : 72 I. C. 14, 71 I. C 1009

——whether a point might have been raised in the previous suit depends upon the particular facts of each case. 20 C. 79 . 19 I. A. 234, P. C., 26 M. 760. 71 I C. 1009.

——*to constitute res judicata* upon a point which might have been but was not raised in the previous suit, there should have been a judicial determination on such point. 28 C. 17, 24 C. 711. 91 I. C. 683.

[illegible] a defence does [illegible] 31 C. 428, *39* [illegible]

[illegible] ughter of the deceased debtor as she was in possession of the property but *subsequently when the deceased's brother recovered the property from* the daughter the decree-holder applied for substitution of his name

S. 11, Res judicata, (7) Expl. IV. Constructive ***res judicata—contd.***

and he did not appear though notice was served upon him and the court ordered the substitution, held that the order had the force of a decree and operated as *res judicrta* on the point. 9 N. L J. 183 1926 Nag. 476 : 96 I. C. 963.

——when a mortgage has become fully ripened all questions between the mortgagor and mortgagee must be decided in the first suit, omission to put forward any cross-claim by the deft. will not entitle him to bring a second suit. 12 L. W 173 : 60 I. C. 226

——where the plff. filed the prior suit for possession on the basis of his title as purchaser and subsequent suit for possession on the basis of a mortgage, the second suit was barred by *res judicata* as he was bound to take the latter plea in previous suit. 108 I. C. 462 : 1928 All. 127 25 A. L J 1035

——prior mortgagee need not appear. 25 C. W. N 417, 47 C. 662 : 38 M. L J 424 . 1920 M. W. N 308, 11 L. W 518 : 22 Bom. L. R 557 55 I. C. 959 **P. C.** but if he has got a subsequent mortgage also he must appear. 19 C. W. N. 942, 947, or if his priority is impeached then he must appear. 1923 Pat. 118 1 Pat. L. R. 238, 39 C 527, 42 C. 662, 24 A. 499, 1 Pat L T 629, 25 C W N. 417 **P. C.**

——when a mortgagee having two mortgages of the same property sues on the subsequent mortgage without referring to the prior one, subsequent suit on prior mortgage is barred by *res judicata*.. 39 B 138

——[illegible]
failed to
redempti
a suit on

——the holder of two independent mortgages over the same property, not restrained by any contract, is competent to institute separate suits to obtain separate decrees for sale on each of them. Or. 2. r. 2 C. P C. is no bar. 33 C. L. J 232 ; 25 C. W. N. 109 : 60 I. C. 809

——the parties should not be allowed to split up a cause of action and claim a decree on it in a later suit when they might have claimed it in the previous suit, where in a previous suit on a mortgage bond the plff. omitted to claim relief against the person and other property of the defts. they cannot claim that relief in a subsequent suit relating to the same bond. 30 C W N. 432 : 24 A. L J. 33 : 5 Pat 135 · 28 Bom. L. R. 1126 91 I. C. 1033 . 1925 P. C. 280 : 5 M. L. J. 1 : 42 C L. J. 592 **P. C.**

——whether a matter ought to have been made a ground of defence or attack in the previous suit depends upon the particular facts of the case. Tests of various descriptions, both positive and negative, have been applied to determine, in individual cases whether a claim which might have been included, ought to have been included in a suit 33 C. L. J. 232 · 25 C W. N. 109 : 60 I. C. 809. 91 I. C. 683 (c)

S. 11, Res Judicata (7) Expl. IV. Constructive *res judicata*—contd.

——constructive *res judicata* does not apply when the party is ignorant of the supposed right 40 M. 1016 : 38 I. C. 627, 13 A. L J. 162 : 27 I C. 950, 94 P R. 1916 : 37 I C. 119.

——whether a point might have been raised depends upon the facts of each case 20 C. 79, 15 N. L. R 114 F. B, 11 C. L. J. 461 13 Bom. L R. 1061 : 12 I C. 813.

——when the plff was not allowed to raise a particular point or make a particular claim there was no *res judicata*, 31 C. L. J. 163.

——doctrine of constructive *res judicata* should be strictly applied. 36 I. C 650 (Pat)

——the decision in a ... alienation by the widow ... plff's father was not the ... in subsequent suit on the ... 1925 All 585

——previous suit on the ground of nearness of the kin bars a subsequent suit on the ground of family custom 47 A. 158, 29 C W. N 25, 48 M. L J 64 23 A L J 739 : 27 Bom. L R. 725 : 1925 P C 55, P C

——when a redemption suit included property not covered by the mortgage and the mortgagee having raised no objection a decree was passed and delivery of possession given, no suit for the recovery of possession of the same was maintainable 87 I. C. 711 : 1925 Mad. 1148

——in a suit for possession after redeeming an usufructuary mortgage the mortgagee did not set up a prior simple mortgage in his favour, held that he was not barred from afterwards suing on that simple mortgage. 87 I. C. 237 : 1925 Lah 516

——when a usufructuary mortgagee in possession obtained a decree for sale of the mortgaged property but does not execute the decree a subsequent mortgagee *pendente lite* is barred to institute suit for redemption 49 M. 691 : 96 I. C. 607 : 50 M L J. 612, (25 M 300 F B 39 M. 896) *fol.*

——failure to raise the plea of non-transferability by the mortgagor in a mortgage suit before the passing of the decree does not bar him to raise the objection in execution department 48 A. 385 : 95 I C 1048 1926 All. 432 . 24 A. L. J. 489.

——when a question has been necessarily decided in effect though not in express terms between the parties they cannot raise the same question in any other suit in any other form. 24 C W. N. 213.

——a prior suit for specific land based on title does not bar a subsequent suit for partition and possession of share. 1926 M. W. N. 724 : 1926 Mad. 1128

——a person is not bound to sue on an alternative cause of ... subse- ... exclu- ... have-

S. 11, Res judicata, (7) Expl IV. Constructive *res judicata*—*contd.*

joint possession with certain other co-owners, a subsequent suit on the ground that the person held to be co-owners had released their right was barred by *res judicata* as the arrangement set up in the subsequent suit might and ought to have been made a ground of attack in the former suit. 99 I C 525 1927 Mad 120 : 24 L. W 812

——where the previous suit was brought by the plff against the deft. treating him as trespasser and the court fond that the deft was a co-owner, a subsequent suit by the plff. recognising the deft to be co-owner but contending that the latter was not entitled to build upon the joint land was not barred because *although the matter which formed the ground of attack in the later suit might have been made a ground of attack in the former suit, the plff was not bound to do so.* 103 I C 494 28 Punj L R 432 1927 Lah 505.

——where in a mortgage suit the widow was implicated as party as legal reprentative of her deceased husband but the widow did not plead her own individual right, a subsequent suit by the widow for the declaration of her own right in the mortgaged properties was barred 98 I C 164 1926 Rang 191 5 Bur L J. 114

(8) Decision based on Compromise

——a consent decreee does not come within s 11 It however raises an estoppel as much as a decree passed in *invitum* as is binding on the consenting parties unless there was want of jurisdiction or unless there were circumstances which would go to vitiate the agreement on which the consent was founded 43 C L. J 116 94 I. C 844 : 1926 Cal. 672

——when both the parties invite decision of the court on a question of status, the decision is *res judicata* 94 I. C 310 1926 Cal. 887.

——extraneous matter embodied in compromise petition does not operate as *res judicata*, 27 C L J 583

——expl VI to sec 11 is not confined only to cases where leave of the court has been granted under Or 1 R 8, nor it is inapplicable where the decree in the previous suit was based on compromise and was not passed after contest. 75 I C 336 (Madras). 55 I. C. 984 : 43 M. 487 . 38 M L. J 493 1920 M. W N. 435 : 27 M L T. 219, 55 I C. 116 . 31 M L. J. 26 2 M W. N 258, *fol*

——a suit instituted on behalf of the public cannot be compromised so as to constitute *res judicata*, so also a suit under s 92 C. P C. 55 C. 519 . 32 C W N. 482 . 48 C. L J 55 108 I. C. 361 9 Pat. L T. 65 1928 P C 16 P C.

——In a suit for redemption of the usufructuary mortgage the parties entered into a compromise by which the plff was to get the property redeemed on payment of a certain sum to the deft within certain time but he failed to do that and brought a second redemption suit, held that it was not barred as the compromise did not provide that the right to redeem would be extinguished. 23 A L. J. 888 : 1926 All. 20 : 48 A. 17 : 92 I. C. 260.

S. 11, Res judicata, (8) Decision based on Compromise—*contd.*

——where in a prior suit for rent a compromise decree was passed but it did not embody the terms of the compromise, it does not operate as *res judicata* as to the rate of rent as it was an admission as to the amount claimed in that suit. 87 I. C. 781 : 1925 Cal. 1011.

(9) Decision based on two or more grounds.

——when the former decision is based on two grounds either of which is sufficient to support [illegible]
between the parties: but whe[illegible]
basis of the decree and the [illegible]
not *res judicata*. 16 C. L. J [illegible]
38 M. 158

——to apply *res judicata* the point must be the basis of the decree 16 C. L. J. 9, 33 C. L. J. 186, 6 C. L. J. 621, 24 C. 900 *Dist.* 38 M. 158 *contra.*

——to constitute *res judicata* finding in the previous suit need not form the basis of the decree in that suit. 12 L. W. 277 : 60 I. C. 397

——where an issue [illegible]
adversely to a party [illegible]
decision on the issue [illegible]
very great weight and [illegible]
unsustainable 48 C. 46 [illegible]

——where decree is one of dismissal in favour of the deft. but one point is decided adversely against him, he cannot appeal and there is no question of *res judicata* 1923 Cal. 297.

——where a decree is based on two grounds either of which is sufficient to support it, it stands on a different footing. 1923 Cal. 297.

——a judgment operates b[illegible] all the findings which are essential to [illegible]
regards findings which did no[illegible]
were in conflict therewith. 39 [illegible]

[illegible]

——when the causes of action are different the subsequent suit is not barred only because the same relief is asked for. 86 I. C. 949 : 1925 *Mad.* 1172.

——where the parties distinctly put forward the contention that the deceased was divided from them and the court gave a decree against his assets in their hands, in the face of that plea and judgment it was not open to those parties to contend that they and the deceased were undivided in interest and that succeeded him by survivorship. 90 I. C. 509 : 49 M. L. J. 104 : 1925 M. W. N. 713.

(10) Decision of unnecessary issues.

——where decision of the court is not based on the finding on an issue but inspite of it and such a finding is not necessary for the decision, it is not *res judicata*. 43 C. L. J. 116 ; 94 I. C. 844 : 1926 Cal 672.

——decision on unnecessary issues does not constitute *res judicata*. 45 A. 466 : 21 A. L. J 393 : 1923 A. 495 74 I. C. 656, 1923 Lah. 248 . 73 I. C. 854, 85 I. C 690 : 1925 All. 794.

——where an issue which was not necessary or proper issue, was tried at the special showing of the parties it constituted *res judicata*, in a subsequent suit. 33 C L J 37 . 63 I. C 161.

——decision of issue improperly raised and decided and accepted by the parties may operate as *res judicata*. 10 C. W N 1065 : 28 A. 727 : 4 C L J. 405 : 3 A. L. J. 695 · 16 M. L J. 440 : 8 Bom. L. R. 722 P. C., 102 I. C. 28.

——decision of unnecessary issue thinking it necessary is *res judicata*. 33 C. L J. 317, 34 M. J L 431 : 45 I C, 975, but such decision without framing issue is not *res judicata*. 49 I. C. 513 (C), 44 B. 321.

——where a point has been necessarily decided in effect though not in express terms between parties, it is *res judicata* 24 C. W. N. 213

——where the decision as to ownership was not the basis of the decree and the decree would have been exactly the same if the decision on the point had been exactly the contrary, it was a decision on unnecessary issue and was not *res judicata*. 1923 Nag. 139.

——unnecessary party when is bound by the decree in his presence 7 C. L J. 563, 45 I. C. 318, 27 A. 59

——where a suit is dismissed on formal defect or as being not maintainable decision on any other issue does not operate as *res judicata* 41 C L. J. 396 . 88 I C 616 1925 Cal. 996

——adverse finding against a party but decree in his favour does not constitute *res judicata* 84 I. C. 622 1924 Mad. 469, 83 I. C, 960 ; 1924 Mad. 689.

—— decision on a necessary issue operates as *res judicata* even if the decision be *ex-parte*. 85 I. C. 562 1925 Mad. 1025.

——if the determination of the issue was inconsistent with the decree it cannot be said that it was necessary for the determination of the suit and such a finding will be treated as unnecessary hence not *res judicata*. Merely because the decision did not ultimately happen to turn on it that would not be sufficient to oust the operation of the rule. 85 I. C 953 1925 Cal 985.

——where a finding on a point is not necessary for the decision of the case it is not *res judicata*. 43 C. L. J. 116.

——there is difference between mortgagor's suit for redemption and mortgagee's suit for sale. In a suit of latter class a person claiming adversely both to the mortgagor and mortgagee may be joined but such person is not bound to raise the question relating to his paramount title. 1927 Mad. 945, 1924 Cal 138 *Dist*.

(11) Decision on question of law or fact.

——a finding on a mixed question of law and fact stands on the same footing as a decision on a queston of fact and can operate as *res judicata* if the finding is necessary to the judgment. 87 I. C. 811 · 1926 Cal 80, L R. 6 All 226

——a decision on a point of law does not operate as *res judicata* if the cause of action in a subsequent suit is different. 87 I. C. 789: 1925 All 761. L. R. 6 All 226

——where the law on which a prior decision between the parties has subsequently been altered as the result of judicial decision or by statute the decision in the prior suit will not operate as *res judicata* 30 C W N 83, 87 I C 767 1925 Cal. 1193

——the doctrine applies to issue of law as well as of facts. 2 Pat 771. 74 I C. 781. 5 Pat. L T. 7.

——a point of law may constitute *res judicata*, 32 C. 749: 9 C W. N. 446, (5 M 304, 22 B. 669, 1 M, 339, 1 C W. N. 657, 28 C 318) *Ref*, (10 C 1087, 15 A 327) *Dist* but an erroneous view of law cannot have the force of *res judicata* in a subsequent suit for different relief. 16 C L. J 154, and the above case

——decision as to abstract question of law as opposed to concrete question such as the construction of a document, does not operate as *res judicata*. 23 Bom L R 749.

——an erroneous decision on a pure question of law in a previous suit operates as *res judicata* 1928 Cal. 777 F B, 1 C W. N. 657, 98 I. C 341 28 Bom. L R. 879: 1926 Bom. 481, 99 I C. 528 1927 All. 206. *Contra* 30 M, 461: 17 M L J. 250

(12) Formal defect

—— [illegible] dismis- [illegible] decree [illegible] C., 46

——on the other hand the fact that deft did not raise the plea of defect of party in a previous rent does not bar him to raise that objection in a subsequent rent suit. 103 I C. 379 1927 All. 505: 25 A. L J 582 49 A 918, *contra*. 99 I. C. 528 1927 All. 106

——dismissal on technical [illegible]

——where the former suit was dismissed on some purely techni- [illegible] maintain- [illegible] 206: 47 I. [illegible] is dismis- [illegible] 3 P. L. J. 404: 46 I. C. 392.

——dismissal of application on the ground of limitation only and not on merit does not operate as *res judicata*. 73 I. C. 705: 1923 Lah. 150.

(13) Judgment obtained by fraud or collusion

——a Judgment obtained by fraud or collusion cannot operate as *res judicata* 24 A. 242, 26 C 891, 37 A. 535, 21 C. 612, 619, 41 C. 990, 4 Pat L J 187, 38 A. 7.

——rejection of review of decree operates as *res judicata* for regular suit for setting aside the decree 18 C. W. N. 1204 2 C. L. J 508. 10 C W N. 527, *fol* 10 C. L J 120: 13 C. W. N. 1197, *Dist* as the case was based on fraud but, according to the P. C ruling 20 C. W. N. 845, when review under s 108 C P C on the ground of fraud has been rejected, no suit lies. 15 C. L. J 446, 448, *Expld* (5 C W N 756 6 C W N. 473) P C *Ref.*

——where an application under s. 151 C. P C to set aside a compromise decree was summarily dismissed it did not bar a regular suit to set aisde the decree on the ground of fraud. 94 I. C. 765: 1926 Pat. 289: 5 Pat. 276.

(14) Matters Finally decided.

——whether an issue has been finally decided or not should be determined by a reference to the pleadings, the issues and the judgment and the mere *production of the decree* is not enough, 43 C, L J 135.

——the question is not whether the previous judgment was right or not but the question is whether it finally decided the matter in issue, matters left open cannot be *res judicata* 3 C W N 517. 1 Bom L R 700: 26 I. A 175 21 A. 515, P C nor the matter left open by the appellate court 42 I. C 518 45 C 442 · 15 A. L. J. 889 19 Bom. L. R 972 34 M. L. J. 12 22 C W N 121 42 I C 959 3 P. L W. 381 26 C L. J. 568 P C, 1 C W N 297, P. C., 47 I.C 2

——when an Appellate court confirms the decision of the trial court by deciding on one point only without giving its decision on another point which was also decided by the trial court, this latter decision will not be *res judicata* in a subsequent suit. 42 C L J. 560 · 92 I C 931. 1926 Cal. 163

——when the suit is for past and future mesne profits and the court decrees the past and remains silent as to the future it will not be *res judicata*. 41 M. 189, F. B., 40 A. 292. 32 C 118, 21 A 425 F. B.

——the refusal of the court to determine an issue does not operate as *res judicata* 1918 Pat 152 22 C. W N 121 26 C L J 568 42 I C 959, 41 M. 188: 42 I. C. 929 F, B., 47 I C 2 (C) 45 I. C 326 · 4 P. L. W. 299.

——where the [illegible] deposit the decretal amount [illegible] suit he cannot bring another [illegible] *contra*, 25 Bom. L. R 211 72

——successive suits on same mortgage adding mortgagor's mortgagor as party is not maintainable 14 L W. 563 (Mad)

——an order rejecting a plaint after a full trial on the merit and recording a finding adversely to the plffs. operates as *res judicata*, for the cause of action 1920 M. W N 616: 12 L. W. 457: 60 [illegible] C. 694.

S. 11. Res judicata, (14) Matters Finally decided—*contd.*

——the validity of an order at one stage of a suit unless forthwith challenged in superior tribunal, is conclusive between the parties and *cannot* be questioned or collaterally attacked at a later *stage* 34 C. L. J. 415

——if in the previous suit for partition some property is left out either intentionally or by mistake and no objection is taken thereto by any party a subsequent suit for partitioning the remaining *property is maintainable; also when properties included* in the previous suit were left out of partition with the consent of the parties they may be partitioned in a subsequent suit, but where the decree in the previous suit dealt with the properties included in that suit and directed that some of them should remain joint between the co-parceners a subsequent suit for partition thereof, is barred by the rule of *res judicata* 47 C L. J. 436; 1928 Cal 459.

——this sec applies to interlocutory orders and orders made according to the consent of the parties 2 Pat L T. 628, 24 C. 216; 35 B 371, 283, 35 M. 75, 8 C 51

——unless the prior mortgagee's prior title is *questioned* he is not bound to set up his prior mortgage as a ground of defence simply because he has been made a party in the second mortgagee's suit 47 C 662. 25 C W. N 417 · 38 M L. J. 424. 1920 M W. N. 308: 11 L W 518 22 Bom L R 557 55 I. C 959 P. C.

——no *res judicata* if in the previous mortgage suit no *order* is made with respect to prior or puisne mortgagee 10 C. L J. 150, 38 C W N. 1013; 24 I C 42.

——absence of *decision* on any point by way of its disallowance constitutes *res judicata* 23 C W. N 108n. But claim refused operates as *res judicata* 32 C. 118, 21 A. 433 P B.

——the issue should be finally decided, so a decision against which a party cannot appeal cannot constitute as *res judicata.* 40 C. 29. 16 C L J. 9; 16 C. W N. 877, 17 M L. T. 85; 27 I. C. 861, 34 M L. J 431 45 I C. 75

——if pltf is permitted to bring a fresh suit without asking for *withdrawal there is no res judicata.* *23 C W. N. 91 46 I. C. 89.*

——where the deft. in a mortgage suit had a double *capacity* as purchaser of equity of redemption and also settlement-holder from [illegible] that is, paramount title and omitted to set up the latter [illegible] [illegible]wards barred by *res judicata. A question* [illegible] ted in a mortgage suit in certain cases [illegible]

——when a suit is withdr[illegible] with liberty to bring fresh suit the judgment of the trial court becomes ineffectual 74 I. C. 894

——where an application by an adopted son for succession certificate was dismissed by the Lower Court on the *ground that* there was no valid authority to adopt and the decision was confirmed by the H. C. on the ground that no inquiry should be held in miscellaneous petitions into *intricate* question of law and fact the question as to the validity of the adoption *was* not *res judicata.* 46 M. 1. 1925 Mad. 497.

S. 11, Res judicata, (14) Matters Finally decided—*contd.*

——where in a suit for [illegible]
money and the mortgagee [illegible]
applied for possession but th[illegible]
fresh suit for redemption [illegible]
484.

[illegible]

——when a suit for the recovery of possession of portion of properties covered by a deed of dedication was decreed a subsequent suit for a declaration that the properties were *Debuttar* was barred so far as the properties dealt with in the previous suit was concerned. 43 C. L. J. 606 97 I C. 209 : 1927 Cal. 1053

——where in a prior suit by a mortgagee against the tenant for possession the latter set up permanent tenancy which was ignored by the trial and the appellate courts but the possession was disallowed on the ground of want of previous notice, in a subsequent suit for possession after the service of due notice the plea of permanent tenancy was *res judicata* 29 Bom. L. R. 215 · 1927 Bom 145 ; 100 I. C. 1033, (48 C. 460, 43 B 568, 47 M. 453) *Dist*

Expl. V. Relief claimed but not expressly granted amounts to refusal

——where a previous suit was brought by the plff for a declaration that the defts. had no title to the properties and for possession and the suit was dismissed on the ground of limitation the declration claimed should be taken to have been refused 29 C. W. N. 861 . 89 I. C. 207 : 1925 Cal. 1195

——in a redemption suit claim was made for mesne profits but this was withdrawn ; a subsequent suit for mesne profits was not barred. 85 I. C. 547 · (c) 1926 Cal 178

——in a suit for specific performance of contract of sale relief as to possession was asked but there was no reference to it in the judgment, held that relief may be taken to have been refused but the matter not having been heard there was no *res judicata.* 27 Bom. L. R 42 : 86 I. C. 1925 Bom. 181.

——absence of decision on any point by way of its disallowance constitutes *res judicata* 23 C. W. N. 108 But claim refused operates as *res judicata.* 32 C. 118, 21 A. 533 F. B.

——where the plff in a previous suit claimed certain properties with a statement that he would pay additional court fees if it was found he was entitled to other properties, subsequent suit for further properties was not barred by *res judicata.* 93 I C. 1 : 1926 M. W. N. 94.

——the refusal of the court to determine an issue does not operate as *res judicata.* 1918 Pat. 152, 22 C. W. N. 121 · 26 C. L J. 568 : 42 I. C 959, 41 M 188 : 42 I. C. 929 F. B., 47 I. C. 2 (c). 45 I. C. 326 : 4 P. L. W. 299.

S. 11, Res judicata. (16) Representative capacity—*contd.*

——a suit by Hindu father for recovery of joint family property binds all coparceners. 1925 Pat. 308, 89 I. C. 120: L R 6 A. 545.

——when the pltf. dies and the right to sue survives the court is bound to determine the question of the successor-in-interest of the deceased without referring the parties to a separate suit and such decision operates as *res judicata*. 48 A. 422, 94 I. C 157: 1924 All 439 24 A. L J 546.

Decree by or against a minor.

——if the court considers that the manager of a joint Hindu family has acted on behalf of the minor members in a previous suit, then a decree obtained therein is binding on them under Expl VI. of s. 11. 51 B. 450: 31 C W. N. 570. 45 C. L. J. 504: 8 Pat L. T. 462 29 Bom. L. R 848 101 I. C 44 · 1927 P. C. 56. P. C.

——where a guardian *ad litem* representing a minor in a suit applied to have his name removed on the ground that the minor had attained majority and order was made to that effect without notice to the minor, a subsequent suit by the minor that he was in fact a minor on that date is not barred 102 I. C. 449: 1927 Pat. 271 · 6 Pat. 388

——a decree passed against a minor properly represented is binding, though the minor may impeach it by a suit on the ground of fraud or gross negligence on the part of the guardian representing him 22 C 8, 19 B 571, 43 I C 354. An act or omission on the part of the guardian which is prejudicial to the interest of the minor is gross negligence 48 A 44 · 90 I C 949, 1926 All. 36, but an omission to bring to the notice of the Court a previous judgment for the purpose of raising the plea of *res judicata* has been held not to constitute gross negligence 47 M. L. J 70. 85 I. C. 812. 1925 M. 258.

Trustee, Shebait etc

——in the cases of shebait, trustee etc if the parties in the subsequent suit were represented by the parties in the former suit the decision operates as *res judicata* 11 M. 191, 12 C. W. N. 737. 39 C. 887. 14 I. C. 142, 46 A. 651; 80 I C. 406: 1924 All 504: 14 B L. R. 450, 9 B. 198, 29 B. 96, 40 B. 606, 17 M. 214 30 M. 215

——where the proceeding was against a shebait in person but the shebait appeared and defended the suit as such there was effective representation of the idol as the proceeding was really directed against the *debutter* estate. 101 I. C. 758; 1927 Cal. 606. 6 M. I A. 393 P. C. *Rel. on.*

17. Widows and reversioners.

——in a suit against a widow in respect of [illegible] the decision [illegible] C. [illegible] 6; [illegible] be shown that there had not been a fair trial of the right in that suit.

S. 11, Res judicata. (17) Widow and reversioners—*contd.*

or in other words, unless that decree could have been successfully impeached on some special ground 9. M. I. A. 543 p. 608 **P. C.**, 40 A. 593 ; 48 I. C. 553 **P. C.**

——the principle of law is where the estate of a deceased Hindu has vested in a female heir a *decree fairly and properly obtained against her* in regard to the estate is, in the absence of fraud or collusion, binding on the reversionary heir. 28 C. L. J. 519 p. 529, **P. C** 19 C. W. N. 1284

——although a Hindu widow represents the estate of the reversioner it is her duty not only to represent the estate but also to protect it. 11 M. I. A. 241. p 267 **P. C.**

——a widow has power to compromise a suit and a decree passed against her, or compromise or on award binds the reversioner quite as much as [illegible]
was entered into bona [illegible]
ted and not for her pe [illegible]
200 : 3 Pat. L T. 749 . 6 [illegible]
P. C. 33 A. 357 9 I A 539, 604 **P C**, *similar cases*, 46 A 637 , 87 I. C. 938 when the decree was on award , 34 A. 385 14 I. C. 184 when the appeal was withdrawn by the widow , when the decree was on admission of the widow.

——but a compromise by which the widow conveyed some properties to her mortgagee when the mortgagee sued to enforce the mortgage, wa [illegible]
M 504 : 1922 M. V [illegible]
479, **F. B.** and [illegible]
presentation but [illegible]
reversioner 42 B. [illegible]
against the legal [illegible]
her husband's es [illegible]
the representative [illegible]
the husband. 39 C. 925 14 I. C. 299

——a suit for possession by a widow in her own right does not operate *as res judicata* in a subsequent suit by the reversioner 35 C. L. J. 348.

——the dismissal of a suit brought by a widow on the ground that it was barred by s 47 C P C does not operate as *res judicata* in a suit by a reversioner. 46 B. 726 · 67 I. C. 209.

——a decision obtained on a fair trial in a suit by or against a Hindu widow, daughter or mother in possession, operates as *res judicata* as regards the question tried and is operative against the ultimate reversioner 25 C W. N 585 33 C L J 421, 1925 Mad. 1270 ; 49 M. L. J 430, 38 M. 406, 82 I. C. 962, 47 M. L. J. 824 21 L. W. 295 **P. C.** 52 I C. 398 : 3 O. W. N. 1 : 1925 P C. 272 **P. C.** 23 A. L. J. 829 : 87 I. C 235 , 47 A. 505 1925 All. 483, because the reversioner represents the whole body of reversioners. 19 A. L. J 749 **F. B.** 19 C. L. J. 157, 12 A. L. J. 1011, 37 A. 496, 33 M. 459, 40 B. 606, 32 C. 62, 22 A. 33. A decree obtained by a reversioner for a share bars a suit for other share. 18 C. W. N. 833 : 27 I. C. 226

S. 11, Res Judicata, (18) Same cause of action—*contd.*

——where the suit of the plff's ancestor for a declaration that certain *chur* in a river belonged to him forming part of his estate was dismissed subsequent suit by the plff. to establish his right of fishery in the same river on the basis that *part of it belonged to him* was barred by *res judicata*. 31 C. W. N. 473 : 46 C. L. J. 322 : 103 I. C. 13 : 1927 Cal 403.

(19) Want of Jurisdiction, Erroneous Decision.

——to constitute *res judicata* the former court must be competent. 12 C. W. N. 359 : 7 C L. J 470 : 19 C L. J. 157, 41 I. C. 905 (c) [illegible]

mat [illegible]
W. [illegible]

——an erroneous decision on a pure question of law in a previous suit may operate as *res judicata*. 1928 Cal. 777 F. B. 28 Bom. L R *876* · *1926* Bom *481*, 45 B *1260*, *94 I. C. 553* : *1926 Pat.* 288, 32 C. W. 882, I C. W. N. 687, *contra* 30 M. 461 : 17 M. L. J. 250. 16 C L. J. 154 . 16 C. W N 621. 22 B. 669

——but an erroneous view of law cannot have the force of *res judicata* in a subsequent suit for different relief. 16 C. L. J. 154 : 16 C. W. N. 621.

——an erroneous decision operates *as res judicata* as regards the matter in controversy. 7 O L. J 524 : 23 O. C. 269 : 2 U. P. L R. 163 · *60 I C. 404*, 15 C. 800, 11 C L J 461, 13 C L J. 119, 16 C. W. N. 877 · 16 C. L. J. 9, 19 C. L. J 34, 96 I C. 963 1926 Nag. 476 : 9 N. L. J. 183

——an erroneous decision on the assumption that the matter was barred by *res judicata* by a prior decision to which the plff. was not in fact a party operates as *res judicata* in the subsequent suit. 1923 M. W. N. 347 : 1923 M. 545 17 L. W. 521 . 72 I. C. 789.

——an *exparte* order passed in proceedings without jurisdiction cannot operate as *res judicata* 92 I. C. 845 : 1926 Cal. 991.

——a question once decided cannot be re-agitated merely because a special bench has innunciated a different rule. 1923 Cal. 629.

——what is not *res judicata* at the time of filing of the suit cannot have that effect by the change in the law e.g. by a later decision of a Full Bench. 85 I. C. 574 : 1925 Mad. 1107.

——decision in a suit based on false claim is *res judicata*. 54 I. C. 200.

——decision in a probate case does not operate as *res judicata* in a civil suit. 15 C. W. N. 1021 : 13 C. L. J. 547. 43 C. 694 · 23 C. L. J. 621 : 20 C. W. N. 738 : 14 A. L. J 466 : 18 Bom. L. R. 397 31 M. L. J. 77 : 33 I. C. 914 P. C.

——the decision of an Assistant Collector, second class, having no power to try the matter is no bar to a suit by the Assistant Collector first class, having such power. 1923 A. 368, 73 I. C. 460 1923 A. 556.

(20) Res judicata when suing or being sued in different capacities.

——plff. is the same but sues in different capacities. subsequent suit is barred. 17 C. W. N 967 but it is not barred when the plff. claims under different title. 31 C. L. J. 163, 24 C. W N. 690, 71 I. C. 1009

——one having personal capacity as well as of executor must be sued being described in both capacities otherwise he will not be represented as executor. 19 C. W. N. 1280

——decree against one in one capacity does not bar a subsequent defence in another capacity. 23 C. L. J. 587 · 35 I C 294

——an adverse decision against limited owner whether on fair trial or compromise, binds the reversioner, if not vitiated by fraud, 19 C. W. N. 1280, 28 C. L. J. 519 P. C.

——when the position of the parties is reversed or when the party was guardian in the previous suit no *res judicata*. 14 M. L. T 229 : 21 I C. 219, 1 P R. 1914 : 22 I. C. 955.

——an application for probate being dismissed for default the legatee's heirs can plead existence of the will by way of defence to suit for property. 87 I C 621. 1925 Mad. 861, 1925 M. W. N. 285.

——suit by or against *benamdar* operates as *res judicata* against real owner, 23 C. W. N. 521, P. C 22 C. W. N. 891, P. C. 19 C L J. 34, *19 C. W N. 361 contra. 18 C. W N. 814 24 C. 644*, 11 C L. J. 47, 25 C. 98 ; 3 C. W. N 20, 30 C. 265, 22 C. W. N. 366.

——the decision of suit by reversioner for certain share as regards legal necessity will be *res judicata* in a subsequent suit by him for other share. 18 C. W. N. 888, 27 I. C. 226

——the decision in a suit by a reversioner against a widow for declaration that an adoption by her was invalid will be *res judicata* in a subsequent suit by him againt a stranger to whom the widow has made a gift, on the question of relationship of the reversioners in as much as the deft who was claiming under the widow was bound by the decree passed against her. 59 I C. 808.

——the decision in the first suit by shebait of a deity for framing the scheme does not bar the second suit by the next friend representing the deity for declaration as to *debuttar* 54 C 770. 45 C. L. J. 605 : 31 C W. N 1063. 1927 M W. N 448 : 25 A. L J 681 : 29 Bom. L R. 961 : 101 I. C. 873 1927 P. C 128 P. C. 2 I. A 283 *Applied.*

——deft was sued as trustee and manager but he asserted his personal right and was unsuccessful. He could not bring a separate suit in his own personal right. 60 I. C 74 *contra* below.

——a person sued in the capacity of the representative of a deceased mortgagor and not pleading paramount title is not barred to plead that title in a subsequent suit. 20 C W N. 675 : 23 C. L. J 587 : 35 I. C. 294. 55 I C. 30 (M) *Dist*

——it matters not that the deft. was described as *proforma*, if there was a real contest with him. 85 I. C. 953 : 1925 Cal. 985.

(20) Res judicata when suing, or being sued in different capacities—*contd.*

——when a suit by an expectant reversioner for declaration of invalidity of mortgage by widow was dismissed on the ground that the plff. was not reversionary heir as alleged by him, suit by him for possession after the death of the widow on the ground that he had become actual reversioner was barred by this doctrine 49 M L J. 143 : 1925 M. W. N. 572 : 1925 Mad. 1162, case on the same principle 86 I. C. 849 · 1925 All 417.

——decision in a suit by principals against agents in respect of certain transaction bars a subsequent suit by agents against the principals in respect of the same transactions. 7 Lah. L J 420 : 26 Punj. L. R. 635, 1925 Lah. 596.

——where the plffs brought a previous suit against a Hindu widow and her lessees for the recovery of the leasehold properties and the suit was held by the appellate court as time barred, the subsequent suit after the widow's death as reversioners against the alienation by the widow is not barred by *res judicata* as the title claimed was different 29 C W. N 861, 89 I C 207 : 1925 Cal 1196

——where a suit is dismissed against the defts but the judgment contains findings adverse to him he can reagitate the question 47 M L J. 487. 82 I C. 438 . 1924 M. W. N. 807.

(21) Res-judicata between co-defts and against pro-forma defts and co-plaintiffs

——in the absence of conflict of interest between co-defts. there will be no *res judicata*. 70 I. C. 232 1921 Pat 369

——as matter may be *res judicata* between co-defts, so it may be *res judicata* between co-plffs 21 M. 8, 36 B. 207 *contra* 1917 M. W. N 14, 28 I C. 213, 18 M 374

——if a finding as between co-plffs. is necessary before the court can give any relief against the defts the finding will be *res judicata*. 90 I. C. 124 : 1925 Mad. 645, 36 B. 207 14 I. C. 466, 38 I C 213 : 1917 M. W. N 14

——this general rule is that there is no estoppel by *res judicata* between co-defts but there are exceptions to this rule 97 I C. 205 : 1926 Pat 478

——a decision as between co-defts operates as *res judicata* if it is necessary to decide any question between them to give relief to the plff 41 C L J 396 : 88 I C. 616 : 1925 Cal. 906, 1926 Pat. 478 : 97 I C. 205, 11 B. 216.

——to constitute *res judicata* between defts there must have [illegible] to be decided and was [illegible] C. L. J. 653. 12 C. 580, [illegible] M. L J. 46 : 5 P. L. [illegible] 3, 210, 33 M. L J. 740 : 43 I. C. 860, 2 P. L. W. 108 41 I. C. 469, 7 A. L J. 451 - 6 I. C 692, 25 C L J. 322 : 21 C W. N. 693, 23 C. L. J. 215, 17 C. W. N. 128, 118, 216, 22 A. 386, 25 B. 75, 22 A, 215, 26 M. 337, 29 M. 51, 30 M. 447, 35 B. 438, 3 Lah. L. J. 223 : 2 Lah. 83 : 62 I C. 665, 63 I. C. 735, 47 Bom [illegible]

(21) Res judicata between co-defts and against pro-forma defts. and co-plaintiffs—*contd.*

534 : 25 Bom. L R 268 : 1923 Bom. 203 : 73 I C 912, 1923 Lah 186 : 71 I. C 481, 35 C. L. J. 173, 86 I. C. 384 : 1925 Mad. 947, 26 Punj. L. R 504, 90 I C 250 : 1925 Lah. 434, 47 A. 778 ; 23 A. L. J. 453 83 I C. 130, 3 Rang. 77 1925 Rang. 228, 100 I C 527 : 1927 All 365, 103 I. C. 701, 1927 Lah. 212 : 92 I. C 131

——when there was no conflict of interest between the defts in the prior suit the decision as to the construction of a deed which was the subject matter of the suit is not *res judicata* between the defts 30 C. W. N. 415 44 C. L. J 399 94 I C. 235 1926 Cal. 568.

——where in a rent suit the question of title is incidentally raised and decided the decision is not *res judicata* in a subsequent suit between the co-defts 96 I C 625 (c).

——where there has been no issue between defts no *res judicata* there. 23 C. L J 215, 40 B 210, 38 B. 438, 22 C. W N. 891 P. C. 1927 Mad 50, 17 C. W N 128, 20 C W N 1177, 19 C W N. 531 P C, 40 B. 21, 216, not *fol* 24 I C 84, even if it be a partition suit. 47 B. 534 25 Bom L. R. 268 : 1923 Bom 203 73 I C. 912.

——C. sues R. and I —C'S case is dismissed holding that the property belongs to R.—in a suit between R and I, the former decision is not *res judicata.* 22 C W. N. 891. P C.

——decision in a claim case is not *res judicata* between co-Jt. Drs. 21 C W N 222 37 I C 887.

——where a creditor brought a suit under Or 21, R. 63 C P. C. against the judgment-debtor and the claimants and it was dismissed, the finding did not operate as *res judicata* in a subsequent suit brought by the debtor against the claimant 55 C. 448 · 32 C W N 248 : 105 I C 617 1928 Cal 130

——if a pro forma deft actually contests a case it will be *res judicata* although no relief was asked against him. 19 C W N. 1280, otherwise not as he is not necessary party. 45 I. C 318 (Pat). 27 A. 59, 7 C L J 563

——but parties in subsequent suit must be claiming under parties in former suit 11 C. L R 122, 22 A. 382, 30 C. 556, 29 A. 1, 5 B. 685.

——a purchaser at a revenue sale does not claim under the defaulting proprietor. 34 C. 868. So also a lessor does not claim under a lessee 11 C L R. 122, nor one reversioner from another. 22 A. 382.

——the [illegible] ht by the reversioner against the [illegible] ig the mortgage, to the effect [illegible] pass and legal necessity was not [illegible] it brought by the mortgagee on [illegible]

[illegible] was described as *pro forma* if there was a real contest and that notwithstanding that the contest was opened by this deft and not by the pltf. 85 I C. 953 , 1925 Cal 985

Res judicata between co-defts. and against pro-forma defts. and co-plaintiffs—*contd.*

——where in a partition suit certain issues were raised between the defts. and the suit itself was dismissed but findings were given on the issues raised between the defts, no appeal lay as the finding was not *res judicata* between the co-defts, the same not being necessary for the dismissal of the suit. 85 I. C. 868 ; 1924 Mad. 858.

(22) Res judicata in rent-suits and suits under B. T. Act.

(Question of rent)

——a decision, whether *ex parte* or contested, in a previous rent suit operates as *res judicata* in a subsequent rent suit even for a different period, when it decides any question which arises in the suit or omits to decide a question which ought to have been decided if objections were taken by the party 29 C. W N. 254 : 40 C. L. J 507 1925 Cal. 427, 20 C. W. N. 48 : 43 C. 170 *Ref.*, 24 C. 711, *Dist* 82 I. C 990 1925 Mad. 378.

——the cause of action for suits for successive periods are different consequently to apply *res judicata* it must be shown that the question of right or liability for all time or once for all was directly *or substantially in issue and was tried and determined*, the question must be directly and substantially in issue and not collaterally or incidentally. 43 C L J 146 30 C. W. N. 593 . 94 I. C. 837 : 1926 Cal. 650.

——where a prior suit for rent was decreed *exparte* irrespective of the question whether the B T. Act applied or not but in a subsequent suit the issue was raised, the previous decision did not operate as *res judicata*. 32 C. W. N 1221.

——the decision as to the rate of rent in a suit for rent for certain years is *res judicata* in a suit for rent for subsequent years only if the issue as to what was the yearly rental was tried and determined in the prior suit. 43 C. L. J 135 · 95 I C 130 · 1926 Cal. 698. 43 C. L J 1146 · 30 C W. N. 593 : 94 I. C 837 1926 Cal 650, 43 C. L. J. 116, 94 I. C 844 : 1926 Cal. 672.

——previous rent decree is not *res judicata* as to the amount of rent but it is presumptive under sec. 51 B. T Act 6 C. W. N. 539. 5 C. L. J 92, 23 C W. N. 136 n, 47 I. C 173 (C), but where there has been no change it is *res judicata*, 21 C. W. N 96 n, whether it is *res judicata* or not depends on circumstances of the case. 1 C. L. 243, 2 I. C 11.

——a rent decree is *res judicata* only to the effect that for the years for which the suit was brought the rent was the amount then found. 1923 Cal 282.

——where the issue in the rent suit determines the rent for a full term of the lease it operates as *res judicata*, otherwise not 77 I. C. 334.

——*the decision as regards the rent for one year* precludes question as to rent for following years. 82 I. C. 990 : 1925 Mad. 378.

Res judicata in rent-suits and suits under B. T. Act—*contd.*

——in a suit for enhancement of rent the question of rate of rent is directly and substantially in issue and a decision of that question operates as *res judicata*. 59 I. C. 752.

——though one and the same person can combine in himself the status of an occupancy raiyat and a raiyat at a fixed rent, yet a previous decision as to his status does not bar the consideration of the question of fixity of rent. 94 I C. 310 : 1926 Cal. 287.

——in a suit for rent the decree in a prior suit for rent between the same parties was filed but not the judgment, held it did not amount to more than a strong piece of evidence regarding the amount of rent realised from year to year 85 I. C. 770 : 1925 Cal. 1116.

——where in a prior suit for rent between the parties a compromise decree was passed but not embodying the terms of the compromise it did not operate as *res judicata* as to rate of rent 87 I. C. 781 : 1925 Cal. 1011.

——a finding arrived at in a rent suit is not *res judicata* in subsequent suit for rent if the latter suit could not have been tried by the court which decided the earlier suit. But it is a valuable piece of evidence 91 I. C 1026 (c).

——the decision in a 105 case as to what additional rent was to be allowed for the excess area does not constitute *res judicata* as to the rate of rent, 1923 Cal. 482.

(Question of area.)

——if in a suit for rent for certain years the court determines the area of the land in the possession of the tenant and the rent annually payable, it is *res judicata* in a subsequent suit 43 C. L. J. 116 : 1926 Cal. 672 · 94 I. C. 844.

——question of area of a holding if decided in previous rent suit, is *res judicata*. 34 C. 1020 : 11 C. W N. 1100 . 6 C L. J. 715 even if the subsequent entry in the record of rights differs 74 I C. 961.

——a decision in a rent suit as to area and annual rental is *res judicata* 43 C. L. J 116.

——a finding that the tenant was not entitled to abatement of rent as there was no reduction in area since the Settlement, is *res judicata* in a subsequent suit in the absence of proof of *change of* circumstances 1926 Cal. 513 : 91 I. C. 738

(Question of interest)

——an erroneous decision in a rent suit as to the granting of interest at 75 p. c. is *res judicata* 1923. Cal. 361.

(Question of relationship)

——a decree in a previous rent suit by ijaradar does not operate as *res judicata*, on the question of relationship of landlord and tenant arising in a suit brought by landlord. 4 C. W. N. 161.

——when a rent suit is decreed a subsequent suit by declaration that he is not plff's. tenant and for refund of decre amount is barred. 18 C. W. N 216 L. P.

Res judicata in rent-suits and suits under B. T. Act—contd.

(Question of title)

——where both quantity of land and amount of rent payable. ... issue in former suit, the decision. ... subsequent title suit. 43 C L. J. ... 71 (11 C. W. N. 1100, 10 C. W. N. ... 20 C. 505, 19 C. 656, 1 C. L J. ... held.

——where in a suit for rent the landlord obtains a decree against the tenant and the latter pays the amount due under the decree, the question of title is *res judicata* in a subsequent suit for ejectment. 87 I. C. 672 ; 1926 Cal. 114

——a previous decision in a rent suit of an issue whether a certain piece of land did or did not belong to a third person is *res judicata* in a subsequent suit between the same parties. It is impossible to lay down any hard and fast rule as to whether a previous decision in a rent ... *cata.* 9(

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sets up ... blishmen ... N. 266. F B. 10 C. W. N. 820, the only material issue in such case is whether the relationship of landlord and tenant existed between parties. 10 C. W N 820, 6 C W. N 66, but where the deft. sets up title in himself, the issue as to the title is substantial and operates as *res judicata.* 10 C. W N. 820

——incidental decision on a question of title in a rent suit does not operate as *res judicata* 63 I C. 762, 15 C 756, P C, 18 C. W. N. 116, 17 C. L. J 71, 3 C W N. 266, F. B, 15 C W. N. 335, 13 C. L. J. 1, 33 C. L J. 186, 14 C. L. J. 220 but see. 33 C L J 3

——former suit for rent in a court not competent to try the question of title, cannot operate as *res judicata* in a suit for title 3 C. W N 202, nor the decision of title incidentally raised can operate as *res judicata.* 24 C. 509 : 1 C. W. N. 500.

——title decided in a rent suit is *res judicata* in a *subsequent civil suit when the same issue arises.* 85 I C 804 : 1925 Cal. 1004.

——decision of a rent suit brought by ex-proprietor is not binding on the purchaser at a revenue sale. 24 C. W. N. 399, 23 C. W. N 204 *contra* 1918 Pat. 134.

(Question of cess.)

——when the amount of cess was not questioned in the previous rent suit, it will not operate as *res judicata.* 28 C 17, 17 C. W. N. 271 n

——a decree in a previous rent suit about cess does not operate as *res judicata.* 17 C. W. N 271 n

(22) Res judicata in rent-suits and suits under B.T.Act—*contd.*

(Exparte *decree.*)

previous rent suit even for a ... arises in the ... ve been decided ... 254 : 40 C. L. J.

——an *ex-parte* decree as to the rate of rent payable is *res judicata.* The court must be presumed to have decided questions which were necessary for supporting the decree made. 91 I C 380 : 1926 Cal. 767

——an *exparte* rent decree though not executed, is evidence as to the amount of rent 3 C. 383. 1 C L. R 385, but it is not conclusive evidence as to rental. 16 C 300 F. B, 7 C. 23 : 8 C. L. R. 257, 11 C L R. 483, 23 W R 149.

——an *ex-parte* rent decree operates as *res judicata* as to the ... C W. N 627, 18 C W N. ... 335, 40 I. C 659 (C), 16 I. C. 516 : 1927 All. 552. ... uted, is some evidence of

——an *exparte* decision in rent suit may operate as *res judicata.* 82 I. C. 990 : 1925 Mad. 378, 16 C. 300 F. B. *not fol*

(*Effect of dismissal*)

——the dismissal of a rent suit is conclusive upon the only point that the defts. were not the tenants during the years for which the rent was claimed 72 I. C 655.

——plff. sued for rent for the years 1319 and 1320, the deft. denied the relationship and the suit was dismissed The judgment in that suit was conclusive between the parties upon *one and one point* only, namely, there was no relationship between the parties during the period in suit. But the plff. could establish that he had a subsisting title and the defts were liable to be ejected and the plff. was also competent to establish that his claim was not barred by limitation because the plff had previous to the years 1319 possession through the defts. as his tenants. 33 C L. J 334 : 61 I C. 201.

(*Decision in a proceeding under ss 90 and 91 B. T. Act*) see *ss. 90 and 91 B T. Act.*

(*Decision under s. 105 B. T. Act.*) see, *ss. 105 B. T Act.*

(*Decision under s 106 B. T. Act.* see, *ss. 106 B T. Act.*

(23) Res judicata in execution proceedings.

——the provisions of s 11 do not apply to execution proceedings. 70 I. C. 530 : 1923 Rang. 119.

——though s. 11. may not in terms apply to execution proceedings, the *principle of the section has been held to apply to cases* where a point has been expressly raised and decided or where it must be discovered to have been raised and decided by necessary implication. 48 A. 245 : 1926 All. 220 : 91 I. C. 785.

Res Judicata in rent-suits and suits under B. T. Act—*contd.*

(Question of title)

——where both quantity of land and amount of rent payable were directly and substantially in issue in former suit, the decision would operate as *res judicata* in a subsequent title suit. 43 C. L. J. 135, 17 C W. N 76 · 17 C. L. J 71 (11 C. W. N. 1100, 10 C W. N. 820, 26 C 428, F. B., 21 C 236, 20 C. 505, 19 C. 656, 1 C L J. 348), *Ref d.*

——where in a suit for rent the landlord obtains a decree against the tenant and the latter pays the amount due under the decree, the question of title is *res judicata* in a subsequent suit for ejectment 87 I. C 672 ; 1926 Cal. 114

——a previous decision in a rent suit of an issue whether a certain piece of land did or did not belong to a third person is *res judicata* in a subsequent suit between the same parties. It is impossible to lay down any hard and fast rule as to whether a previous decision in a rent suit does or does not operate as *res judicata*. 90 I. C. 756 . 1926 Cal. 369

——when in a suit for rent the deft. denies title of the pltf. and sets up the title of a third person, a subsequent suit for the establishment of title is not barred. 26 C. 423 3 C. W. N. 266, F B. 10 C. W N 820, the only material issue in such case is whether the relationship of landlord and tenant existed between parties. 10 C. W N 820, 6 C W. N. 66, but where the deft. sets up title in himself, the issue as to the title is substantial and operates as *res judicata*. 10 C W N. 820

——incid[illegible] does not operate [illegible]
N. 116, 17 C. [illegible]
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——*former* suit for rent in a court not competent to try the question of title, cannot operate as *res judicata* in a suit for title 3 C. W N 202, nor the decision of title incidentally raised can operate as *res judicata*. 24 C. 509 ; 1 C. W. N. 500.

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[illegible] that [illegible] -oved [illegible] same [illegible] cess.

(22) Res judicata in rent-suits and suits under B.T.Act—*contd.*

(Exparte *decree.)*

——a decision, whether *ex-parte* or contested, in a previous rent suit operates as *res judicata* in a subsequent rent suit even for a different period, when it decides any question which arises in the suit or omits to decide a question which ought to have been decided if objections were taken by the party. 29 C W. N 254 : 40 C. L. J. 507. 20 C. W. N 48 : 43 C. 170 *Ref.* 25 C 711 *Diss.*

——an *ex-parte* decree as to the rate of rent payable is *res judicata.* The court must be presumed to have decided questions which were necessary for supporting the decree made 91 I. C. 380 : 1926 Cal. 767.

——an *exparte* rent decree though not executed, is evidence as to the amount of rent 3 C. 383 . 1 C L. R 385, but it is not conclusive evidence as to rental. 16 C 300 F. B., 7 C. 23 . 8 C. L. R. 257, 11 C L R. 483, 23 W R 149

[illegible] is *res judicata* as to the [illegible] C. W. N. 627, 18 C. W N. [illegible] I. 335, 40 I C. 659 (C), 16 I. [illegible] C 516 : 1927 All. 552.

——an *ex-parte* rent decree, if executed, is some evidence of rate of rent 2 C W. N 172.

——an *exparte* decision in rent suit may operate as *res judicata.* 82 I. C 990 : 1925 Mad. 378, 16 C. 300 F. B. *not fol.*

(Effect of dismissal)

——the dismissal of a rent suit is conclusive upon the only point that the defts. were not the tenants during the years for which the rent was claimed. 72 I. C 655

——plff sued for rent for the years 1319 and 1320, the deft. denied the relationship and the suit was dismissed The judgment in that suit was conclusive between the parties upon *one and one point* only, namely, there was no relationship between the parties during the period in suit But the plff. could establish that he had a subsisting title and the defts we[illegible] was also competent to establish [illegible] limitation because the plff. had pre[illegible] through the defts. as his tenants.

(Decision in a proceeding under ss. 90 and 91 B. T. Act.) see. *ss. 90 and 91 B T Act.*

(Decision under s. 105 B. T. Act.) see, *ss. 105 B. T. Act.*

(Decision under s. 106 B. T. Act. see, *ss. 106 B. T. Act.*

(23) Res judicata in execution proceedings.

——the provisions of s. 11 do not apply to execution proceedings. 70 I. C. 530 · 1923 Rang. 119.

——though s. 11. may not in terms apply to executi[illegible]roceedings, the principle of, the section has been held to ap[illegible]ses where a point has been expressly raised and decide[illegible] it must be discovered to have been raised and decided b[illegible] implication. 48 A. 245 : 1926 All. 220 91 I. C 795.

(23) Res judicata in execution proceeding—*contd.*

——the principle of constructive *res judicata* applies to orders in execution. 40 M. 1016, 8 C. 51, 1928 Mad. 746.

——the dismissal of an application in execution proceeding operates as res judicata 40 C. L. J. 431 P. C.

——a decision in an execution proceeding of a question properly arising for consideration is final even when it is made with the consent of some of the parties and on adjudication as to the others 24 C W N 269

——the principle underlying this sec applies to execution proceedings as much as to suits 5 Pat L T 7 : 74 I C. 781 : 2 Pat 771, 47 A 86 80 I C 722 22 A. L. J 928. 1925 All. 117, 8 N. L. J. 91 1923 Nag 236, 91 I C 785

——but the principle of explanation IV. to sec. 11 has not been extended to execution proceedings. 19 A L. J. 923 : 90 I. C. 276 : 6 P. L T 507 6 P L T 473 86 I C 548.

——the doctrine of constructive *res judicata* also applies to execution proceedings on principle 90 I C 83, 89 I. C. 1009, 34 C L J. 163

——where a decree or order has been once construed in execution proceeding it becomes final between the parties as an interlocutory order and the matter cannot be re-agitated 95 I C. 31.

——a decision at one stage of execution *proceedings* cannot be questioned at a later stage of the proceedings not because it is *res judicata* under sec 13 (old) C P C, but upon general principles of law, for if it were not binding there would be *no* end to litigation 14 C W N 114, (8 C 51 8 I A 123, P C 6 A 269 : 11 I. A. 37, P. C 7 A 102 11 I A 181 P C) *Fol.* 3 C 47 4 I A 127, P. C. *Expld* 15 A 84 p 98, F. B, *Ref*. 6 C 203, *consd* 8 B 54, 2 C. L. J. 384 : 9 C. W N. 956, 11 B 537, 19 A L J 923, 1923 Nag. 236 - 72 I. C. 473 7 Lah L J 319 · 90 I C 683 1925 Lah 507, 90 I. C 83 : 6 All. 606. 64 I C 724, 34 C. L J 163, 28 Punj L R. 607 : 100 I C 23 : 9 Lah. L. J 193, 99 I. C 1006 1927 Lah. 179.

——this rule applies even in the case of an *ex-parte* order passed on an application. 14 C W. N. 114, provided the Jt. *Dr* is given an opportunity to appear 13 C. 57, 9 B 828, 24 M 683 : even the question of limitation cannot be raised. 24 M 669, 1923 Nag 236 : 72 I. C. 473, 1925 Nag. 82, 22 L W 747, 1926 Mad. 677 : 93 I. C. 1017.

——the decision of Judge in execution proceedings cannot be questioned by his successor in office in subsequent execution proceeding. 7 Lah. L. J. 319 : 90 I. C. 683. 1925 Lah. 507.

——when a mortgage decree is executed without making it final and the Jt. Dr. fails to take any objection he *is* precluded from taking objection at a later stage. 7 Lah. L. J. 397 : 1925 Lah. 640.

——an order of executing court which is *ultra vires* does not operate as *res judicata* in a subsequent stage of the same execution proceeding. 4 Pat. 440 : 1925 Pat. 807 : 93 I. C. [illegible]

S. 11, Res judicata, (23) Res judicata in execution proceedings—*contd.*

——matters which might have been raised in the suit cannot be raised in execution. 5 L. L. J 163 · 1923 Lah 560 : 74 I C 577

——an order in an inquiry under Or. 21 R 66 C. P. C. is not final and parties are at liberty to re-open the same question in a subsequent proceeding 2 Pat L. R 118 · 4 Pat. 731 · 1925 P 500, 92 I. C 326 : 7 Pat. L. T. 353.

——omission to take objection where it in no way affects the position of the decree-holder, does not estop Jt Dr from contesting his liability when he has become aware of his legal position. 7 L. L. J. 343 · 26 Punj L R, 634

——an execution purchaser is the representative of the judgment-debtor for the application of the doctrine of *res judicata*, 97 I. C 205 : 1926 Pat. 478, 1922 Pat 63 *fol* and there is no difference in principle between a purchaser in execution of a money decree and that of mortgage decree 97 I. C 205 1926 Pat 478, 10 C. L J 150 *Rel on.*

Ss 13, 14, FOREIGN JUDGMENTS.

——a judgment given against deft on his failure to answer interrogatories after striking out his defence is not a judgment "on the merits" and cannot be enforced in British India as such 40 M. 112 . 21 M L. T. 78 19 Bom. L. R 206 21 C W N 358 : 25 C. L. J. 233 P. C.

——the provisions of sec 13 apply to decrees that are transferred to British Courts for execution under the provision of sec. 44 C P. C. and therefore it is open to the court to enter into the question whether the decree by the foreign court was passed without jurisdiction or not, 41 C L J 508 1925 Cal 955 89 I C. 347.

——where foreign decrees are sought to be executed in British Indian Courts, notice ought to be issued by the executing court to the judgment debtor to appear and state his objection, if any, and execution should be ordered, if deemed proper, only thereafter 86 I. C 492 ; 1925 Mad. 788 · 21 L W 330, 43 M 675 *Dist*

——a foreign judgment has no force or authority as such in British India but may give a cause of action for a suit to obtain the same relief in British India It is only in such proceedings that the question of effect of the foreign judgment properly arises 20 C. W. N. 1213 1916 M. W. N. 153 36 I C 710 P C

——a judgment delivered against a party represented by a solicitor who accepted services of the writ of summons, the party himself being unable to appear and defend the suit in London, is a judgment given on the merits within this sec 50 I C. 780 17 A. L. J. 501.

——where after due summons the deft entered appearance and had an opportunity of defending the action but did not do so and the court passed judgment *ex-parte* in pltf's favour held that the judgment must be held to have been given on the merits. 6 Bur. L. T. 160 ; 20 I. C. 971.

Ss. 13, 14, Foreign Judgments—*contd.*

——a decision is not on merits when the deft's written statement is struck out for his failure to answer interrogatories and he is not allowed to go on the merits. 39 M. 95 · 27 I. C. 386 : 27 M. L J. 670, affirmed by the P C in 40 M. 112 : 38 I. C 683 : 32 M. L. J. 35 : 21 C. W. N. 358 : 25 C L. J. 233 P C.

——meaning of judgment on merits. 40 M. 112 : 21 C. W. N. 358 : 25 C L. J. 233 19 Bom L R 206 P C

877 *overruled*

——the phrase 'merits of the case' has been used in the Code in contra-distinction to a judgment by way of penalty, 105 I. C. 186 : 1927 All 510 . 25 A L J 837 . 50 A 270

——when a suit is brought in India on a foreign judgment and a plea is brought forth that the foreign court had no jurisdiction but it is found that the defts, appeared and contested the claim, the plea is open 21 A L, J 890 . 1924 All 161.

——where the decision in a Foreign Court was obtained between the widow and the alleged son of the deceased it must be held that the widow completely represented the estate and that any decision between the parties in that suit, provided there was a direct adjudication upon the point, is conclusive between them and their successors, provided the judgment is not disqualified by any of the flaws set forth in sec. 13, 1922 Lab. 175.

——where the deft. was sued in the court of Straits Settlements and he filed written statement but at the time of trial his solicitor reported that he had no instruction and thereupon a judgment was delivered on examining the plff's witness and on this judgment a suit was laid against the deft, in the British Court, held that the judgment of the Foreign Court was given on merits and that the same was conclusive against the deft in the present suit. 57 I C. 742 : 1920 M. W. N 412 · 11 L. W. 609, 40 M. 112 P. C *Rel*

——a decision cannot be said to be not given on merits of the case because it was given *ex-parte* 22 L. W. 820, 47 M. 877 · 47 M. L. J 356.

——where one of the defts. was a minor and no guardian *ad litem* was appointed, there was a violation of one other principle of natural justice and the foreign judgment cannot be relied on in British India as regards that minor deft 102 I. C. 523 : 1927 Lah 200 : 8 Lah. 54.

——when the legal representative of the deceased deft. was not brought on the record and notice was not served [illegible] proper form, the foreign judgment was vitiated as regards [illegible] parties. *above case.*

Ss. 13, 14, Foreign Judgments—*contd.*

——entertaiment of third petition for review after the dismissal of the first two applications, amounts to a violation of the principles of natural justice and consequently the foreign judgment cannot be the basis of a suit in British India. *above case.*

——where the subject matter is a *res* situated as to be within the lawful control of the State under the authority of which a court sits and that authority has conferred jurisdiction on the court to decide as to the disposition of the thing and the court has acted within that jurisdiction, that decision is conclusive whether it might seem right or wrong under the law of another country. 30 Bom. L. R. 753 : 47 C. L. J. 263 107 I. C. 352 : 1928 P. C 83. P. C

——the execution of a power authorising an agent to conduct litigation in a foreign court is a submission to the jurisdiction of that Foreign Court and the decision of the Foreign Court is binding on the parties. 22 L. W 820 : 92 I. C 491 1926 Mad. 259

——the fact of having taken an objection to the jurisdiction of the Foreign Court, in the lower court, is vitiated by the fact that the same plea was not raised in the appellate court and hence this conduct implied submission to Foreign judgment 29 I. C 456

——a submission to jurisdiction for saving property is not a voluntary submission even if a written statement is filed objecting to the jurisdiction and raising a defence on the merits 39 M. 24 : 16 M. L. T 479 : 26 I C 287 : 1915 M. W N. 162 F B

——this sec should be determined by the International Law and not by the law of that country If the deft. submits to the jurisdiction of a Foreign Court and takes the chance of a judgment in his favour then the decree is binding but if he appears not voluntarily but under duress or coercive process he is said to have not appeared 39 M. 733 19 M L. T. 68 1916 M W N 83 32 I. C. 597

——what is submission to jurisdiction of Foreign Court 47 M. 877 : 47 M. L. J. 356 1925 Mad 155

——irregular service of notice, effect of. *above case.*

——a wrong view as to burden of proof will not make a foreign judgment erroneous on the face of it A mistake of law in a foreign judgment is no ground for vacating it 41 M. 205 · 34 M L J 395 45 I. C 703.

——every issue decided by the foreign court is not binding on the British Indian courts The expression ' matter directly adjudicated upon " in s 13 should be held to include the right set up by the plff limited only to the particular relief granted or refused. 1928 Mad. 327 108 I C. 305 54 M L. J 479

——the fact that foreign courts do not regard rules of the courts of British *India as imperative even if the rules are of legal applica*tion in such States, should not be a reason for dismissing suits based on such foreign judgments on the ground that they are contrary to natural justice 34 I. C. 255 13 P. W. R. 1916.

Ss. 13, 14, Foreign Judgments—*contd.*

——a judgment of a French India Court removing trustees appointed by the will and appointing new ones cannot be enforced by an action in British Court for possession of properties covered by the will and situated in British India especially when letters of Administration have been granted in British India to defts, the first trustees 21 M L T 315 37 I. C 404 : 5 L W 740.

——the expression "Court of competent jurisdiction" in s 13, should, for the purposes of action relating to the recovery of the office of trusteeship, be held to be the Court of what may be called the domicile of trust, 108 I C 305 · 1928 Mad. 327 54 M L J 479

——where the trust properties are all situate in British India and all trusts are to be performed in British India the decision of the Pondicherry court relating to the trust is not a decision of the "court of competent jurisdiction" 108 I C 305. 1928 Mad. 323: 54 M L J 479

——if all who have a right to appear and be heard in a case have been duly made parties the judgment establishes a perfect and complete right against all as such as would a conveyance of joint estate by all the parties interested 36 M 141: 16 I. C. 656: 24 M L J 469

——the circumstances that give a court jurisdiction to entertain a suit on a foreign judgment and to render the defendants liable thereon are alternative (1) the defendant being a foreign subject (2) his residence in a foreign country (3) his selection of forum (4) his submission by appearance and (5) his contract to submit 37 M 163· 18 I C. 189 24 M L J 619

——the judgment of competent Foreign Court cannot be impeached on the plea that if the suit had been brought in India the suit would have been barred by time 35 I C 741· 9 Bur. L T 106

——the jurisdiction of the court trying the previously instituted suit need not depend upon actual facts but upon allegation made in the plaint 43 C 144: 33 I. C. 288

——in a suit on a foreign judgment the plff need not state that the court had jurisdiction over the parties or the cause, every presumption being in favour of such judgment. 24 M. L. T. 244 49 I. C 202.

——s 13 is not confined in its application to plffs. suing on it, a deft. is equally entitled to non-suit the plff on the basis of it. 108 I. C. 305 1928 Mad. 327 : 54 M. L J. 479

——a judgment of a foreign court obtained against a deft. cannot be enforced in British India where the deft at the time of the commencement of this suit, was not a subject of, nor resident in the country in which the judgment was obtained. 105 I. C. 186; : 1927 All. 510 ; 25 A. L. J. 887

§ 15 PLACE OF SUING.

——this sec. does not oust the jurisdiction of the higher grades. 7 A. 230, 17 C. 155, 14 M. 183, 4 Bur. L. J. 104 ; 90 I. C. 728 ; 1925 Rang 278.

S. 15, Place of suing—*contd.*

——decree passsed by a court of lower grade in a suit which should have been tried by court of higher grade is without jurisdiction and is a nullity. 17 C. 155

——once the institution takes place in accordance with the provisions of this sec. its operation is exhausted The section does not authorise the transfer of a pending suit merely because in the course of the trial it is found that the plff. is entitled to a part of the claim which is cognizable by a lower court 54 I C. 655

See other cases under 'jurisdiction.'

§ 16. WHERE SUBJECT-MATTER IS SITUATE

——where the relief sought can be entirely obtained through the deft.'s personal obedience the suit can be instituted either in the court within the local limits of whose jurisdiction the deft actually and voluntarily resides or carries on business or personally works for gain. 23 Bom. L R 903 68 I C 510 46 M 108 1922 Bom. 188.

——the word deft in this sec means all the defts where there are more than one 73 I C. 405 (C), 21 W. R 303 *fol.*

——a suit for declaration that a will is a forgery comes under s. 20 (c) and not under this sec. 1923 Mad 109 72 I C. 920 : 43 M L J. 615 . 1922 M. W. N 834

——transfer of place where the subject-matter is situated to a jurisdiction of different court does not deprive the court which originally entertained suit, of its jurisdiction to try it to conclusion 87 I. C 152 47 M. L J 448 1925 Mad 117

——the Secretary of State for India in council is not a person who dwells or carries on business or personally works for gain within the local limits of Calcutta. 40 C. 308 21 I C 1.

——where the properties are situate in different jurisdictions ss 16 and 17 are no bar to parties bringing successive suits. 1916 M. W. N 148 32 I C. 423 3 L W 107, 14 C 835, 22 B 922 *fol*

——when properties are situate in two provinces and a probate proceeding is pending in one, an administration suit in the other is maintainable 96 I C 691 27 Punj L R 398 1926 Lah 503

——a suit to enforce a charge created on the land for Govt. revenue on it can be instituted in the court at the place where the land is situated 39 M 795 18 M L T 464 29 M L J. 639

——s 16 C P. C does not preclude all courts other than the court within whose local limits the immoveable property is situated from trying any question relating to the title in the property, when the question is mere incidental to the relief 9 M L. T 372, 10 I. C. 267.

——ss 16 and 17 are not confined to suits involving only immovable property but they apply equally to suits for immovable property as well as movable property provided that the immovable property is situate wholly or in part within the local jurisdiction of the court. 96 I C 691 1926 Lah. 503 27 Punj L R 398

——a suit for maintenance with prayer for a charge on property within the jurisdiction of a court against a subject of a Native State is cognizable by the court 40 B. 337 : 32 I. C 985 18 Bom. L R 67

Ss. 13, 14, Foreign Judgments—*contd.*

——a judgment of a French India Court removing trustees appointed by the will and appointing new ones cannot be enforced by an action in British Court for possession of properties covered by the will and situated in British India especially when letters of Administration have been granted in British India to defts, the first trustees 21 M L T 315 37 I. C. 404 : 5 L. W. 740

——the expression "Court of competent jurisdiction" in s 13, should, for the purposes of action relating to the recovery of the office of trusteeship, be held to be the Court of what may be called the domicile of trust, 108 I C 305 : 1928 Mad 327 54 M. L J. 479

——where the trust properties are all situate in British India and all trusts are to be performed in British India the decision of the Pondicherry court relating to the trust is not a decision of the "court of competent jurisdiction" 108 I. C 305 1928 Mad 323 54 M L J 479

——if all who have a right to appear and be heard in a case have been duly made parties the judgment establishes a perfect and complete right against all as such as would a conveyance of joint estate by all the parties interested. 36 M. 141 : 16 I. C. 656 24 M. L J 469

——the circumstances that give a court jurisdiction to entertain a suit on a foreign judgment and to render the defendants liable thereon are alternative (1) the defendant being a foreign subject (2) his residence in a foreign country (3) his selection of forum (4) his submission by appearance and (5) his contract to submit 37 M 163. 18 I C 189 24 M L J 619

——the judgment of competent Foreign Court cannot be impeached on the plea that if the suit had been brought in India the suit would have been barred by time. 35 I. C. 741 : 9 Bur L T 106

——the jurisdiction of the court trying the previously instituted suit need not depend upon actual facts but upon allegation made in the plaint. 43 C 144 : 33 I. C. 288

——in a suit on a foreign judgment the plff need not state that the court had jurisdiction over the parties or the cause, every presumption being in favour of such judgment. 24 M. L. T. 244. 49 I. C 202.

——s 13 is not confined in its application to plffs suing on it a deft is equally entitled to non-suit the plff on the basis of it. 108 I C 305 1928 Mad 327 : 54 M. L J. 479.

——a judgment of a foreign court obtained against a deft. cannot be enforced in British India where the deft. at the time of the commencement of this suit, was not a subject of, nor resident in the country in which the judgment was obtained. 105 I C. 186; . 1927 All. 510 : 25 A. L. J. 887.

§ 15 PLACE OF SUING.

——this sec. does not oust the jurisdiction of the higher grades. 7 A. 230, 17 C. 155, 14 M. 183, 4 Bur. L. J. 104 : 90 I. C. 728 : 1925 Rang. 278.

S. 20. Where defendants reside or cause of action arises—*contd.*

——in a suit for accounts against an agent the cause of action arises at the place where the contract of agency was made or where it was to be performed or where the refusal to account took place. 6 Lah 153 26 Punj L R. 335, 88 I. C 950, 1924 All 530, 1925 Lah. 387, 94 I C 287 1926 Sind. 238.

——it is settled law that a suit by a principal against a commission agent who has agreed to execute an order placed with him by correspondence must be instituted at the place where the commission agent carried on business 109 I. C 28 : 1928 Lah. 297 : 29 Punj L. R 406

——a court has jurisdiction to entertain a suit if the cause of action arose even partly within its jurisdiction. 13 A L. J 66 : 26 I C 620, 22 C W N 517 : 44 I C. 694.

——"cause of action" means the cause of action as it was at the time when the right to sue arose for the first time. 31 M. L J. 316 37 I C 681 5 L W 246

——cause of action in a suit for restitution of conjugal right arises from the wife absenting herself from the husband's residence. 54 I C 120.

——vesting of properties in the official Receiver is part of the cause of action 89 I C 493.

——suit for setting aside an *ex parte* decree may be brought in the place where the plff resides when false return was submitted by the serving peon alleging that the plff evaded the service of summons 7 P W R. 1921 59 I C 2, 37 A 189 28 I. C. 502

——where a fraudulent decree is to be set aside 65 I. C 318, 41 I C. 161, 37 A. 189, 36 A 564

——a fraudulent decree of another court may be set aside by the court where it is sent for execution and where the deft. resides. 27 C. W N 359, 5 C W. N. 559 *Ref.* 39 A. 607, 59 I C. 2 (L.), 36 A. 564 24 I. C 978

——a suit for a declaration that a decree was obtained by fraud and for injunction to restrain its execution may be brought both at where the decree was obtained and at where it was transferred for execution 94 I C. 377. 7 Lah. 61 : 1926, 7 Lah 277 : 27 Punj. L. R 517.

——the jurisdiction of the court trying a remanded case depends entirely on the order remanding the case. 44 M. L. J. 238 : 1923 M. W. N. 191. 32 M L. T 276 : 1923 M. 351 : 17 L. W. 355 : 72 I. C. 314.

——where there is no stipulation to pay the money at any other place it is payable where it is lent 16 C. L. J. 279 : 15 I. C. 855.

——where a decree is transferred to another court for rateable distribution that court has the jurisdiction to entertain a suit to declare that decree as fraudulent and collusive. 72 I. C. 992.

——where a person purchased a ticket for journey by railway at Agra but *fell out of the train and was injured owing to the* neglect of the Ry. Co. at B the cause of action for a suit for damages arises at B and not at Agra. 41 A. 488 : 50 I. C. 130 : 17 A. L. J. 566, 28 C. 401 P. C. *Ref.*

S. 20. Where defendants reside or cause of action arises—*contd.*

——a court within whose territorial jurisdiction a decree is put into execution may entertain a suit. 100 I. C. 164 · 1927 Lah. 778

——if tort is committed within the limits of one court and the tort-feaser resides within the limits of another, then both courts have jurisdiction 39 M. 433 · 28 M. L. J 310 · 28 I. C. 394 · 2 L. W. 290

——where leave to sue was sought for but refused the suit could not go on with. 46 B 229 64 I. C 919 . 1922 Bom 152.

——leave to sue may be granted under s 20 (b) without previous notice to the deft., 64 I. C 794 11 L B R. 26

——the merits of an order refusing leave to institute a suit in a particular court under s 20 cl (b) cannot be attacked in an appeal against an order returning a plaint for presentation to another court 7 Lah L J. 66 88 I C 546 1925 Lah 338

for other cases, see, "C P C Jurisdiction"

S. 21. OBJECTION OF JURISDICTION.

——the questior [illegible] first instance and [illegible] only when prejudic [illegible] Mad 171, 49 M 74 [illegible]

——suit to set aside decree passed without territorial jurisdiction is excluded by waiver of objection to jurisdiction 87 I. C. 152 · 1925 Mad. 117 47 M. L J 448.

——a decree passed without any objection as to jurisdiction cannot be questioned in another court of collateral jurisdiction 108 I C 321 1928 Pat. 324 7 Pat. 216

——this sec cannot be construed as either legislating for foreign tribunals or codifying any rules of international law. It has no application to cases of foreign judgments sought, under the provisions of sec 44 C P. C. and on the strength of the notification in the Gazette of India by the Governor General in Council, referred to in that section to be executed in British Indian Courts. 86 I. C. 493 : 21 L. W. 330.

[illegible] ppel- [illegible] it. [illegible] of [illegible] rty [illegible])5 62 I. C. 399.

——an order passed by an Appellate court allowing an objection as to the place of suing should consider and decide whether there has been a failure of justice in consequence of the suit having been instituted in the wrong court. 42 A. 74 : 52 I C. 801.

——to entitle the Appellate and Revisional Courts to set aside a decree for want of territorial jurisdiction all conditions set out in s. 21 must be fulfilled. 96 I. C. 544 (c).

S. 21. Objection of jurisdiction—*contd.*

——the provisions of s 21 C. P Code are an exception to the well established rule that where the court has no inherent jurisdiction over the subject-matter of a suit its decree is a nullity even though the parties may have consented to the jurisdiction of the court. This exception cannot be so interpreted as to have a wider application than what is justified by its terms 27 C. W. N 542 : 1923 Cal 619.

——a decree passed without jurisdiction is a nullity. but there is distinction between a judgment where a court assumes a jurisdiction which it is wanting and when the court, in the exercise of its jurisdiction acts wrongly in disregard of the law. Where the court having jurisdiction in a case passed a decree without complying with the provisions of s. 147 A of the B. T. Act, which provides that in rent-suits the court should satisfy and record reasons for holding that the enhancement agreed to is fair and equitable, the decree was operative and binding on the parties and not a nullity 30 C W. N 940 · 45 C L. J. 24 : 97 I. C. 770 : 1926 Cal. 1101, 48 C. 138 *Rel. on.* 17 C. W N. 496, Disapproved.

——the question whether the trial court has no territorial jurisdiction cannot be gone into in second appeal, unless it was raised at the earliest possible moment in the course of suit. 48 I. C. 465.

——the discussion as to the merit of the questions involved in a suit is necessary before a court can determine the issue of jurisdiction. 40 C. L. J. 515.

——although the objection as to jurisdiction was taken at the earliest possible opportunity before issues were settled, yet having regard to s 21 of the C P. Code and to the fact that the evidence had been fully taken and there was no prejudice to the parties, the High Court refused to interfere in revision. 44 I C. 694 : 22 C. W. N. 517.

——a defendant who objects to the jurisdiction of a court cannot be said to have acquiesced in the trial of the suit if he does not apply for a transfer. 27 I. C 232 . 18 C. W. N. 1340

——where there has been no failure of justice from the trial of [illegible]
ti [illegible]

of [illegible]
re [illegible]

entir [illegible]
194 : [illegible]

——s 21 C. P. C, applies to all objections based on the alleged infringement [illegible]
institution of [illegible]
revisional cou [illegible]
as to the pla [illegible]
and even ther [illegible]
M 675 : 39 M [illegible]
C. 871 : 28 M. L. [illegible]

S. 21. Objection of jurisdiction—*contd.*

——an appellate court will not allow an objection to the place of suing unless it was taken before the settlement of issues as there will be a failure of justice 47 I C 764 . (1918) M. W. N. 661.

——an objection to the place of suing not raised in the trial court could not be taken in appeal In all cases where objection is taken that the court taking cognizance of the suit has no jurisdiction to adjudicate on the claim, whether in whole or in part for want of jurisdiction, it is an objection to the place of suing (1916) 1 M W N. 354 34 I. C .411 19 M. L. T. 360 *overruled*

——"courts" in s 17 C P C., means courts to which the Code applies The court of a district subject to the C P. Code, has no jurisdiction under s 17 to entertain a suit so far as it claims a decree for sale of mortgaged land situated in a scheduled district That part of a decree which orders a sale of a land so situate can be set aside, although no objection to the jurisdiction of the first court was taken, s 21 C P C not applying to the circumstances The objection was not an objecti
going to the nullity of
tion and could be taken
51 I. C 185 21 Bom.
360 34 I C. 411 : 1918 M W N 354 *overruled*

——an execution sale after confirmation cannot be avoided on the ground that the court had no territorial jurisdiction over the property (1913) M. W N. 136 13 M L T 207 18 I. C. 498: 24 M. L J. 70.

——if a plaintiff chooses his own venue for the trial of a suit and the case proceeds to judgment, the High Court will not in the absence of prejudice, entertain an objection on the ground of want of jurisdiction 55 I C 442

——the sec does not preclude the objection to jurisdiction being raised in a fresh suit 98 I C. 341 1926 Bom 481.

——this sec cannot be used in execution proceedings. 1923 Mad 746

S. 22 Power to transfer suits maintainable in more than one court.

mandatory. An application
made at the earliest possible
issues are settled or before
L. R 465 . 7 Lah. L. J. 93.

1925 Lah 175.

——balance of convenience is to be looked to. 1923 Lah 383: 72 I. C. 592.

——balance of convenience and bias of court are sufficient ground of transfer. 15 C. L. J. 162, 19 C W. N. 68n, 41 A. 381, 167 P. R 1919, 54 I. C. 935, 33 P. W. R. 1917, 40 I. C. 111, 21 O. C. 217 : 43 I. C. 105, 167 P. R. 1919 : 54 I. C. 935, 44 A. 278.

S. 22. Power to transfer suits maintainable in more than one court—*contd.*

——consideration of convenience can certainly be taken into account in allowing transfer but the deft. who applies for transfer must show that consideration of convenience should outweigh the cardinal principle that it is the right of the plff as *arbiter lites* to choose his own forum 106 I C. 870 1928 Mad. 15 1927 M. W N 607

——the suit was transferred on the ground of convenience, opposite party being compensated by cost. 48 C 53. 62 I. C. 115.

——the mere fact that it would be more convenient to the deft. to have the case in another form, is no ground for transfer. Ss. 22 *and 23 do not provide for the transfer of a case from a court subordinate to one* H C to the original side of another H C. 69 I C. 772, 44 A 278, 1 Pat L T 389 *Ref*, 27 M. L J 645 *approved*, 12 C. W. N 446 *Dist.* 73 I. C 860, 2 Pat L. T 111.

——the plff has always a right to choose his forum which should not be interfered with except in special cases. 73 I C 860, 86 I. C 495 1924 Oudh 410, 97 I C 390, 106 I C 869 1928 Lah 159, 1928 Lah 183, 167 P R 1919. 1927 Lah 404 *fol*

——but if the deft can show a clear balance of advantage in the way of convenience and expense, transfer should be allowed. 1923 Oudh 30 69 I C 717 9 O L J, 413

——although one H C will not issue an injunction to a court subordinate to another H C, an order passed under s. 22 is final and it will not be open to any other court in India to dispute it. 6 Pat, L T 540 85 I C 852.

——s 22 recquires that notice must be given to the opposite party prior to the filing of an application for transfer, if no such notice is given the application does not lie. 107 I C 593.

S 23. To What court application lies.

——when two suits between the same parties are pending in

1928 Oudh 89 40 O W. N. 1114

——a Judge of the High Court sitting on the Original Side is

of the High Court sitting on the original side which was made to a Division Bench, was not maintainable, 100 I. C. 331; 1927 Cal. 290 45 C L J. 71.

S. 24. General power of transfer and withdrawal.

Application to execution proceedings

——the word "suit" in s. 24 includes execution proceedings. A particular execution application can be transferred under the sec. 41 A. 57 : 85 I. C 746 · 1925 All 276, 95 I. C. 243 : 1926 Lah. 465.

——s 24 applies to execution proceedings. 49 M. 746 ; 95 I. C. 12 : 1926 Mad. 421

——a Dt. Judge has power under this sec. to withdraw to its own [illegible] to a subordinate Court.

[illegible] be transferred. 13 I. C [illegible]

Criminal complaint

——this sec. cannot be invoked to allow a court other than the court, in the course of proceeding in which, a perjury or forgery has been committed or a court to which appeals ordinarily lie from that court, to entertain the question of preferring a criminal complaint 49 A 460 : 101 I. C. 247 : 1927 All 469, 25 A L J 433.

Jurisdiction of court.

——where jurisdiction of a court is denied an application for transfer to that court does not lie 1923 Lah. 288 : 71 I. C 263 : 12 A L J 986 *lol*

Grounds of transfer.

——a transfer should be made on strong grounds A transfer may be allowed in the court where all the evidence would be available. 69 I C 239

——where a court tried a case and afterwards found out that it had no jurisdiction and returned the plaint it was a proper case for the High Court to send the case for disposal by the same court. 1923 A 249 . 21 A. L. J. 86 : 73 I C 495.

——balance of convenience and bias of the court are sufficient grounds of transfer. 15 C. L. J. 162, 19 C W. N - 68 n , 41 A. 381, 167 P. R. 1913 54 I C 935. 33 P W. R 1917 : 40 I C 111, 21 O C 217 ; 48 I. C. 105, 167 P R. 1919 : 54 I C. 935, 44 A. 278, 101 I. C. 723 : 1927 Nag. 219.

——[illegible]
shown b[illegible]
an inqui[illegible]
irrelevant [illegible] 91 I. C. 559 : 1926 Mad. 359.

——prejudice against. pleader is not sufficient ground of transfer. 91 I. C. 559 : 1926 Mad. 359.

——transfer may be allowed on the ground that there has been an adverse decision on a point of law in a connected case by the same court. 69 I. C. 585 *contra* 1922 Lah. 369 : 67 I. C. 283.

——a reasonable apprehension on the part of the litigant should receive consideration. 1923 Lah. 564.

S. 24. Ground of transfer—*contd*

——the fact that the deft. is an Honorary Magistrate of the First class and appears to be a man of influence at the place is no ground for *transferring* a case. 98 I. C. 859 · 1927 Lah. 80.

At any stage.

——the Dt J can transfer a part-heard case from the file of the subordinate court 10 C. W N. 12, 26 M. 595, 17 A. 106, 13 I. C. 542 (C), 5 B 680, 22 B 778, 6 M. 357, 7 A. 342

Insolvency jurisdiction.

——the H. C. in the exercise of its insolvency jurisdiction has no power to order withdrawal of the proceeding in insolvency from the court of the Subordinate Judge in the Presidency to itself. 49 B 788 1925 Bom. 543 . 27 Bom L. R 1207, 39 B. 604 *approved.*

Small C. Court Suit.

——a suit instituted in S. C. Court and transferred by the District Judge to a
be appealed against
1 Pat. L. R 186 . 6
F. B. *fol. contra* 64 I

——because it does not then cease to be S. C. C suit. 27 C L. J. 461, 38 A. 425, 39 A. 214, 37 A 450, 14 A. L J. 705 : 36 I C. 317 : 16 A. L. J. 548 : 46 I C. 893 .

——a small cause suit may be transferred by the Dt. Judge after remand by the H C. 88 I. C 139 . 26 Punj. L. R. 308 · 1925 Lah. 561,

Power of H. C.

——*Quaere*, where a Dt. Judge has refused a transfer whether the H. C. can exercise its concurrent jurisdiction under this sec. 87 I. C. 170.

——under this sec the Chief justice of the High Court has power to transfer matters other than suits to a Subordinate Court having jurisdiction to try them 98 I. C. 371 : 38 M L. T. 35 : 1927 Mad 321.

——the powers of the H. C. to transfer a case from one subordinate Court to another is usually exercised by the Appellate side of the H. C , 100 I C. 265 . 1927 Rang. 105 : 4 Rang. 554.

Notice.

——the District Judge
failure of that is certainly
C 62 : 74 I C 249, 84 I.
A L. J. 948 . 1926 All. 17,
transfers the case of his
560, 23 O. C. 216 · 58 I. C. 667.

——an order of transfer without notice to the other party can be set aside in revision. 1925 Lah. 189, 90 I C. 287 · 23 A. L J. 948, 84 I. C. 238 : 1923 Lah. 444

S. 35. General—*contd.*

——costs in mortgage suit follow the character of the amount decreed in the suit and form part of the entire decretal amount to be realised from the mortgaged properties. 41 C. L. J. 607 : 93 I. C. 364 1925 Cal 1135

——ordinarily a mortgagee is entitled to cost, unless he raises questions which involve a denial of the rights of the mortgagor to redeem 91 I C 943 1926 Mad 405

——the court has a complete discretion to award cost. 22 C. W N 372, 25 B 230, 1925 Oudh 699, but it must be judicially exercised on legal principles 24 C W. N 352 : 58 I. C 421, 107 I. C. 881 1928 Oudh. 224

——where there has been no misconduct on the part of the plff. the court has no discretion 62 I C 812

——where the plffs did not properly represent the case before the trial court but were successful in appeal they would not get any costs 104 I C. 325 1927 Lah 723.

——there is no rule of law that because a suit or appeal is heard *ex-parte*, the successful plff or appellant is not entitled to costs against the absent deft or respondent 29 C W N 297 : 86 I. C. 321. 1925 Cal 569

——award of costs where the suit abates 43 M 284 · 54 I C. 118 37 M L J 596, 1912 M W. N 382 ; 15 I C 369 : 11 M L. T. 202

——commissioner's fee may be realised by execution and it need not be entered in the decree 40 C L. J 180, 10 C. W. N. 234. *Expl*

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——excessive cost should not be allowed where a plaint is rejected at an early stage. 35 P R. 1914 . 25 I C 435 : 237 P. L. R 1914

——the fact of delay in the disposal of the suit owing to the laches of the plff could not be taken into consideration in dealing with cost 65 I C 769

——the court must record its reason for depriving a successful party of costs. 34 P. L R. 55 : 64 I. C 962, 108 I C. 740 1928 Nag. 171.

——defts'. admission of plff's rights does not deprive him of the costs of the suit if the latter is compelled to bring a suit. 62 I C. 812.

——the judge who hears the case cannot interfere with the order a Chambers. 50 B 430:
9

alised from mortgaged property. 35 C. 431.

——where both the parties advance pleas in excess, each party is to bear his cost. 14 C. 99, 108 ; 13 I. A 116 P. C., 19 C. 253, 266 : 19 I. A. 48

S. 35. General—*contd.*

——separate cost should not be allowed to defts, if the defence is common to all or the interest is same. 17 W R. 188, 12 W. R 70.

[illegible] pear at the [illegible] cost should [illegible] 41 C L J. [illegible]

——where appeal to Privy Council is presented but not prosecuted the respondent is entitled to costs on petition for leave to appeal. 89 I. C 213 · 27 Bom L R 699, 1925 Bom 471

——if no relief is asked against a respondent, no cost should be awarded to him though he unnecessarily appears 1918 Pat 218

——interest should not be allowed on costs unless such costs have been actually incurred 60 I. C. 345.

——a claim for future interest is within the discretion of the trial court 86 I C 240. 7 Lah L. J 1 : 1925 Lah 308

——where plff's suit is dismissed each deft. is entitled to costs taxed on the basis of the suit valuation and not on the basis of what each deft's interest might be in the suit itself. 27 Bom L R 692 : 89 I C. 211 1925 Bom 432

——where cost is awarded to the reversioner suing different sets of alienees, the costs should, so far as each set of defts. is concerned, be proportionate to the value of the property in which such set of defts. may be interested. 1928 Mad. 16

——a deft. is not entitled to contribution in respect of cost against co-deft for which both are liable unless there be some equity. 32 A 585.

——third person helping the plff is no ground to order the plff. to furnish security 18 C W N. 119

——the court may in all cases exercise discretion and must order for security for cost when the plff is a puppet in the hands of others. 18 C W N 119.

——the object of awarding cost to successful party is not to punish the other party but to compensate the successful party. 25 C. W. N 297

——plff suing for third person, is against public policy. 18 C. W. N. 119.

——in partnership suits cost should be paid out of the assets of the partnership, or in default of assets, by the partners proportionately, but if any partner denies the fact of partnership, he will bear the cost 7 C 428.

——the costs incurred before the arbitrator or umpire cannot be regarded as the costs of "a proceeding in the High Court' but are costs of a tribunal unconnected with Court. The Court holding that reference to arbitration was not valid cannot pass order as to costs. 109 I. C 175 1928 Mad 370 1928 M. W. N. 228 : 54 M L. J. 580.

——a guardian *ad litem* who is party to a suit may be made to pay the costs 1928 Mad. 590 : 1928 M. W. N. 318.

S. 35. Cost in Partition suit.

——ordinarily parties are to bear their own cost up to th preliminary decree but where the deft. makes false claim, th unsuccessful party should bear the cost 20 C. W. N. 51, 5 C. L. 643 · 34 C 878, 10 C. L J 503, 12 C L. J 346

——general rule is that the parties should have their own cost except with regard to the institution fee which should be born proportionately by all the parties. 1923 Bom. 464.

——costs in a partition suit up to the preliminary decree ough not to be given to plff. but to be borne by all parties. Such an orde may be made even though some of the defts. have not appealed fron the decree ordering cost to plff as it is to their benefit. 42 C. 451 19 C. W. N. 233. 28 I C. 446

——in a suit for partition the court has a discretion to awar costs against a party who raises a vexatious contention and fails 21 I. C 746

——in a partition suit between the members of family wher neither party has been guilty of unfair contention, the cost, till the preliminary decree, should come out of the estate 54 I. C. 382 : 11 L W. 5 (34 C 878, 42 C. 451 *not fol*).

Cost in suit withdrawn.

——when a suit is withdraw[illegible]
condition of payment of cost t[illegible]
deposit of such cost before trial [illegible]
compliance 15 C W N 998, 31[illegible]

For other cases, see "C P. C[illegible]

Cost in Probate cases.

——decree in a probate case directing that the costs of both the parties should be paid out of the estate and that joint Letters of Administration should be issued to both the parties, cannot be executed by one party against the other but the proper course is to sell or mortgage sufficient portion of the estate to pay off the costs of the parties. 24 I. C. 214.

Appeal from order awarding cost

——the appellate court has no power to interfere with the discretion of the trial court. 42 C L J. 137 : 90 I. C 486 : 1925 Cal. 1085, 95 I. C. 446 *contra* below.

——an appellate court can interfere with the discretion of the lower court 22 C. W. N. 372 ; 44 I. C 870, 21 C W. N. 339 : 38 I C 388.

——an appeal lies where the order as to cost involves a matter of principle, 11 C. 359, 34 C. 878, 12 C. 179, 63 I. C. 811 or when there has been no real exercise of discretion, 12 C. 270. or when the order proceeds upon a misapprehension of fact or law, 16 B. 676, otherwise not, 12 C. 179, 28 C. 567.

——where the principle of awarding cost is not wrong the discretion exercised by the court below should not be interfered with.

S. 35. Appeal from order awarding cost—*contd.*

1923 Bom. 37 : 72 I. C. 993 and where the first appellate court improperly interferes a second appeal lies 1923 Oudh. 155 : 25 O C. 385 : 10 C. L. J 20 : 72 I C. 222.

——where discretion has been rightly exercised the H C will not interfere. 9 O. and A. L. R. 7 . 73 I. C 307, 90 I C. 577.

——a Dt. court is competent to decide whether the order of taxation of costs in his own court is right or wrong even after disposed of by the High Court. L. R. 550.

discretionary with the lower court, yet the appellate court can check it. 21 C W. N. 339 24 C. W N. 352.

——an omission to provide for cost may be corrected either by review or by appeal. 1923 Oudh. 155 : 73 I. C. 222.

——where a redemption suit was decreed by the trial court and the appellate court but in second appeal the defts.'s costs of the suit were claimed on the ground that he was not guilty of any misconduct, held that as the point had never been raised before the lower appellate court he was entitled only to the costs of the first court. 86 I. C 793, 1925 Mad 778 . 48 M L J. 213.

S. 35 A. Compensatory costs in case of false or vexatious claims or defence.

——compensation under this section can be awarded only after objection by the opposite party 94 I C 78 : 1926 Lah 972

S. 36 Application of provisions of decree to orders.

——an order under Or. 20 R 11 (2) can be executed as if it were a decree. 85 I C 291 2 Rang 673 · 1925 Rang 189

§§. 37—45. EXECUTION AND TRANSFER OF DECREES AND ORDERS.

——preliminary decree in a mortgage suit valuing Rs 2000 was passed by a munsiff, final decree was passed by a Subordinate Judge, it might be executed by the successor of the munsiff. 47 C 1100 : 24 C. W. N 899 · 57 I C. 877.

——the Dt Judge cannot by any order under s. 13 (2) take away the jurisdiction of a court to execute a decree passed by it, when it is the only court which can execute it under the provision of sec. 38 read with sec 37 C. P C, 41 C L J. 166 86 I C. 775 1925 Cal. 679.

——where a decree passed by an Additional Subordinate Judge's court ...

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T. 333.

——s. 37 cl. (b) gives jurisdiction to execute the decree of another court when two conditions are fulfilled (1) when the original

Ss. 37—45. Execution and transfer of decrees and orders— *contd*

court passing the decree has ceased to exist (2) it must cease to have jurisdiction to execute the decree 6 P. L. J. 304: 2 Pat L. T 374 1921 Pat 186 62 I C. 489

——an executing court cannot refuse to execute a decree passed against a *minor not properly represented* in the suit. 1928 M W. N. 227, 15 C W N 725 *fol*

——the court which passed the decree does not lose its jurisdiction to execute the decree even though it has lost territorial jurisdiction over the property. 1928 Mad 746, (6 C. 513, 42 M 821, F. B.) *fol* (37 M 462, 1927 Mad. 627) *Diss from* The new court is not competent to execute the decree (30 M 537, 42 M. 461), *fol.* 42 M. 821 *Expl* 1928 Mad 746

——where the area is transferred from one jurisdiction to another both court can execute the decree 35 C 974 12 C. W. N. 859, 42 M 821 F B, 37 M 462 1917 M W N 788 42 I C 671

——a mortgage decree for such can be executed by the court which passed the decree although at the time of execution the territorial jurisdiction is transferred. 107 I C 195.

——but where after the date of preliminary decree in a mortgage suit the territorial jurisdiction was transferred but the same court passed the final decree without any objection of the mortgagor, held that the court which passed the decree had no jurisdiction to all the property which had passed out of its jurisdiction 50 M. 882 : 1927 Mad 627 103 I. C 245 52 M L J 605 1927 M W N 282.

——execution cannot be issued before the preparation of final decree 12 L W 34 59 I C 161

——where an application for the transfer of a decree was made to the District Court of A but the Jt Dr resided in the District B and the district Judge of A had administrative jurisdiction over both the Districts A and B, the application could not be said to be not in accordance with law 1928 Cal 265.

——s 38 read with s 39 shows that the court which passed the decree is primarily the court to execute the decree but such court may send a decree for execution to a subordinate court neither of its own motion or on the application of the Decree-holder 5 Pat 714.

——when area of the court where the Jt. Dr resides is transferred to another court that court has jurisdiction to execute the decree. 45 M. L J 210 : 1923 M. W. N 406 1924 M 32 : 18 L W. 17 73 I C 956, 37 M. 462 22 I. C 899, 26 M. L. J. 189

——after a decree has been transferred an application for execution to the former court is not a step in aid of execution. 3 Pat 247, 39 M. 640 : 18 Bom. L. R. 909 : 21 C. W. N. 162 ; 36 I. C. 682 : 24 C. L. J 478 P.C.

——but a court transferring its decree for execution can bring it back. 50 B. 439 : 94 I. C. 146 : 1926 Bom. 271.

——simultaneous execution of a decree in two or more courts is not illegal. 13 Bur. L. T. 235, 63 I. C. 809 *contra*, it is legal under exceptional circumstances. 37 M. 231 : 39 M. 640 ; 36 I. C. 682 P.C.

Ss. 37—45 Execution and transfer of decrees and orders— *contd.*

——a decree cannot be transferred for execution to a court which has no pecuniary jurisdiction to entertain the suit in which the decree was passed 2 Pat L T. 422 : 1922 Pat. 229, 1922 P 188 : 67 I. C 530, 37 C 574 14 C. W N. 662.

——difference between application for transfer and that of execution 1923 Pat 280.

——except in case of decree for sale of mortgaged properties no court can execute decree entirely affecting property beyond its jurisdiction 6 Pat. L T. 71 80 I. C. 901 1925 Pat 139

——after issue of certificate whether rightly or wrongly, the court to whom the decree is transferred cannot deal with execution matters. 22 A L. J. 1039 . 85 I C. 390 . 1925 All 179

——once a decree is transferred under s 39 the court which passed the decree ceases to have jurisdiction till it receives a certificate under s 41 and therefore a second transfer of the case by that court for execution is without jurisdiction 12 O L J. 287 : 89 I. C. 99 1925 Oudh 428, 1925 All 276 *affirmed.* 1923 P 384 *Ref.* 1923 P 224 *Dist*

——when a decree is transferred for execution and certificate is issued, jurisdiction of the court ceases 22 A. L J 1039 : 85 I C. 390 : 1925 All 179

——*under the circumstances of the case the original court* was held to have jurisdiction to entertain the application and even if there was a defect it was cured by the subsequent granting of the certificate, the date of granting it being immaterial 89 I. C 958

——a civil court which passes a decree and has territorial jurisdiction over property has jurisdiction to order execution of the decree, though it be assigned by the District Judge under s 13 (2) C P. C , 41 C L J 166

——a decree cannot be transferred for execution to a court which has no pecuniary jurisdiction to entertain the suit in which the decree was passed 3 Pat L. T. 422 · 1 Pat 651 67 I C. 538 1922 Pat 220.

——competency of the court to which decree is transferred. 1 Pat 651

——s. 39 does not apply to decree passed by the Presidency Small Cause Court. 1928 Cal. 265

Ss. 37—45. Execution and transfer of decrees and orders— *contd*

——the court to which a decree is transferred for execution has the same powers as if the decree was passed by it But its jurisdiction ceases when it takes action under *s. 41.* 94 I. C. 36. 5 Pat. 398 1926 Pat 274 7 Pat L T 461

——when a Munsiff passes an order in execution proceeding transferred to him by a Small Cause Court his order is subject to appeal in the same way as if the decree was passed by himself. 103 I C 344, 1927 All. 740.

——when a decree is transmitted there is no presumption that it intended the decree to be executed even against properties situated within the jurisdiction of the transmitting court, 11 L. W. 747,

——the court to which a decree is transferred for execution has right to determine whether a particular individual was a partner of a firm 43 A 394 19 A. L J 187 61 I C 401

——s 41 contemplates two different courts and it does not prescribe any particular in which the court to which a decree is sent for execution should inform the court as regards the result of the same 1923 Bom 371

——the court to which a decree is sent for execution is not bound to send a certificate simply because an application for execution has failed, there should be a complete failure 25 Bom. L. R. 453 1923 Bom 396 74 I C 149

——such certificate must be sent and it does not itself put an end to the jurisdiction of that court to execute the decree. 1922 Nag 210 68 I C. 657

——the court to which a decree is transferred for execution cannot question the order of transfer [illegible] ing the decree, 42 P. L R 1918 [illegible] the jurisdiction of such court cea [illegible]

——substitution must be in the original court [illegible] N. 533 9 C. L J 433, 22 C. 538, 27 C. 488 *Contra* 28 M. 466, 18 B. 224, 55 I. C 156 (N)

——under s 39 a mortgage decree can be transferred for execution to the court where the property is situate, but the court of transfer obtains jurisdiction only to deal with that particular execution until it is withdrawn or stayed or result is certified. If the Jt. Dr dies before certificate is issued the court of transfer does not lose jurisdiction over the executing proceeding but the decree-holder must get an order for substitution from the court which passed the decree This is a matter of procedure and not of jurisdiction, so the [illegible] proceeding [illegible] the [illegible] J. [illegible] C

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——wher [illegible] to transfer [illegible] cute the dec [illegible] decree. 1927 [illegible]

Ss. 37—45. Execution and transfer of decrees and orders—*contd.*

——when the D. Hr obtains an order for transfer but the decree is not actually sent the court which passed the decree has jurisdiction to execute it. 3 Pat. L. T 298 : 1922 P. 301 1 Pat. 328. 65 I. C. 332.

——s 42 is not applicable to the execution of a decree of the Madras Small Cause Court transferred to a court in muffassil 1925 M. W. N. 713 : 90 I. C. 509 · 49 M L. J. 104.

——a transferred decree cannot be transferred. 4 P. L J. 49 : 49 I C. 374.

——execution of decree when the court passing the decree ceases to exist. 49 I. C. 94 (Pat).

——an executing court cannot order prohibitory order beyond jurisdiction. 177 P. L R 1915 . 30 I C. 487.

——the expression "may be executed" in sec. 44 gives a discretion to the court to which application is made for executing a decree, to refuse to execute it though the discretion should not be capriciously exercised 86 I. C 492 1925 Mad. 788 21 L W 330

——it is open to the court to whom a decree is sent for execution under s. 44 to refuse execution on the ground that the court which passed the decree had no jurisdiction to do so. 41 C L J. 508 · 89 I. C. 347 1925 Cal 955.

——the word ' may be executed in British India as if they had been passed by the courts in British India" refer only to the mode of execution. They *do not mean* that such decrees should for all purposes whatsoever be placed in the same position as decrees of British Indian Courts. 86 I. C 492 · 1925 Mad. 788.

——when foreign judgments are sought to be executed in British Indian Courts notice must be issued to the Jt Dr 1925 Mad 788 : 86 I. C 492 : 21 L. W 330

For other cases, see "*execution* "

S. 46. Precepts.

——a court to which a decree is transferred for execution cannot issue a precept and the scope of s 46 is not in any way enlarged by s. 42, 92 I. C. 621 1926 sind 157

——when a court transfers its decree for execution to another court it does not lose its jurisdiction to issue a precept in respect of the decree 31 C W N 653 : 102 I C 513 1927 Cal 581

——the court to which a precept is issued derives its authority from that precept and has not power to do anything beyond that authority but can deal with incidental matters and can accept money or security from the Jt Dr., 94 I C. 119 1926 Lah 433. 8 L L. J. 164 27 Punj L R. 757.

——an executing court cannot decide the validity of the issue of the precept, the proper remedy being by way of review or appeal. 31 C W. N 653 102 I C. 513 ; 1927 Cal. 581.

47. QUESTIONS TO BE DETERMINED BY THE EXECUTING COURT.

Scope of the sec

——it is [illegible]
of decree an[illegible]
it is not lim[illegible]
sec 20 C W [illegible]

——the main object underlying this sec. is to prevent multiplicity of suits and to secure that all matters which can be decided in the suit shall be so decided 30 C W. N. 41 : 42 C. L. J. 22 : 89 I C 744. 1925 Cal 1258

——an order under s. 47 should conclusively and finally determine the rights of the parties with regard to the matters in controversy. 3 Rang 132 89 I C. 300 1925 Rang 271.

——a prayer under s 47 can be joined with a prayer under Or 21, R 90 in the application and the party cannot be compelled to elect 107 I C 848 : 1928 Pat 27 : 7 Pat 331

——an executing court cannot amend a decree but when it passes an order to amend any decree its order comes within s 47 103 I. C 673 1927 Lah 651

——an executing court is not competent to enlarge, extend or modify the decree even by consent of parties subsequent to the decree, and the only adjustment of the decree of which the executing court can take cognizance is that contemplated by Or. 21 r. 2 C. P C. 27 C W N 280 37 C L J 17 : 71 I C. 378, 16 W. R. 275 *fol*

——questions relating to execution or discharge &c of a decree refer to matters arising subsequent to the passing of the decree and not antecedent to it. 4 U P. L. R 93 : 67 I. C. 753

——question arising after and before execution can be tried under this sec 24 A 491.

——persons who are parties to the suit cannot prefer an objection under Or. 21 R 58 such objections by such persons or their representatives fall order this sec 54 C 1064 107 I. C. 357 : 1928 Cal 94

——a decree passed against a dead person is a nullity and objection to that effect can be taken in execution. 98 I. C. 927 : 1927 Bom. 53 · 28 Bom. L. R 1367, (26 B. 317, 35 B. 393) *Riel on*, 38 B 194 *Dist*

——where the decree is without jurisdiction objection to that effect can be taken in execution proceeding. 31 C. W. N. 739. 103 I C 644. 1927 Cal. 578, 103 I. C. 673 · 1927 Lah. 651, 1925 Cal 907 F. B. *fol.*

——objection against execution may be taken on the ground of subsequent event. 24 C. L. J. 523, 21 C. W. N. 766.

(*Question of restitution and mesne profits.*)

——application for restitution and refund of property or money if excess is found due after amendment of a decree, is not to be made under this sec. 27 A. 485, 22 A. 79, 5 C. W. N. 627

S. 47. Scope of the sec.—*contd.*

——application by judgment-debtor for restitution of immoveable property seized by decree-holder in excess of the decree is under this sec. and Art, 121 L. Act. applies 38 A. 339, 23 C. 483, 22 W. R 435, 2 A. 61.

——restitution of property after the sale is set aside, is under *this* sec. *16 M. 287, 22 A. 108.*

74 I L. 995

——it applies to a petition for restitution of an execution case on the ground that the petition for satisfaction is a forgery. 26 C L. J. 317 : 40 I. C 439

——such an application for restitution is a proceeding in execution under s 47 1922 Nag. 198, 67 I C 319, 13 B 485, 28 M 355, 45 B, 1137, 25 A 441 *fol*

——lease *pendente lite*, *liability of the lessee for mesne profits* under Or 22 r 10 does not fall within this sec. 43 M. L J 589 31 M. L. T 131 : 27 C W. N 29 : 36 C L. J. 542 . 20 A. L J 988, 24 Bom. L R 1251 16 L W 905 68 I C 973 P. C

——an application under s 144 C P C. for mesne profits relates to

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——where a decree directs a fixed amount to be paid as mesne profits but does not say anything about interest an executing court cannot award interest It is otherwise where the decree bears the amount to be ascertained by the executing court, 96 I. C. 697 · 1926 Mad 952, 6 C L J 462.

——application in execution to ascertain mesne profits comes under this sec. as a question relating to execution. 23 Bom L R 263

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(*Question of prior agreement*).

S. 47. Scope of the sec.—*contd.*

separate suit would be restraining the execution of the decree by way of injunction. 31 C 479, 29 C 810, 6 C. W. N. 838, 6 C. W. N. 796 But the Madras and the Bombay High Courts hold a contray view; *see below*

——it is open to a Jt Dr. to plead in bar of execution of a decree a pre-decree arrangement between him and the decree-holder that the decree was not to be executed 49 M. 513 · 1926 M. 583 1926 M W. N 368. 50 M. L. J. 364

——an agreement prior to decree not to execute against one of the Jt Dr. but to realise the whole amount from the other debtors can be pleaded as a defence when execution is sought against him and should be considered by the executing court on its merits. 87 I. C. 297 1925 Mad. 591 48 M L. J 277, (40 M, 233 F. B, 37 M L J 356, 46 M L. J. 240) *fol.* 43 M. 725 44 L. W 317. *Diss from.*

——*s* 47 *is wide* enough to permit any valid objection to be taken by the Jt Dr against the D Hr or his legal representative An agreement between such legal representative and the Jt. Dr prior to the decree which would preclude the former from applying can be set up in bar of execution. 46 M L. J 240: 1924 M. W N 144, 19 L W. 27 77 I. C 547, 1924 Mad. 611, 40 M. 233 F. B. *fol.* *Similarly in* 22 B. 463 F. B.

——the executing court has not got the power to decline to execute a decree personally against the judgment debtor on the ground that there was a prior agreement between the parties to the effect 100 I C 156 1927 Lah 194 9 Lah L J. 7, 40 M. 233, F. B *Dist.*

——where a suit for khas possession was compromised and dismissed on defts' agreeing to execute a kabuliyat in plaintiff's favour and the plff then sued him for specific performance of the contract to execute the kabulyat, there being no direction for its execution in the decree, the suit was not barred by s. 244 7. C. W N 158

(Proceeding relating to delivery of possession.)

——when the property is purchased by a stranger question as to delivery of possession does not come under this sec. 14 C. 644, 31 M 177, when decreee-holder is the auction-purchaser there is conflict of authorities According to some the question relating to delivery of possession comes under this sec. 27 C. 34 4 C. W N. 417, 7 C. L. J. 436, 30 A 72, 25 M. 529, 26 M. 740, 35 B 452, 31 C. 737, so also in case of purchaser from decree-holder. 28 M. 87, according to other it does not come under this sec 20 C. L J 433 · 19 C. W N. 835, 33 C. 227, 31 A 82 F. B, 6 C. L. J. 749 1925 Cal. 1250, 1923 Cal 345. But it is held that where decree-holder-auction-purchaser takes possession, judgment-debtor can object under this sec. that the same was compromised. 18 C W. N. 26, 20 C. W. N. 675, 829.

——this *sec.* does not cover a dispute as to possession between auction purchaser and Jt Dr. 84 I. C. 746 : 47 A. 304 : 1925 All. 236

S. 47. Scope of the sec.—*contd.*

possession to auction decree holder is not a question arising in such execution, discharge or al 1250 · 89 I. C 196, **B.** *below*

——a decree-holder auction purchaser is a party to the suit rder sion N. 97 I.

——resistance to delivery of possession to decree-holder-auction purchaser,——maintainability of suit for removal of obstruction. 86 I. C. 503 : 1924 Bom 527

——an enquiry as to the question relating to execution of a decree for possession of land allotted by partition falls under s 47. 43 M. L. J 124 1922 M. W. N. 415 : 31 M L T 43 3 Pat. L T 547 : 1 Pat 378 : 20 A L J. 650 · 16 L. W 128 · 26 C W. N. 906 · 36 C L. J 1 : 24 Bom L R 974 **P C**

——an application from the transferee of the judgment debtor *pendente lite* for the restitution of possession of properties after the decree-holder has taken delivery of possession, on the ground that it had not been ascertained at the time of taking delivery which items fell to the share of the decree holder is not barred by Or 21 R. 102 and is maintainable under sec 47 97 I. C 1031 1926 Mad 963 : 51 M. L. J 255.

——in the absence of any decree in the suit for payment a mere declaration that the property is subject to a charge and that possession cannot be delivered unless that is paid, does not entitle the parties to work out the charge in execution of the decree. 106 I. C 507 : 1928 Mad 474.

(*Question of fraud*)

——an execution sale which has been brought about by the fraud of the decree-holder is liable to be set aside by the executing [illegible] and did not ser for value 923 Cal. 538 ·

——question of fraudulent execution of decree comes under this sec. 41 A. 443.

——sec 47 would be very much narrowed if it were laid down that people claiming under a purely colourable and fraudulent documents are not to have their claims set aside or ignored when proceedings are taken in execution. 1923 Cal. 344

[illegible]

de an execution 47 C P. C. 41,

S. 47. Scope of the sec.—*contd*

(*Proceeding under Or. 21, R. 90*)

——a proceeding under Or 21 r 90 is not a proceeding in execution and a compromise relating to it does not come under s 47 and Or 21, r 2 but it comes under Or 23, r. 3 and the court has power to record such compromise. 6 Pat L. J. 253: 2 Pat. L. T. 273, 62 I. C 608

(*Question as to jurisdiction*)

——an objection to the jurisdiction of the court that passed the decree is not a question coming within this sec. 49 M. L J. 664: 22 L. W 567, *contra*. 31 C W N 739 103 I. C 644: 1927 Cal. 578, 103 I C 673 1927 Lah 651, 1925 Cal. 907. F. B

——but *an objection can be raised in execution proceedings* that the decree sought to be executed is a nullity. 6 Lah 313: 88 I. C. 865 1925 Lah 494, 98 I C 927 1927 Bom 53 28 Bom L. R 1367, 26 B 317, 35 B 393 31 C. W N 739 103 I C. 644 1927 Cal 578. 103 I C 673 1927 Lah. 651, 1925 Cal 907 F. B.

(*Question of staying execution.*)

——orders staying or refusing to stay execution come under this sec 42 I C 342, *contra* below

——order staying or refusing to stay execution are no longer to be considered as orders determining questions relating to the execution of a decree No appeal lies from such order 25 C. W. N. 555 20 C L J 512 *fol*

——an order relating to the sufficiency of the security tendered as a condition of the stay of execution which has been granted, is not one which comes within the *purview* of sec. 47 4 Bur. L. J. 61 88 I C 740, 41 C 160 *fol*

(*Other miscellaneous questions*)

——if the property was in part attached and sold the pltf's remedy as a party to the suit would be under s 47 C. P. C. and not by a separate suit, but if the property was not included either in the sale proclamation or in the sale certificate and was not in fact purchased at a court-auction and was wrongly taken possession of by the auction-purchaser under colour of false title, no question arose within sec 47, 6 P. L. T 473, 1925 P 376 86 I C 648

——the title of a purchaser in execution of a morgage-decree can be determined by an application under this sec. and not by separate suit and such a suit can be treated as a proceeding under s 47, subject to any objection as to jurisdiction and limitation under Art. 181, *ie*, 3 years from the date of sale 54 C. 419: 103 I C. 233: 1927 Cal 614, 44 M 433.

——the court cannot treat a suit as a *proceeding* under this sec. where on application under this sec. would be barred by limitation 53 C. 837: 99 I. C. 180: 1927 Cal 106, (22 A. 376, 46 C. 975) *Rel. on.*

——when a question arises as to what is included in a *decree* in execution proceedings the executing court has got to go into the question as to what was decreed. 85 I C. 1004: 1925 Cal. 1243

S. 47. Scope of the sec.—*contd.*

——a court executing a decree is entitled to go into the question whether the party in possession had caused wilful damage to the property after the date of the decree and before the date of the execution application 89 I. C 205 : 27 Bom. L R. 687. 1925 Bom. 385.

——the question whether a property is accretion or increase in the *hypothecated property for whose redemption the suit was* brought and decreed, is a question within this sec. 49 B. 233 : 86 I. C 368 : 27 Bom. L R. 455 48 M. L J 648 P C.

——an order on D Hr. to furnish correct boundaries failing which execution case is to be dismissed, is an order amounting to a judicial determination of the rights of the parties under s. 47 C. P. C, 29 C. W. N 556

——a sale of the portion of the mortgaged property in execution of the decree for cost obtained by some successful dett against the *mortgagee D. Hr cannot be set aside under this sec and is not* void but irregular and can be set aside in proper proceeding. 25 C. W N. 400

[illegible] in which [illegible] between [illegible] under this [illegible] this sec, [illegible]

——if the judgment-debtor pleads non-transferability the question comes under this sec. 27 C. 187, 415, 16 B. 328

——suits for accounts,-compromise of, points to be decided by competent accountants and arbitrators,-question as to share of profits does not come under this sec 71 I C 817

——an order dismissing an application for rateable distribution is not appealable and the remedy is by suit. 32 M L. T 155.

——the questions whether money was deposited in time in a pre-emption decree is one falling under this sec 26 O C 345 74 I. C. 558

——right to draw out and right to deposit money into court is a question relaiting to execution. 46 M L. J 567

——an objection to decree is not a question relating to execu tion and must be by regular suit 13 Bur L T 170

——question arising in proceeding for making preliminary mortgage decree final are not covered by s 47 1925 Nag 132

——an application by Jt Dr. that the property sought to be attached is wakf property and as such is not attachable, is one falling under Or 21, r. 58 and not under this sec and an order thereon is not appealable. 3 Pat. L. T 432 1922 P. 196 · 67 I. C 438

——where the execution of a mortgage decree was objected to on the ground of nonpayment of additional court fee it was a matter relating to execution 1922 P 59 : 3 Pat L T. 146.

——when a pre-emption decree was silent as to standing crops the question did not arise in execution 1923 Nag 327.

S. 47. When separate suit lies—*contd.*

——separate sui [illegible]
of a decree 22 B 47 [illegible]
277, 365, 23 C. 639, [illegible]

——to set aside [illegible]
L. J. 360 P. C 21 C [illegible]

——to declare that the property is debutter and cannot be sold and the deft is estopped from questioning its maintainability when he pleaded in the execution proceeding that the question did not come under s 47, 11 C W N. 145

——to decide whether a decree against a widow is binding against reversioner, 30 M. 402

——to decide as to an agreement not to execute a decree. 31 C, 179, 29 C 810 *contra* 22 B 463 F B., 46 M L. J. 240

——to decide the question as to damages for breach of contract, to certify or adjust payment, 23 B. 394, but a suit for declaration that a decree has been satisfied will not lie. 21 C 437, 31 C. 480, 15 M. 302.

——for possession when once symbolical possession has been taken. 23 C L J 587 · 20 C W N 675

——when the D Hr is obstructed in taking delivery of possession he can apply again under Or 21 r. 97 for delivery of possession after removing the obstruction and such an order is appealable as being an order under the sec 1921 M W N 698.

——a claim by the Jt. Dr. under a mortgage decree to recover property alleged to have been wrongly delivered to the auction-purchaser comes under this sec though the auction-purchaser was a stranger to the mortgage suit No separate suit lies. 41 M L. J. 120 1921 M W N 491 · 14 L W 92 · 63 I C. 200, 44 M 483 P. C.

——a representative of a judgment-debtor cannot sue a stranger auction-purchaser impeaching his title 53 C 837 ; 99 I. C. 180 · 1927 Cal 106.

——when [illegible] his remedy is to proceed [illegible] nt suit for declaration of [illegible] 407

——when t[illegible] not through court and was [illegible], a suit to recover possess[illegible]

——when the auction-purchaser takes possession of certain property not covered by the sale it cannot be decided in execution but a separate suit will lie 64 I C 860.

——a suit by the D. Hr. for possession against the Jt. Dr. is maintainable after he gets the property from the auction-purchaser who surrenders it in his favour. 63 I C. 762.

——the dispute between the assignee of a decree and the purchaser of property comprised in the decree cannot be decided in execution of the decree but must be left to separate suit, 98 I. C. 856 : 1927 Mad. 240

——a suit filed by a decree-holder in pursuance of an order passed under Or 21 r. 58 directing him to file separate suit to

S. 47. When separate suit lies—*contd.*

establish his title cannot be dismissed on the ground that the remedy lay under s 47. 86 I. C 323 : 1925 All 240.

——this sec. is no bar to a suit, instituted against auction-purchaser who was not the decree-holder by one of the Jt Drs for the recovery of property not liable to be sold in execution 96, I C 771 : 1926 All 730, (1925 All 236. 31 A. 82 1923 All 470, *Rel.*

——where the decree-holder by *bona fide* mistake put some of his own property to sale which was purchased by a stranger, his only remedy was by a suit under Or 21 r 103 C. P C and no application under this sec. lay, 1922 M W. N 121 1922 M. 63 . 15 L W. 272.

——though a right of suit is provided by Or. 21 R 103 C. P. C. still if the order comes also under s. 47 C. P. C the remedy is only an appeal and not a suit 90 I. C. 952 1925 M. W. N 577 1925 Mad 1198.

——where a person was a party to a suit but his name was subsequently struck off and decree was passed, he could not maintain an application under s 47 in relation to the execution of the decree and consequently a separate suit was maintainable 100 I C. 406 . 1928 Mad. 276 · 1927 M. W N. 905, 49 A 379 : 100 I. C. 495 1927 All. 378 : 25 A L J. 253.

——the appellant filed a suit for possession and obtained an *exparte* decree, the respondent filed a second suit to set aside the said decree as fraudulent and for other reliefs and the suit was dismissed The lower appellate court without deciding the question of fraud held that the *exparte* decree was without jurisdiction on the ground that it comprised lands not claimed and remanded the case for fresh decision, held that the question as to whether the decree in the former suit comprised lands beyond claim was a matter to be determined by court executing the decree and second suit lay. 42 C L J 22 30 C W N 41 1925 Cal. 1258, 47 A 304 84 I C. 746 1925 A 236.

——when the pltf obtained a decree for joint khas possession against the defts but failed to take symbolical possession, or to take any step to execute the decree and subsequently brought a suit for partition and possession, the suit was barred by s. 47 but the same might be treated as an application to execute the original decree if it was not time-barred The partition suit was not maintainable because it presupposed joint possession, actual or constructive 54 C. 524 : 31 C. W. N 406 . 101 I C 622 1927 Cal 411, 12 C W N. 37 *Rel. on*

——second suit for ejectment on fresh cause of action is not barred by this sec. 20 A L. J. 619 · 1922 All. 411

——where a final decree for sale is passed in a suit on a mortgage but is not executed for more than three years s. 47 does not bar the mortgagor from bringing a suit for redemption of the mortgage. 86 I C. 527 : 1925 Mad. 1191

——a question arising between auction-purchaser and the Jt. Dr. as to the identity of the property is not one falling under s 47

S. 47. When separate suit lies—*contd.*

C P. C but must be determined by suit, even if the decree-holder is the purchaser 87 I. C. 641 1925 All 703.

——where a decree was passed against a minor treating him as major and in execution the Jt Dr filed an objection that the decree was not binding on him, the objection might be treated as a suit under s 47 cl (2) subject to the question of limitation and jurisdiction. 48 A 362 93 I. C 376 : 1926 All 387 : 24 A. L J. 379

——when a minor representative of a deceased Jt. Dr. is not properly represented by " . . . declare the sale a nullity i

——an objection whi as plff may be made tl 27 C W. N 280 · 38 C. C 946 *fol*

——where some movable property was attached and placed in the charge of the D. Hr as depository, a suit by the Jt Dr against the D Hr. for the recovery of the property was not barred by the sec. as the D. Hr was only depository, 59 I. C. 477.

——the decree-holder-auction-purchaser being deprived of the part of the property is not entitled to apply under this sec. for compensation. 25 C. W. N 756 : 63 I C 126.

——agreement amongst decree-holders to pay each other cannot be enforced under this sec. but can be enforced by separate suit. 1923 A. 573 74 I. C. 351.

——to enforce the rights declared by declaratory suit, 22 B 267. but if the decree be directory (as in the case of a decree for monthly allowance) it will be enforced by execution from time to time. 19 C 139, 22 C. 903.

——to decide claim for contribution against Co-judgment-debtor. 18 A. 106.

——to decide questions as to mal-administration of judgment debtor's estate. 35 C 1100.

——by the mortgagor judgment-debtor for redemption when the judgment-debtor does not apply for order absolute after getting a preliminary decree. 39 B. 41.

——when a D. Hr. auction-purchaser is resisted in taking possession not only by the Jt. Dr. but also by a stranger who claims an interest in the property, his proper remedy is to bring a separate suit against both ; s 47 will not be a bar to such suit 44 B. 977 22 Bom L R. 1101 : 59 I C. 366

——where an auction-purchaser's right to joint possession is admitted his title to the property should be settled by a regular suit for partition and not by an application for execution. 105 I C 414 : 1927 Mad. 952 : 39 M. L. T. 281.

——a subsequent mortgagee impleaded in the suit by the prior mortgagee but subsequently exempted from the suit *is entitled* to bring a suit questioning the validity of the decree. 48 A. 574 : 1926 All. 475 · 95 I. C 147.

s. 47 Limitation.

——any application to set ... its natur ... by Art ... M. L. T ... 3 Pat L

——... application to set aside an execu... ound of illegality or irregularity. ... 16 L W 934.

——w... execution by mistake and sale confirmed, no suit for the recovery of the property or its value is maintainable after 2 years without setting aside the sale within the period prescribed by Art. 166 L. Act, 24 Bom L R. 423: 67 I C. 857.

——where the D. Hr purchases at an execution sale without leave to bid, the sale is not void but merely voidable and an application to set aside the sale is governed by Article 12 L. Act 3 P. L. T 529 · 31 M L T. 209: 16 L. W. 190 1922 P. C. 336 49 I. A. 312: 67 I C 814 **P. C**, 67 I C 894.

Parties under s. 47.

——questions between decree-holder and judgment-debtor, the execution-purchaser being only interested in the result, come under this section. 19 C. 683 · 19 I A. 166 **P C.**, 43 M 107 **F. B.**, 1928 Mad. 806, 43 M. 696 *expl*

——question between judgment-debtor and the auction-purchaser, decree holder not being a party, does not come under this sec. 20 M. 487, 25 B 631, but it is held that a suit by a judgment-debtor against decree-holder and auction-purchaser, to set aside a sale is barred by this sec 6 A. 448, 8 A 146; it is also held that such a suit does not lie even against the auction purchaser only because such a qu... judgment-debtor and decree-holde...

——a proceeding between ... and the judgment-debtor is a ... 659: 1926 Mad 857 · 51 M. L. J. ...

——a decree-holder auction-purchaser is a party to the suit within this sec. and does not cease to be so after the sale takes place 53 C 781 43 C. L. J. 345. 30 C. W. N 649 95 I C 494. 1926 Cal 798 **F. B**, 97 I C 697 1927 Cal 57.

——an auction-purchaser is not a party to the suit within the meaning of s 47 85 I. C. 750 1925 Cal 1223. *but see above F. B. case*

——"parties to suit" include parties on the same side arranged against each other ...

——if a prop... decree which h... judgment-debtor ... that the sale w... the question of ... judgment-debtor. ...

Parties under s. 47—*contd.*

——an application under s 47 need not necessarily be between parties arrayed against each other as decree-holder on the one side and judgment-debtors or their representatives on the other. Such an application is maintainable as between co-plffs or co-defts 99 I. C. 418 1927 Rang. 45 4 Rang. 418, 7 A. 681 *not fol*, 45 M. L. J. 478 *Rel on*, *But see below.*

——question between decree-holders *inter se* is not a question between parties to the suit or their representatives 8 M. 495, 11 C. W N 433, 93 I C 649 1926 Mad. 691 97 I C. 1020 : 1926 Mad. 1104 1926 M. W. N. 683, 103 I. C 724 1927 Pat 288 · 6 Pat 386, nor a question betweeen judgment-debtors *inter se* 6 A 12, nor a question between a party and his own representative. 25 B. 631

——but the executing court can decide who is entitled to execute the decree when the dispute is between the son of the decree-holder and the heir of the benamdar transferee decree-holder. 51 M. 219 105 I C 405 1927 Mad. 903 · 1927 M. W. N. 639 : 39 M. L T. 176, so also can decide the title of the Jt. Dr. 102 I. C. 179 . 1927 All 574.

——when the landlord has accepted rent for a long period from the purchaser of a non-transferable occupancy holding as *marfatdar* he can object to execution proceedings against the original tenant, under this sec 64 I C 124 (C)

——a party who has been exonerated from the judgment but whose name appears in the record is a party to the suit within this sec 49 M. 494 · 94 I C. 526 . 1926 Mad 484 : 1926 M. W. N 251 . 94 I C. 123 1926 Mad 687 : 50 M L J 387

——where a suit against several defts was dismissed and the plff. appealed against some of the defts. alone and succeeded in getting a decree in the execution of which other defts. objected, held that the latter must be still deemd as parties to the suit within this sec 91 I C 181

——where the first deft. against whom no decree was passed filed an applica[illegible]
his hand shoul[illegible]
by the D. Hr. [illegible]
premature. 25 B [illegible]

——application for reteable distribution being rejected, the question is not betweeen parties to suit. 1923 Pat. 204.

——a surety for restitution by way of mesne profits pending appeal is not a party to the suit or his representative under s. 47 or s 144 C P. C. 42 A. 158 38 M. L J. 302 : 11 A. L. J. 263 : 22 Bom L R. 521 : 13 L. W. 82, 55 I. C. 550 P. C.

——where a widow was unnecessarily made party to a suit on the allegation that [illegible]
was in possession [illegible]
succeeded on the m[illegible]
this sec. 34 C. L. J [illegible]

Parties under s. 47—*contd.*

——a dispute among co-decree-holders as to the right of one to execute a joint decree excluding the other is not a question between parties to the suit. So a dispute between Jt Drs. *inter se* as to the possession of the property after the satisfaction of the decree does not come under this sec. Persons may be parties opposed to each other without being arrayed as plff. and deft respectively in the suit. 32 M. L J. 118 : 70 I. C. 329

——this sec. is not limited in its application to question arising only to parties who are opposed to each other in the suit, 45 M. L. J. 478 : 18 L W. 311 . 1923 M. W. N. 662.

——where the deft 's name is struck out at plff.'s instance but the claim is not dismissed against him, deft is not a party under this section as there is no formal conclusive adjudication against him. 1925 Nag. 118.

——a surety by virtue of sec 145 is a party within sec 47 and a plea of fraud can be raised before the execution court by him. 7 L. L. J 457 ; 26 Punj L R 561

——any questions arising as to the satisfaction of the decree are questions under s 47 and persons who are neither parties to the suit nor their representatives cannot be joined in execution proceedings 8 N L. J 73 98 I C 888

——a suit against several defts. having been dismissed the plff. preferred an appeal against some defts and succeeded in getting a decree In the execution some of the other defts objected ; held they must still be deemed as parties to the suit within this sec 91 I C 181

——a benamder is neither a party nor the representative of party within this sec. 98 I C. 14 1926 Mad 1081 51 M L J. 391.

Representative.

(*Application of this section.*)

——the question as to who is the representative of the decree-holder or judgment-debtor comes under this sec 16 A 483, 25 M 545, 27 C. 670, 48 A 499 . 1926 All 681 94 I C. 454

——when an objection is taken by the person who has become the [illegible] execution, that [illegible] 20 C L J. 481, [illegible] ; 711, 28 A 51, [illegible] egal representa- [illegible] hat he holds the property on behalf of a third party the objection comes under Or 21 r. 58 and not under this 23 M. 195, 199, 17 M 399, 23 B. 237, 317, 31 M. 125 · so also when the objector is not the legal representative of the judgment-debtor 20 C L J. 485

——where a person who was impleaded as a party but against whom no decree was passed objects to the attachment of the property in his hands basing his claim on a conveyance executed by the Jt. Dr. the objection comes under this sec and not Or. 21, r 58, 24 C L. J, 477.

S. 47. Representative—*contd.*

——where the original judgment-debtor claims the property in another capacity Or 21 r. 58 will apply. 39 C. 298 (F. B). 42 C. 440 17 C 711, so also when he claims on behalf of third party. 23 M 195 23 B. 237, 31 M 125

——question as to legal representative entitled to execute the decree must be decided under this sec. L. R 3. A 473.

——claim by legal representative of Jt Dr, as his own property comes under this sec 3 Pat L T. 613 68 I C 369.

——it does not apply to a question between D. Hr and his assignee 20 C. W N 679, 43 I C 165 11 S. L R. 74

——this sec should receive *the widest interpretation*; when the legal representative of a deceased Jt. Dr claims the property as his own the question must be investigated under this sec. 3 Pat L J 613 68 I C 369, 51 M 46 106 I. C 230 1927 Mad. 1043 ; 53 M. L. J. 824 F B

(Representative of the Decree Holder).

——it includes any transferee of the decree-holder's interest who so far as such interest is concerned is bound by the decree. 24 C. 62, 26 A 447, 41 C 418, 26 C 250, 16 A 483, 27 C 670.

——it includes a judgment-creditor who attaches a decree held by his judgment-debtor 16 M 20 29 M 318.

——purchaser of property (not decree) from a plaintiff who has obtained an order of injunction respecting that property is not representative of the plaintiff 32 B 181

——the purchaser from the decree-holder auction-purchaser is not a representative of the D Hr *qua* D Hr and his suit for recovery of possession within 12 years is not barred by this sec 1922 L. B. R 18 ; 64 I C 68

——the heir of the deceased puisne mortgagee must be made party in execution of [illegible]
of the execution are vo[illegible]

——sale-proceeds l[illegible]
ing and withdrawing th[illegible]
his interest, attaching [illegible]
decree-holder. 29 C L J. 361.

——where a decree is sought to be executed by the assignee thereof it is competent to the court to entertain at the instance of the Jt. Dr. and the original decree-holder, objections to the execution of the decree on the ground that the title to the decree has not passed to the assignee. 4 Pat. 120 • 86 I. C. 564 . 1925 Pat. 449.

[illegible]

A. [illegible]

——but a judgment debtor is entitled to have any question relating to the execution, discharge or satisfaction of the decree

S. 47.—Representative—*contd.*

decided under s 47 as much against the decree-holder as against the auction-purchaser in a mortgage suit who is regarded as the representative of the decree-holder for the purpose of inquiry into that question. 96 I C. 137 1926 All 457 · 24 A L. J. 519

(*Representative of the Judgment-Debtor*).

——an assignee of Jt Dr is his representative. 18 C. L J 264, 21 I C. 938.

——purchaser, lessee, or mortgagee from a judgment-debtor of property attached, is his representative 21 A 20, 28 C. 492, 20 M. 378, 34 M. 450, 11 C. W. N 312, 9 C W. N. 134, 5 C. W N 821, but the transferee of non-transferable occupancy holding is not representative. 11 C. W N. 313 p 314.

——a purchaser of a non-transferable occupancy holding was not a representative of the Jt. Dr and could bring a suit for a declaration that the co-sharer land-lord was not entitled to sell the holding in execution of his decree for rent which was a money decree 1921 Pat 154

——an unrecorded co-sharer in a tenancy sold in execution of a rent decree against the recorded co-sharer is not a representative of the recorded co-sharer within this sec 15 C W. N. 512 13 C L. J. 257

——purchaser of judgment-debtor's equity of redemption is a representative 16 A 286, 291, 22 A 243, (private sale), 26 A, 447, 24 C. 62, 11 C. W. N 495, (judicial sale) Formerly there was distinction between these two sales 16 C 355, 7 A 222

——purchaser of equity of redemption, not *bonafide* but collusive, is not representative of the Jt Dr 42 I C. 1 (C)

——persons who have purchased judgment debtor's interest prior to the decree for rent obtained by the landlord are bound by the decree and as such are representative of the judgment-debtor. 54 C 1064 . 107 I. C 357 : 1928 Cal 94

——a person who is bound by a decree or who is affected by it is a representative within s. 47 Thus a mortgagee who is not a party *to a rent suit against the mortgagor is a representative of the* Jt. Dr. 90 I C. 955

——alienees from the defts. in a partition suit during the pendency of the suit are not the "representatives" of the defts within the meaning of s. 47 52 B. 208 108 I C 17 1928 Bom 65 : 30 Bom. L. R. 102

——mortgagee of Jt Dr may come under this sec 1 Pat. L. J 267 : 56 I. C. 646

——the heirs of a deceased mortgagor Jt Dr who have been substituted in execution proceedings cannot challenge the right of the mortgagee to execute the mortgage-decree. 80 I C 141 4 Pat 510 : 87 I. C. 849 . 1925 Pat 62.

——purchaser from judgment debtor of attached property with court's permission under Or 21 r. 83 is a representative 23 A 116

——the purchaser of property attached in execution of a decree is a "representative" of the Jt. Dr. within this sec. 93 I. C. 30 : 6 Lah. 544 : 1926 Lah. 134

S. 47. Representative—*contd.*

——when a person purchased from the Jt. Dr. some property on which there was a charge created by a decree and the property is subsequently sold in execution thereof the purchaser cannot take proceedings under this sec. to set aside the sale as he is not a representative of the Jt. Dr. 45 Bom. 812 : 23 Bom. L. R. 254 . 61 I. C 287

——a representative of the judgment debtor is not entitled to sue a stranger auction-purchaser impeaching his title. 53 C 837 , 99 I. C. 150 . 1927 Cal. 106.

——a representative of the Jt. Dr within this sec. might maintain an application under Or 21. r 100. 65 I C 476, 3 Pat. L J 579

——a purchaser at a revenue sale of the interest of the Jt Dr. after a decree for sale on a mortgage has been passed is a representative of the Jt. Dr. and is entitled to apply for setting aside sale under Or 21 r 99. 1 Pat L R 133 · 72 I. C. 862, 34 M. 417, 15 C W. N 542

——official assignee is a representative of insolvent judgment-debtor 28 C 419 *contra.* 22 C 259, 21 B 205, 7 A. 752, 30 A. 487.

——an auction-purchaser is not the representative of the Jt Dr. and cannot apply under s 47. 1923 Nag 161, 34 M. 417, 42 B. 411 *Ref.* nor is he the representative of the D Hr., 25 Bom. L R. 147, 1923 Bom 214 . 72 I. C 256

Appeal under s 47.

——whether an appeal lies or not depends upon whether the question relates to the execution of the decree and whether it is between the parties to the original suit or their representatives so as to bring the order under s 47. 15 C. W. N. 512 : 13 C L J. 257

——an order in execution proceeding can come under sec. 47 only when it determines some question relating to the right and liabilities of the parties with reference to the relief granted by the decree and not any incidental question. 34 A. 530, 24 C. 725, 739, 35 C. 764, 41 C. 60

——an order passed in execution cannot be appealable simply because it fulfils the condition laid down is s. 47. In order to be appealable the order must fall within the definition of decree in s. 2 (2), 94 I. C 1 1926 All 401.

——an order passed against a decree-holder auction-purchaser under Or 21 R. 98 is not appealable even if questions relating to execution of the decree are decided therein. 92 I. C. 544 : 1926 Cal. 985.

——when a decree-holder-auction-purchaser is obstructed in taking delivery and the court refuses to remove the obstruction, the order is one under. s. 47 and is appealable. 39 M. L. J. 602 : 1920 M. W. N. 563 : 12 L. W. 273 : 61 I. C. 349.

——an execution sale was set aside with the consent of the decree-holder and judgment-debtor, on appeal by the auction-purchaser, the order was reversed and sale confirmed : no second appeal lay by the Jt. Dr 62 I. C. 986.

Appeal under s. 47—*contd.*

——where an application under Or. 21, r 100 is fought out between persons who were parties to the suit or their representatives it comes under s. 47 and the order thereon is appealable. 41 M. L. J. 54 : 1921 M. W. N 487 . 14 L W 85 : 63 I C. 730.

——where the rights obtained under two mortgage decrees are in conflict with each other (here there were two reciprocal mortgage decrees between prior and subsequent mortgagees) the rights under the later decree prevails *above case.*

——where a person who was impleaded as a party to the suit but against whom no decree was passed, objects to the attachment of properties in his hands relying on a conveyance executed by the deceased Jt. Dr. the objection comes under this sec. and not under [illegible] J 477.

[illegible] a decree is neither a decree [illegible] s not appealable. 45 B 241 . [illegible]0 I C 23 28 Punj L R. 607 [illegible]. 75 I C. 419, 94 I C 352 : [illegible]

——when a suit property is transferred *pendente lite* by the deft. in pursuance of an agreement to sell executed and registered long before the institution of the suit, the transferee is the representative of the Jt Dr and cannot obstruct the D. Hr in getting possession in execution of the decree. On an application under Or 21 r. 97 by the Dr. Hr the obstruction was ordered to be removed and an appeal against that order by the obstructor (transferee) lay *under this sec 1921 M W N 698*

——an order rejecting security and ordering execution to continue is not appealable, 102 I C. 621 : 1927 Lah 527, 41 C. 160 *fol,* (1924 Lah. 602, 1925 Lah 69 and 1924 Lah 671) *not fol*

——an order refusing to arrest the Jt. Dr. comes within this sec. and is appealable 4 Lah L. J 266 1922 Lah 259

——an order dismissing an application for execution for default of the decree-holder is not appealable. 68 I C. 337.

——an order setting the terms of the sale proclamation and directing its issue is not appealable, 35 C L J. 170 64 I C 547. 16 C. W N. 124, 970 *Ref.*

——there is no appeal against an order determining a question under Or 21 R. 66. 98 I C 567 : 1926 Cal 1184, 16 C. W. N 124, 970 *fol.* 99 I. C. 455 · 1927 All 208

——an order merely fixing the value of the property under Or 21, R. 66 is not appealable, but where other questions are also decided with respect to the sale proclamation the order is appealable under this sec. 91 I C. 819 1926 Cal. 610

—— an order of the executing court refusing to alter t[illegible] valuation of the property in the sale proclamation is not appe[illegible]able. 30 Bom. L. R 679 · 1928 Bom. 245.

——there is no appeal from an order refusing to stay executi[illegible] 68 I. C. 49 ; 100 I. C. 76 1927 Lah 235.

Appeal under s. 47—contd.

——a decision whether execution shall or shall not take place for the time being is a question relating to execution and is appealable. 68 I C. 751

——proceedings in execution of an order concerning cost of commission come under s. 151 and not s. 47 and are not appealable 74 I C. 186

——an order passed on an application for delivery of possession under Or 21, R 95 is an order under this sec. and is appealable. 53 C. 781 : 30 C W N 649 . 43 C L. J. 345 95 I C 494 : 1926 Cal. 793. F. B. *contra below*

——an order passed on an application made under Or. 21 R 95 against a Jt Dr in favour of the auction-purchaser decree-holder is not an order under s 47 and is not appealable. 1928 Oudh 199 · 5 O W. N 108 F B.

——an order accepting security as sufficient is not appealable. 106 I. C 866

——an order setting aside the confirmation of an execution sale is not one under s 47 and is not appealable 100 I. C. 800 : 1927 Lab 337

——an order issuing a warrant for arrest is one falling under s 47 and is appealable. 72 I C 766

——an order dismissing an application for rateable distribution is not appealable 33 M. L T. 155

——an order dismissing an application for execution for default of the D Hr is not appealable 4 Pat L T 204 : 1923 P 180.

——an order refusing to make defaulting bidder to pay the difference in price between the amount of his bid and the amount realised on resale, is appealable 107 I C. 274 1928 Lah. 249.

——an order dismissing the application for ascertainment of mesne profits under Or. 2 O R 12 is a decree under s. 2 (2) and can be the subject of second appeal. 30 Bom L. R. 503 : 1928 Bom 236.

——notification of incumbrance in the sale proclamation by the D Hr -Jt. Dr's. objection to that allowed,-D. Hr. may appeal as it [illegible] proclamation 1 Pat

[illegible] stensibly made under [illegible] s under this sec. and an order passed therein amounts to a decree from which a second appeal lies. 22 A. L. J 413.

——proceedings between the Jt. Dr. and the D Hr. as to whether the attachment is valid are proceedings under s. 47. 1923 Cal 344 : 76 I. C 316.

——a Jt. Dr's application complaining of unlawful dispossession is maintainable under this sec even after the execution is struck off as fully satisfied. 78 I. C. 224.

——the question of non-service of notice under Or. 21 r 22 comes under s. 47 and second appeal lies. 5 Pat. L. T. 61.

——an order refusing to stay sale pending appeal falls under this sec. and is appealable. 75 I. C. 615, 789, 1001,

Appeal under s. 47—*contd.*

——where any person has become liable as surety for the fulfilment of
purposes of a
an order dis
appealable

——where an executing court holds that the decree could be executed only against the property of the Jt. Dr and not against him personally it has the force of a decree and is appealable. 75 I. C: 1039.

——no appeal lies against an order merely setting the terms of the sale proclamation. 46 M L J 192 19 L. W. 235, 27 M. 59. 14 M. L. J. 57 F. B.

——an order passed on an application by a Jt Dr. to have an execution sale set aside is appealable only if the auction-purchaser is a party to the suit, otherwise s. 47 will not apply 4 Pat. 718. 6 P. L T. 795

——a claim petition put in by an exonerated defendant in the attachment of certain properties falls within s. 47 and the order therein is subject to an appeal and second appeal, 3 Pat L. R 90. 6 Pat P. L. T 725 : 87 I C 743.

——there is no right of appeal from an interlocutory order which directs an enquiry into mesne profits, as the question determined cannot be said to be one relating to the execution, satisfaction or discharge. When a final decree incorporating the result of the enquiry is passed under Or 20 r. 12 (c) then an appeal lies 23 A L J 458: 47 A. 543 L R 6 A 359 : 87 I. C 322 : A. I R 1925 All. 588.

——an order upon a question whether notices under Or. 21, R 22 were or were not served must be regarded as any order under s 47 from which second appeal lies 97 I. C 798 1926 Pat 397

——
on the
s. 47 C
parties.

——where the judgment-debtor applies to the court for setting aside an entire sale held in execution of a mortgage decree on the ground that the said sale had taken place in contravention of the decree, and the sale was set aside and an appeal having been preferred from that decision, a preliminary objection was taken that the application was not under Or 21, r 90, but was under s 151 and that r
to be one
an appeal
to be sold
464 : A. I. R. 1925 A. 551.

——order on objection as to the boundaries in sale proclamation falls within this sec. and is appealable. 29 C. W. N 556 : 80 I. C. 861. 1925 cal. 318.

Appeal under s. 47—contd.

——where during the pendency of execution proceedings the judgment-debtor dies and disputes arise as to the legal representative, an order preferring one man to another falls under s. 47 and is appealable. 47 A. 365 · 86 I. C 1048 A I. R. 1925, All. 578

——where a mortgage decree was passed against certain properties and the court ordered that at first all except a certain item should be put up for sale and if such sale failed to fetch a sufficient sum, then the other item should be sold, *held*, that the order was a final order between the parties in a matter relating to the execution, satisfaction and discharge of the decree and was appealable 1925 P. H C. C. 164 6 P. L. T. 393 . A. I. R. 1925 Pat 484

——an order allowing an objection to an attachment by the legal representative of a judgment debtor falls under s. 47 and being a decree is appealable If the order is passed *ex-parte* it can be set aside under O 9 R. 13, L. R 6 All 278 87 I. C. 287 : A. I R. 1925 All 594

——order dismissing objections to sale under O. 21. R. 90 is not a decree and no second appeal lies therefrom. 6 L. 250 : A I R 1925 Lah 624, 26 A L. J. 412 · 108 I. C. 899 : 1923 All 354

——where an order is passed [illegible]
wherein the decree-holder purch[illegible]
the order falls under s. 47 and [illegible]
726 · 1925 P H C C 212 88 I C [illegible]

——orders passed relating to a scheme formed and sanctioned by the cou[illegible]
and are n[illegible]
2 O W. N [illegible]
W. N 45[illegible]
155 49 M [illegible]
1926 Mad. [illegible]

S. 48. LIMIT OF TIME FOR EXECUTION.

Applicability of the sec.

——this sec is retrospective [illegible]
execution of a mortgage decree [illegible]
force 45 B 365 · 59 I. C. 790 :
17 C. W. N. 622 : 19 I. C. 391,
L. J 977

——except decrees grar[illegible]
decrees. A decree directing [illegible]
come under the expression [illegible]
s. 48 C. P. C. 26 I C. 244 : 6 M. L. T. [illegible]

——the present sec. is more extensive than s. 230 of the old Code and covers compromise decrees. 39 B. 256 : 28 I. C 478 : 17 Bom. L. R. 178 : 73 I. C. 794 : 1223 Lah. 678.

——a decree holder will have 12 years to perfect the preliminary decree into an order absolute under s. 89 Tr. P. Act and another 12

S 48. Applicability of the sec.—contd.

years for executing the order absolute. 39 M. 544 : 29 I. C. 237, 17 M. L. T. 424.

——the subsequent order referred to in the sec. may be barred by a court to which the decree has been transferred. 95 I C. 243 · 1926 Lah 465, 1925 Bom. 503 *fol.*

Applicability of s 15 of the L. Act.

——this sec. is unqualified and is not controlled by s 15 of the ed

279 *fol.*

Continuation of application.

——s. 48 applies to execution applications made after the new Code comes into operation. Where an application for execution was made 12 years after the passing of the decree but within 3 years from the last application it was not barred as it was but a continuation [illegible]

——
cation
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C. 541 (c)

——an application for [illegible]
tion of a prior applicati
and is directed against [illegible]
cation 20 C W. N. 95[illegible]
L. J. 214

is similar in scope and character to the previous application 72 I. C. 862 : 1 Pat L R 139.

——an application for execution is of an entirely different nature from the application for transfer of the decree to another court, consequently the former cannot be treated as one in continuation of the latter application 95 I. C. 26 · 1926 All. 660, 34 A. 336 *Rel on*, (26 A. 361. 4 A. L. J. 405) *Dist.*

S. 98. Date of decree.

——means the date of final decree. 8 C. 218, 11 A 267.

——if the decree sought to be executed is an appellate decree the period runs from the date of appellate decree whatever may be the result. 34 C. 874.

——but where a person prefers an appeal when no appeal lies the order disposing of the so-called appeal does not amount to a decree within cl. (a) and limitation runs from the date of original decree 48 A 377 · 94 I C 961 · 1926 All. 440.

——for purposes of s. 48 (1) Cl. (a) a preliminary as well as a final decree or decree absolute in the case should be taken as a single and indivisible one. Therefore the date of decree means the date of the final decree. 33 I C. 180

——there is only one decree that can be executed *i.e.* in case of appeal, the decree of the appellate court. 26 M. 9, and in case of second appeal, the decree of the second appellate court 32 A. 136.

——in the case of contingent decree the date of happening of the contingency. 36 B 368

——the subsequent order, directing payment in s. 48 Cl. (b) means an order made by the court which passed the decree as that court and not as executing court. 2 Pat L. T. 80, 40 A. 198 *fol* 14 C 348 *Ref*

——the present sec applies to all decrees including mortgage decrees excepting decrees granting an injunction. 39 C 256.

——the section is retrospective. 40 C 704 *contra* 32 A. 492.

——this sec applies to mortgage decree passed before the new Act 20 C. W. N, 952, 40 C 704 17 C W. N 622, 22 Bom L R 1420. 59 I C 790, 45 B 365.

——when the order is made for the payment of the decretal amount by instalment on compromise between the parties, the time is extended 1923 Lah 381 ; 73 I C. 671.

——but party's coming to an arrangement out of court for the payment by instalment not being given effect to by the court, does not extend the period. 72 I. C 477.

——when an executing court records a compromise the original decree is not altered and limitation is still calculated from the date of the decree 1923 Lab 678 73 I C. 794

——when there is necessity for decree being made absolute (Mortgage decree under Deccan Agriculturist's Relief Act) limitation runs from the date when the decree could be executed and not from the date of its being made absolute, 46 B. 761 . 24 Bom. L R 269 · 1922 Bom. 95 : 67 I. C. 153.

——this sec. is wider than the old sec 230. 39 B. 256.

——wilful evasion by a Jt. Dr. of warrant of arrest amounts to fraud and saves limitation. 1920 M. W. N. 788 12 L W. 710 ; 60 I. C. 630.

——when the property of the Jt. Dr. was attached in execution of a decree obtained in District Court and the D. Hr. of a decree in the Munsiff's Court applied for reteable distribution in the District

S. 48. Date of decree—*contd.*

Court twelve years after the date of the decree his last application in the Munsiff's Court being within 12 years, held that the application to D C. was not a new one but only a continuance of the application made in the Munsiff's Court. 1921 M. W. N. 507, 32 M. 384 *fol*, 40 M. 496 *Ref.*

——the date of amendment is the date of the decree within this sec. 60 I C 318.

——assuming that an order for mesne profits is an order for payment of money, it is not an order for the payment of money at a certain date within the meaning of s 48 (b), 103 I C. 31 : 1927 Mad. 842 : 53 M. L. J. 440, 22 C. W. N. 145 P. C. *fol.*

——Or 34 R. 6 does not apply to a decree passed on a *solerama* In this case execution of the decree against the person of the Jt. Dr. was also held to be barred by s 48, 48 C L. J. 102.

——in case of unnecessary appeal the period of 12 years runs from the date of dismissal of the appeal. 43 A. 405 : 19 A. L. J. 159 : L. R. 2 A. 31 : 61 I. C. 129

——the court cannot order at the instance of the D Hr. that a decree which has ceased to be an instalment decree should be restored to its previous status so as to prevent time from running against him. 27 Bom. L R. 461 : 87 I. C 769 ; 1925 Bom. 326

——an order by an executing court directing the payment of the decretal amount in instalments is a "subsequent order" within s. 48 (1) (b) C. P. C. The interpretation placed by the Allahabad High Court in 40 A. 198 on the words "subsequent order" that it must be an order by the court which passed the decree and not by the court executing it, was dissented from. 49 B. 695 , 27 Bom. L. R. 961 : 88 I C. 949 : 1925 Bom. 503

——where the decree is against some defts. and appeal is preferred against others which is dismissed the date of decree against the former is the date of the decree of the original court. 25 Bom. L R. 371 · 1923 Bom. 400 : 70 I. C. 310.

——where the decree was obtained against several defts and only some of them preferred appeal which was dismised, the 12 years period as against the defts. who did not appeal commenced to run from the date of the original decree. 30 C. W. N 306 : 95 I. C. 257 : 1926 Cal 664.

——where the money is payable within 6 months of the decree the right to apply for execution occurs in default. 21 A. L. J. 861 : L. R. 4 A. 591.

——when the mortgage decree directs the realisation of the amount unsatisfied by the sale [illegible] property and person of the mor[illegible] from the date of the decree. 3[illegible] I. C 436 P. C., which overrule[illegible] Mad. 331, *fol.*

——where a decree directs the recovery of money from one on failure of the payment by another the execution of the decree becomes barred against the former after 12 years from the d[illegible]

S. 48. Date of decree—contd

the decree. 48 M. 846 : 49 M. L. J. 498 : 91 I. C. 597 : 1926 Mad. 20, 50 M. 5 . 52 M. L. J. 256.

——a barred debt is not provable in bankruptcy proceedings but a debt does not become barred by lapse of time if it was not barred at the commencement of the bankruptcy. 48 M. 846 : 49 M. L. J. 498.

Fraud or force.

——of the judgment-debtor gives a new starting point, 22 M. 320, 34 A. 20, 6 M. 365, 367.

——fraud in this sec should be understood in a large and liberal sense. The delaying of execution by frivolous, futile and dishonest objection on the part of the Jt. Dr. amounts to fraud. 44 A. 319 1922 A. 145 20 A L J. 185 65 I. C. 877.

——"fraud" in the sec includes not merely deceit but also, except with reference to contract, circumvention. Time cannot be extended unless the fraud has prevented the execution. 103 I. C 277 . 1927 All 668 . 25 A L J. 842.

——wilful evasion by the Jt. Dr. of warrant of arrest to avoid payment amounts to fraud and gives fresh starting. 1920 M. W. N. 788 · 12 L W. 710 60 I. C. 630

——preventing attachment by locking up the house, 9 M. 318, 22 M. 320, evading arrest by any contrivance or dishonestly evading payment by eluding service of warrant, 6 M. 365, 354, 670, fictitious transfer of property to defeat or delay the execution. 4 M. 292, applying to set aside *ex-parte* decree with the sole object of delaying proceedings in execution, 11 C. W. N. 440, are frauds within this sec.

——the decree-holder should be diligent in proceeding with the execution from the date of the decree, otherwise the court shall not use power under this sec 25 M. 670

——fraud of one judgment-debtor does not keep the decree alive against the others. 35 M. 670 12 I C. 679.

——other cases of fraud under this sec. 15 C. L. J. 678 18 C. W. N. 492, 22 C. W. N. 145 . 45 I C. 436 P. C., 31 C. 792, 40 M 989, 6 A L. J 401 . 2 I. C 222, 31 M L J 513 : 37 I. C. 741, 9 A. L. J. 17 : 13 I. C. 929, 38 M 419.

——locking up house, evading arrest or payment, or fictitious transfer, are frauds. 1925 Nag 82.

——when the Jt. Dr. who is able to pay the decretal amount evades arrest in execution he is guilty of fraud under s. 48 and the period of limitation is extended. 80 I. C. 731 (M), 6 M. 365, *fol* 8 M L J. 208, *not fol.*

"Fresh application."

——in this sec. it means a substantial application and not an ancillary application to proceed in the matter of substantial application already made. 17 C. 55, 18 A. 482, 9 I. C. 817 : 8 A. L. J. 412 F. B., 33 A. 517, 21 A. 155.

S 48. Fresh application—*contd.*

——an application to transfer a decree will not save limitation if the application to the court where the decree is transferred for execution is not made within 12 years. 16 C 744, 22 C. 92, 20 A. 78, 34 A. 396 : 14 I. C 172 . 9 A L J. 365 : 35 B. 103.

——to claim an application in continuation of the previous application two conditions are to be satisfied (1) that the previous application was dismissed for no fault or default of the D. Hr. (2) [illegible] and character to the [illegible] 362.

[illegible] a fresh application [illegible] 3 : 15 L W 245.

[illegible]

——in order that an application should be a continuation of another application it is necessary that the two applications must be of the same nature 34 A. 396 · 14 I C. 172 . 9 A L. J. 365.

——where a Jt. Dr. successfully evaded arrest and spent some time pretending to prosecute proceedings in insolvency and successfully prevented the D. Hr from executing his decree within 12 years, the Jt. Dr is guilty of fraud. 13 I C 929 · 9 A. L. J. 17.

Minority.

——Minority of the decree-holder does not extend the period of limitation provided by the sec 35 M 186, 36 B. 498, *contra*, 6 B. 936.

§ 49. TRANSFEREE (*of decree*)

——this sec. relates only to the stage of execution and has no application to a suit for damages. A transferee from a decree-holder executing a decree inspite of adjustment is not inferentially a trustee for the Jt Dr, 42 M. 338 . 36 M. L J. 376 . 50 I. C 584 : 1919 M W N. 284.

——Judgment-debtor is entitled to set-off against transferee. 1 B. L R. 23, F. B.

——where transferee has notice of a suit by judgment-debtor against decree-holder, he purchases the decree subject to the result of the suit. 16 C 619, 16 M. 428.

——a transferee may realise the entire amount although he did not pay the whole amount. 18 C W N. 113

——when a decree has been assigned the Jt Dr may after depositing the decretal amount in court attach it in execution of his own decree against the assignee. 19 N L. R. 164 75 I C. 752 : 1924 Nag 46.

——an application to a court by the transferee of a decree to be substituted in place of the original plff and for recognition of the transfer will not be entertained except on an application for execution 14 I C. 704.

——the right of the assignee of decree to execute the decree cannot be made conditional upon equities which the mortgagor-Jt. Dr. may have against the mortgagee-Jt. Dr. for

S. 49. Transferee (*of decree*)—*contd.*

whom he is said to be the benamdar. 4 Pat. 120 : 86 I. C. 564 : 1925 Pat. 449

——the question as to whether the non-payment of a part of the consideration money would debar the assignee of a decree from executing the decree would depend on the intention of the parties as to when the title was to pass to the transferee 4 Pat. 120 : 86 I. C 564 . 1925 Pat 449

§ 50. LEGAL REPRESENTATIVE. (*of Jt.-Dr.*)

Applicability.

——s 50 does not apply to a case in which the Jt Dr. died before the decree was passed 8 N. L. J. 73 : 89 I. C. 888 : 1925 Nag 288, 55 I. C. 449 : 16 N. L R 138.

——the property obtained by a son on partition with his father is not "assets" within ss. 50 and 53 C. P C. 38 M. 1120 : 27 M. L. J 112 . 24 I. C. 474 1914 M. W. N 742.

——a party may be substituted in execution proceeding, 14 C. W N. 752.

Who is ?

——stranger taking possession of the property of the deceased J. Dr. is a legal representative 17 M 186.

——a decree may be executed against the legal representative and the transferee from him. 51 B. 37 . 29 Bom. L. R. 60 : 1927 Bom. 93 : 100 I. C. 582.

——*residuary legatee who has taken possession of the property and has applied for letter of administration is a legal representative.* 30 C. 1044.

——the purchaser of the business of a firm is not the legal representative of the firm. 30 C. 961 · 31 M 464

——plff. is to choose whc [illegible] death of the deft. ; if he makes pa [illegible] is not represented the latter [illegible] wrong person, 18 C. W N. [illegible] *contra*. he will not be bound ev [illegible] capacity. 18 C. W. N. 173.

——the attachment of the undivided interest of a Hindu son in coparcenary property creates a charge on the property which is not extinguished by his death. The father who but for the attachment would take his interest by survivorship is the legal representative 89 I C. 291 : 23 A. L. J. 877 : 48 A. 4 : 1926 All 157

——the balance of a sale proceeds of occupancy fields sold after the father's death in execution of a mortgage decree against him are not assets of the father's estate in the hands of the son. 89 I. C. 477 : 1925 Nag 449.

——a person who dies *pendente lite* before decree is passed against him is not a Jt Dr. and the decree cannot be enforced against his legal representative. 55 I. C. 449 : 16 N. L. R. 138.

S. 50. Who is—*contd.*

——where a wrong heir is brought on the record who contests the suit to the knowledge of the true heir (reversioner) the latter is equally bound by the decree and mortgage sale thereunder. 51 B. 125 : 29 Bom. L. R. 107 : 100 I. C. 956 : 1927 Bom. 131. (48 I. A. 187 P. C. 49 I. A 129 P. C.) *Rel. on.*

How to apply against L. R.

——if the Jt. Dr dies pending execution proceeding, fresh application need not be made, D. Hr. is to apply for substitution only. 34 B. 142.

——the legal representative could not be proceeded against in execution till he has been brought on the record and the court which passed the decree only has the power to bring him on the record as the legal representative 17 I. C 293 : 23 M. L. J. 287 . 191 M. W. N. 888.

'Apply to the Court'—which Court'?

[illegible] ecution to another [illegible] is to be made in [illegible] *contra* 22 C 558 [illegible] ld decide as to who is the legal representative of the parties and as to whether the decree is barred by limitation and should not leave it to be decided by the Court to which the decree is transferred for execution. 91 I C. 1056 : 1926 Mad. 411 : 1926 M W N. 120.

Effect of heirs of Jt. Dr, not being brought on record.

——where a judgment-debtor died after proclamation of sale and his legal representative was not brought on record before the sale actually took place, the sale was not a nullity and was not liable to be set aside The omission was a mere irregularity. 32 C. W. N 418.

N. B.

——under the old law it was held that once attachment was made before the death of Jt. Dr. the property could be sold (though the sale was voidable) without [illegible] the record. 12 A. 440. F. B, [illegible] P C., 18 C. W. N 768, 23 [illegible] (*contra* 6 M. 180, 15 M. 399 [illegible] sec. where the wordings are [illegible] executed" this may not hold good

Miscellaneous.

[illegible] und[illegible] his [illegible] wou[illegible] regi[illegible] in whose hand some property has come must show cause why other property has not come. 1924 M. W. N. 207 : 19 L. W. 113.

S. 50. Miscellaneous—*contd.*

——legal representative cannot question any proceeding taken ... A. 45, 21 A. 277, 10 B. 74
... be enforced against the son of
... ainst a purchaser of the property

——from the mere fact that a person is a legal representative it could not be roughly presumed that he got the assets of the deceased 1924 M. W. N. 207 : 19 L. W. 119

——on the death of Jt Dr the D Hr. should get at least 6 months' time to bring the legal representative on the record on the analogy of Art 177 L Act 62 I C 52

§ 51. MODE OF EXECUTION.

——s. 51 merely prescribes the mode in which the decree-holder may execute the decree one of them being by the appointment of receiver, it does not give, any right to the D. Hr. to apply for the appointment of receiver 1922 Pat 66, 369 67 I C 506: 4 Pat L. J. 58

——a receiver can be appointed to realise the rents and profits in execution of a decree against a ghatwal though the ghatwal property cannot be attached and sold 39 C. 1010 : 16 C. W. N 802 · 14 I C. 227

——though the right of future maintenance cannot be attached the court may, in a fitting case appoint a receiver for realising rents and paying out of the same a sufficient sum for maintenance and the balance to the decree-holder. 47 A 384 : 87 I C 295 : 1925 All 176, 40 M 302 : 34 I C. 381

——an executing court can appoint receiver for realisation of property by prosecuting cases outside jurisdiction 29 M. L. T. 110 : 1921 M W N 106 . 13 L W 150 61 I C 753.

——Cl (e) does not authorise a court to read into a decree a supplementary or alternative relief which is not there 42 M L J. 356 : 1922 M 299 16 L W 589 · 70 I C 529

——the court passing a decree for rent cannot limit the right of the landlord to execute it in any legal method open to him 45 I C. 702 (c)

——an application under s 51 may be inferred from an act of the court. 52 I C 356.

§ 52. ENFORCEMENT OF DECREE AGAINST L. R.

——the proper procedure for the D. Hr. is to bring the son of the deceased father on the record, separate suit to determine the liability of the son is barred by s 47, the question of the debt being for immoral purpose relates to execution proceeding and it must be determined therein. 6 Pat. L. J. 451 : 62 I. C. 905

——where a decree is passed against the assets of a deceased ... either be investi-
...bility against the
... of the execution

S. 52. **Enforcement of decree against L. R.**—*contd.*

L. J. 899.

——when the decree was against the assets of the father in the hands of the son the property did not cease to be the property of the deceased father merely because the son died and it passed into the hands of his heir or legal representative. 24 I. C. 280 : 1914 M. W. N 354.

...assets may either be investi- ...rce the liability against the ...he course of the execution

——the plff. can get a decree only on proof that some assets belonging to the deceased debtor exist, he need not prove the extent of such assets. 56 I C. 962

——a suit against the legal representative of a deceased person should not be dismissed on the mere ground that the defts are not in possession of any portion of the property left by the deceased. 89 I C 236 · 1926 Nag. 170, 49 A 645. 101 I C. 507. 1927 All. 459 : 25 A. L. J. 359.

——a decree making the assets of the father and the joint pro- ... due by the father is perfectly ... was held not binding on the sons ... J. 502 29 M. L T. 320. 36 I. C.

... for the reservation of property to ... T. 147

——an executor *de son tort* is a legal representative for the purpose of s 52. 50 I. C 951.

——under this sec. the income of landed property which has passed from the Zemınder to the next, the property being an impartible Raj, is liable to execution for the debts of the deceased Zeminder. 46 M. L J 261 F. B., 46 M L. J 374.

——a decree against a ward of court may under the general law be executed like any other decree and cash balance in the personal ledger of the Collector may be attached 18 C. W N. 1055. 19 C. L. J 409 · 22 I C 694

——decree against a wrong heir cannot be enforced against a rightful heir 33 M 75 32 C. 296 P. C. 5 C W. N 10 P. C., 18 I. C. 381. 15 Bom L R. 41.

——where the defts ... the assets of the deceased sufficien- ... decree may be passed against

—— ... father's debt is liable only to the e ... y in his hands and his

S. 50. *Miscellaneous—contd*

——legal representative cannot question any proceeding taken during life-time of the deceased 31 A. 45, 21 A. 277, 10 B. 74

——decree for injunction may be enforced against the son of the Jt Dr 25 B 283, but not against a purchaser of the property from the Jt Dr 26 B 140, 30 B 181

——from the mere fact that a person is a legal representative it could not be roughly presumed that he got the assets of the deceased 1924 M W N 207 19 L W 119

——on the death of Jt Dr the D Hr should get at least 6 months' time to bring the legal representative on the record on the analogy of Art 177 L Act 62 I C 52

§ 51. MODE OF EXECUTION.

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——Cl (e) does not authorise a court to read into a decree a supplementary or alternative relief which is not there 42 M. L. J. 356 1922 M 299 16 L W 589 70 I C 529

——the court passing a decree for rent cannot limit the right of the landlord to execute it in any legal method open to him 45 I. C 702 (c)

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——the proper procedure for the D Hr is to bring the son of the deceased father on the record, separate suit to determine the liability of the son is barred by s. 47, the question of the debt being for immoral purpose relates to execution proceeding and it must be determined therein. 6 Pat. L. J. 451 : 62 I. C 905

——where a decree is passed against the assets of a deceased person, the question of the possession of assets may either be investigated in the course of the suit to enforce the liability against the assets or may be left for adjudication in the course of the execution proceedings 85 I. C. 768 : 1925 Nag. 380.

S. 52. Enforcement of decree against L. R.—contd.

should n
in posse
I C. 236

Assets
L. J. 899.

——when the decree was against the assets of the father in the hands of the son the property did not cease to be the property of the deceased father merely because the son died and it passed into the hands of his heir or legal representative. 24 I. C 280 : 1914 M. W. N. 354

belonging to the deceased debtor exist, he need not prove the extent of such assets. 56 I C 962

——a suit against the legal representative of a deceased person should not be dismissed on the mere ground that the defts are not in possession of any portion of the property left by the deceased. 89 I. C. 236 . 1926 Nag. 170, 49 A 645 . 101 I C. 507 : 1927 All. 459 : 25 A. L. J. 359

——a decree making the assets of the father and the joint properties of sons liable for the amount due by the father is perfectly legitimate even though the sale was held not binding on the sons in respect of their shares. 31 M. L J. 502 . 29 M. L. T. 320 . 36 I. C. 387 : 1916 M. W. N. 217.

——this sec. does not provide for the reservation of property to satisfy debts. 30 I. C. 256· 18 M L T. 147

——an executor *de son tort* is a legal representative for the purpose of s 52. 50 I. C 951.

——under this sec. the income of landed property which has passed from the Zeminder to the next, the property being an impartible Raj, is liable to execution for the debts of the deceased Zemınder. 46 M. L. J 261 F. B., 46 M L. J. 374.

——a decree against a ward of court may under the general law be executed like any other decree and cash balance in the personal ledger of the Collector may be attached 18 C W. N 1055 : 19 C. L. J 409 · 22 I. C. 694.

——decree against a wrong heir cannot be enforced against a rightful heir. 33 M. 75 32 C 295 P. C. 5 C W N 10 P. C., 18 I. C. 381 : 15 Bom. L R 41.

——where the deft appropriates the assets of the deceased sufficient ... a personal decree may be passed
... 446 *fol.*
... or his father's debt is liable only
... property in his hands and his

S. 52. Enforcement of decree against L. R.—*contd.*

personal property is not liable even though a decree has been so passed. 65 I. C. 224.

——when hundi is executed by father, son is liable to the extent of the co-parcenary property only. 2 Pat. L. T. 396 : 65 I. C. 224

——the onus of personal liability discussed. 30 M. L. J. 391 : 35 I. C. 224 : 1916 M. W. N 92.

53. LIABILITY OF ANCESTRAL PROPERTY.

——this sec has been added in order to set at rest question on which the High Courts were divided in opinion. 34 C. 642 F. B.

——a gratuity granted to the heir of a deceased employee by Railway administration is not assets of the deceased. 9 O. L J. 401 : 4 U P. L. R 96 26 O. C 53 : 1923 Oudh 21 : 69 I. C. 893.

——a Hindu son is liable for the debts of his deceased father to the extent of the ancestral properties unless he can show that the debt was contracted for illegal or immoral purpose. It is so even if the son was a party to the decree. 20 A. L J 969 : 1923 A. 124 : 71 I. C 417.

——by the express provision of this sec. the sons of the Mitakshara family have been made the legal representatives of their father in respect of the property which descends to them and have been made liable by the court 1923 P 143

[illegible] the lineal descendants and [illegible] uired right by survivorship [illegible] ed co-parcener. 45 A. 455 : [illegible]) · 73 I. C 958.

[illegible] perty and not merely the father's share is liable 10 O and A L. R. 313

——s. 53 is not confined to money decrees only If a decree is passed in respect of joint family property it can be executed against the sons after father's death. 46 M. L J 47 : 19 L. W. 484 : 83 I. C. 985 · 1925 Mad 571.

——but the word "decree" in the sec. does not include a decree for an injunction obtained against the father restraining him from obstructing the plff from using a water tank, such a decree cannot, after the father's death, be enforced in execution against the sons 42 B. 504 : 46 I. C. 745.

——a decree-holder who has a decree against a Hindu father can proceed in execution after his death against joint ancestral property in the hands of the son and treat him as the legal representative of the father, provided the debt was not tainted with illegality or immorality. 23 A. L. J. 467 : 88 I. C. 200 : 1925 All. 471.

——it is only such property as was under the control of the [illegible] his antecedent debts that [illegible] : 48 A. 245 : 1926 All. 220.

[illegible] possession of the standing [illegible]

§ 54. PARTITION OF ESTATE OR SEPARATION OF SHARE.

——the word "estate" is used in its ordinary signification. 10 C. 435. A rayatwari land is not an "estate." 6 M. 97, 7 M 382. So also isolated plot of land which falls short of being the share of a co-share of a *mahal* is not an "estate" 6 A 452. But *Sheri* lands held under a lease from the Govt. for a fixed period come within the sec. as revenue-paying lands. 16 B. 528

es do

parti-

——the partition must be by the Collector 8 C. L. R. 367 and he is to give delivery of possession 11 B. 662, 12 B. 371.

——the court cannot examine the work of the Collector and direct him to make a fresh partition. 16 B 528.

——where a decree relates to an estate of the kind mentioned in the sec, it should declare the rights of the several parties interested in the property but as regards partition or separation it should direct the same to be made by the collector or by any Gazetted subordinate of the Collector. 41 A. 207: 49 I. C 267, 2 Pat. L. J. 221 39 I C. 173.

——when the Collector contravenes the decretal command of the court or transgresses the partition law his action is subject to the control of the Civil Court 12 B. 371, 14 B. 450, 28 B 238, 40 B 118.

——where a Collector has made a partition there is nothing to prevent him from reversing the partition for mistake or other cause before he has passed final order and returned the proceedings to the court 5 Bom. L R. 648.

——the civil court can partition revenue-paying estates save when the partition seeks a *separate allotment of revenue.* 24 C. 725: 1 C. W. N. 374 F. B., 23 C. 679 *overlued.*

——one application for execution of a decree in a partition case may be continued by another. 3 C. 351 doubted in 12 A. 506

§§55-59. ARREST AND DETENTION AND RELEASE.

would produce the *judgment-debtor on the date fixed for production* and not with both the conditions. 1928 Mad. 1081 · 101 I C. 525: 52 M. L. J 523

——where on the arrest of the Jt. Dr the surety executed a bond undertaking to pay the decretal amount in case the Jt. Dr did not file an insolvency petition and to produce the Jt. Dr in case that petition was rejected, held that the bond was one under ss 55 and 145 and the liability was perfectly general and not limited to the execution proceeding 5 Pat. L. J. 417: 1921 Pat 19 1 Pat. L. T 604: 57 I. C. 303: 1924 Pat. 63.

——security furnished by the Jt Dr. under cl. (4) should be directed to continue until a final order is made in his petition to be declared an insolvent 23 Bom L R 1263.

——a money decree does not necessarily carry with it right t execute it by arrest of the Jt Dr e. g. a minor or a female or legal representative 5 N. L. J 49 : 18 N. L. R 145 : 1922 Nag. 98 · 65 I C 53.

——payment made by the surety who undertook to produce the Jt. Dr in his failure to be adjudged insolvent must be credited against the decree 25 C W N 36.

——after the adjudication order a proceeding for the arrest of the Jt. Dr cannot be commenced against the insolvent without the leave of the Insolvency Court, but there is no provision in that sec. expressly prohibiting the continuance or completion of a proceeding commenced before the adjudication order, except in so far as it may involve an application for a remedy against property of the insolvent 3 Rang 187 89 I C 381 · 1925 Rang 305.

——in case of failure of the Jt Dr to apply within time the security is liable though Jt Dr may die after the time allowed. 86 I C 257 1924 Bom 428

——the period of one month prescribed by sec. 55 (4) cannot be extended by the court The surety is liable even after the dismissal of execution proceedings against the Jt. Dr 86 I. C. 304, 95 I C. 444 1926 Mad 689 · 50 M L J 477

——when appearance of the Jt Dr. is not sufficient to discharge the surety. 86 I C 105 23 A. L. J 59 . 1925 All 344.

——the security is not absolved from his duty to produce the Jt. Dr. before the court merely because the Jt Dr. had got protection order between the date of the bond and the date whe he was called upon to produce the Jt Dr. 97 I. C. 413 : 1926 Mad. 958 · 1926 M. W N 612.

S 60. ATTACHABLE PROPERTIES

Agriculturist.

——when the cultivation is small and the Jt. Dr. has other business, he is not an agriculturist. 10 C. W N 184 n

——where the Jt Dr's only source of living is not by cultivation the land he is not an agriculturist 63 I. C. 681 (C)

——an agriculturist whose house is exempt from attachment s. 60 (c) is one who belongs to the class of common agriculturists till the field and whose main source of livelihood is cultivatic W. N 874 ; 35 I. C 343.

——the party alleging to be agriculturist must prove that l his livelihood wholly for principally by agriculture or tha ordinarily engages himself in agricultural labour. 192 2.

—burden of proof as to whether he is agriculturist is on Dr., 35 A. 307 : 19 I. C. 125, 1927 Lah. 610 : 100 I. C. 104

S. 60. **Agriculturist**—*contd*

——person engaged in cultivating the soil comes under this sec. although he has no culturable lands of his own. 41 B. 475 : 39 C. 639 : 19 Bom. L. R. 281, 12 B 363, 28 B. 125, 35 A. 307 : 19 I. C. 125.

——it is doubtful whether it can correctly be said that where-ever a person is both a cultivator and a Zeminder he can only be called an agriculturist if his main source of income is derived from agriculture. 1928 All. 211, 35 A. 307 *Dist* and *doubted*. 106 I C. 49 . 1927 All. 601.

——a party alleging that he is an agriculturist must prove that he earns his livelihood wholly or principally in agricultural labour. 105 I C 795 1923 Bom. 12, 106 I. C. 45 . 1928 Lah. 132

——persons having means of livelihood otherwise and having some raiyati lands are not exempted 20 C. W. N. 874 35 I. C. 343, 15 A L. J 540 : 40 I C 544.

——a large landed proprietor, even though his sole income is from land is not agriculturist within this sec, The protection given by cl (c) is given to small owners of land as well as actual tillers of the soil. 49 M. 227 · 92 I. C 398 : 1926 Mad 350 : 50 M. L. J. 90.

——a house of an agriculturist is not saleable if it appertains to his holding 34 A. 25, F. B., 51 I. C. 553, 39 A. 120 38 I C. 171.

——a house in a town belonging to a family which lived by cultivation could not be said to be appertenant of the agricultural holding and is liable to be sold. 45 I C. 546.

——but a house in the city to which an agriculturist takes his cattle [illegible]
even [illegible]
tural [illegible]
tural [illegible]
—[illegible]
one m[illegible]

——the exception extends after the death of the Jt Dr. to his representative occupying the house in good faith as agriculturist 7 B. 530, 1928 All 211.

——the court is to decide whether the cattle of the agriculturist are necessary to earn his livelihood 61 I. C 777.

——pledging of cattle as security does not affect s 60 cl. (b) *above case*.

——an agriculturist may mortgage his house and it may be sold in execution of a mortgage decree L R. 5 A. 201, 84 I C 749 : 1924 A 328, 34 A. 25 · 11 I C 646 : 8 A. L J 1045 F. B., 33 A. 136 9 I. C. 931

——where an agriculturist Jt Dr agreed under a compromise to have immoveable property attached in execution, he cannot at the time of execution be protected by saying that the property is non-transferable. 24 C. W N. 575 · 57 I. C. 249

——the only house of an agriculturist is not liable to attachment. 73 I C. 928.

S. 60. Agriculturist—contd.

——a tenant who has sold his fixed-rate-holding but still cultivates land and still has got some shikimi land, is an agriculturist and the house occupied by him is exempted from attachment 87 I. C 564 : 1925 All. 432.

——a Jt. Dr who is admittedly an agriculturist does not cease to be so by his becoming an *Akali*. 83 I. C 543 : 7 Lah. L J. 95 : 26 Punj L. R 463

——an agriculturist who makes a transfer of his land by lease or mortgage does not cease to be an agriculturist. 55 I. C. 481 : 16 N L R 89

——where the chief source of income of an insolvent at the time of his application is his zamindari, he is not an agriculturist in the true meaning of the word and his house is not therefore property exempt from sale under s 60 (c) 15 A. L. J 540 : 40 I. C. 544

——where a widow sub-let the holding after her husband's death and had no bullocks, her house and *kotha* were regarded as occupied by an agriculturist 102 I. C. 712 1927 Nag. 374, 16 N. L. R. 89. *fol.*

House of agriculturist.

——the house of an agriculturist or the site on which it stands cannot be attached simply because it is in a dilapidated condition. It must be clearly proved that the owner has no intention to repair it 105 I C 129 . 1928 Nag 23

——"occupation" does not necessarily mean "residence" only, so the house need not be actually used by the agriculturist for residence, only it must belong to him. 99 I C. 376 : 1927 All. 214. *contra*. the house must be used by the Jt. Dr. for purposes which are necessary for the cultivation of his land. 98 I. C. 857 : 1927 Lah 66

——the house must be a "building"; if the house is in ruins without door or roof, it cannot be said to be a building 99 I. C. 376 : 1927 All. 214

——the conduct of the judgment-debtor, may estop him from pleading that the house is not saleable. 102 I. C. 616 · 8 Pat. L. T. 563 . 1927 Pat 233, (4 B. 25, 34 A 25 F. B., 24 C. W N. 575) *fol.*

Debt.

——a sum of money which might not become due or the payment of which depends upon contingencies which may or may not happen is not a debt. 27 C 38.

——a money-claim that has already become due is a debt but a money-claim *accruing* due is not a debt and cannot be attached; the attachment must operate at the time of attachment. 14 M. I. A. 40, 50 : 30 A. 246.

——maintenance allowance that has become due. 6 W. R. 62 (misc.), 30 M. 279, wages of private servants that have become due. 21 M. 393, 31 A. 304. and private pensions that have become due. 6 C. L. R. 19 are debts.

S. 60. Debt—*contd.*

——although the right of maintenance is not attachable and *not saleable the proper remedy lies in the appointment of a*

P. C. 176.

——right to future maintenance, construction of an award. 1925 All. 297 85 I. C 477 : 23 A L J. 149.

——right to sue for damages cannot be attached and sold. 9 C. 695.

——a debt in order to be attachable need not be ascertained but must be accruing or have accrued There is *distinction* between the case where there is an existing debt, payment whereof is deferred and the case where both the debt and its payment rest in the future. In the former case there is an attachable debt and in the latter case there is not. 1925 Cal. 561.

——"debt" means an existing debt. It involves (a) an obligation incurred by the debtor, (b) a liability on the part of the debtor to pay for that obligation at a certain date 108 I. C. 229 : 1928 All. 193 · 26 A. L. J. 253

——a debt which is sought to be attached must be one which the Jt Dr. could himself enforce for his own benefit, for a creditor acquires no larger rights than those of a debtor. So if the debt is due to the Jt Dr. in the capacity of a trustee only or if he has parted with the debt b
power to himself to revok
L. T. 504 : 1925 Pat. 372

——Jt Dr. who ha
cannot set it up by way of defence in a suit for possession by auction-purchaser. 40 A. 680, 29 A. 612, 28 B. 125, 34 C. 199 but where the Jt Dr. was not aware of the proceeding he can 26 C 727, 732.

——damages resulting from wrongful attachment can be recovered from the decree-holder though he acts in good faith. 8 N. L. J. 170 : 1925 Nag. 390.

Property

——doors and windows of buildings cannot be separately attached for they have no separate existence as property. 11 C 164

——crops grown on a tenancy by the heir of a deceased tenant are not his crops and cannot be attached. 69 I. C. 520, 84 P W. R. 1916. *fol.*

——Hindu widow's life-interest in lands alloted on compromise cannot be attached. 24 Bom. L. R. 293 : 47 Bom 597 : 1923. Bom. 276 : 73 I C 196.

——musical instruments are not "tools of artisans" and not exempt from attachment. 38 I. C. 415 : 1917 M. W. N. 420 : 5, L. W. 596

S. 60. "Saleable"

——the word 'saleable' in s. 60 means saleable by auction at a compulsory sale under the order of the court and not transferable by act of parties, when a parmanent lease did not forbid a court-sale the holder of it cannot complain against such sale. 19 C W. N. *1182 : 23 C L J. 428. 28 I C 837*

——equity of redemption, 21 B 226, share of a partner, 20 C 693, right to claim specific performance of contract, 14 C 241, *life interest in trust funds but not the maintenance grant of* Hindu widow 10 B 342 15 A 371 16 A 443. 12 M. 250, a vested remainder 17 B 501 are saleable

——a gratuity paid by a University for services rendered not being a pension granted by Govt. is not exempt from attachment *75 I C 945*

——what is voluntarily transferable may be saleable in execution of decree 23 C L J 428 19 C. W N. 1182 : 20 C 273

——a Ghatwalli or Police Jagir is saleable subject to the objection to the Government 2 P. L T 742 64 I C. 522.

——*Asthal property is not saleable in execution* of a personal decree against a *Mohant.* 61 I C 757

——religious office, 6 M. 76, 4 M. 391 16 M. 146, 6 B. 298, 300, the right of management of temple 4 A 81, 5 M. 89, I M. 235 23 M 271, 1 C W N 493, 29 C 470, the right to officiate at funeral ceremonies 96 W R 171 are not saleable.

——a *Jatrsbahi* of Gayawal is not attachable. 3 Pat. L. T. 603 : 1922 Pat 228 1922 P 556. 68 I C 944, 2 Pat L. J. 705 *Ref.*

——but it has been held by the Bombay H. C that the right of a priest in the net proceeds of the offerings could be attached and the same did not fall under proviso (f). It was also held that the executing court had power to restrict the bidders to a particular class or classes 100 I C. 1008 : 29 Bom. L R. 102: 1927 Bom. 143.

——property to be attached must be in existence. 29 C L. J. 595.

——the future perquisite on account of offering or *bhog* to the deity is not attachable 1 Pat L T. 75 55 I. C. 175, (29 C 470 : *1 C. W. N. 493 1 M. 235, 23 M 274, 4A 81) fol*

——in cases where no attachment is necessary and sale takes place in pursuance of a mortgage decree directing a sale of the mortgaged property s. 60 is no bar. 23 A. L. J. 841 : 89 I. C 364 : 1925 A. 652. 47 A. 900.

——the question whether a certain pension is of such a character as not to be liable to be sold is a mixed question of law and fact. 47 A. 900 : 23 A. L. J 841 : 89 I. C. 364. 1925 All. 652.

——political *pension is not saleable under cl. (g).* 50 M. 711 : 103 I. C. 339 : 1927 Mad 604 : 52 M. L. J 622

——reversionary interest is attachable. 1915 M. W. N. 577.

——*where under a compromise between two brothers the* younger acquired some property "in lieu of his maintenance" during

S. 60. Saleable—*contd*

his brother's lifetime with full ownership after the latter's death, held that "right to future maintenance" in s. 60 (h) contemplated a bare right of maintenance and nothing more and did not attract such a right. 19 A. L. J. 648 : 34 P. L. R. 109 : 63 I. C 181, 85 I. C. 477 : 23 A. L. J. 149 ; 1925 All. 287

—a heritable annuity created by a will is not a right of future maintenance and is attachable. 24 O. C. 250 63 I C. 851, 10 C. W. N. 1102 ; 30 M. 279 . 27 C. 38 : 1 N. W. P. 138 : 15 A 470 : 7 O C 90 **P. C.** *Ref.*

—although the right of maintenance is in law not attachable and not saleable under s. 60 the proper remedy lies in filing a case for the appointment of a receiver for realising the rents and profits of the property paying out of the same a sufficient and adequate sum for the maintenance of the Jt Dr. and his family and applying the balance, if any, to the liquidation of creditor's debt 47 A. 385 : 41 C. L J. 383 : 87 I. C. 295 : 23 A. L. J. 634 : 1925 M. W. N. 630 · 27 Bom. L. R. 849 **P. C.**

—a mere right to maintenance cannot be attached and sold in execution of decree. 40 M. 302 : 34 I C. 381 ; 30 M. L. J. 361.

—but where the father transferred all his properties to his son for payment of debts and reserving a monthly allowance which was a charge on the estate, it was attachable. 16 C L J. 354 : 17 C. W. N. 662.

—money that has become due on account of maintenance is attachable. 27 C. 38.

—a Jagir which was a maintenance grant was under the terms of the *sanad* attachable. 22 C. W. N. 577 : 1918 M W. N. 384: 47 I. C. 632 **P. C.**

—a sewing machine owned by a tailor is a tool of an artisan and exempt from attachment. 65 I C. 416.

—articles used for making jaggery are implements of husbandry and cannot be attached 25 Bom. L R. 1211

—a deposit in provident fund is not attachable even after the subscriber retires 45 A 551 : 21 A. L J 454 · 1924 A. 68 : 74 I. C. 746, 50 C. 347 : 27 C. W. N. 472 . 1923 Cal 585, 46 C. 962, 35 C 641, 29 B. 259, 5 Bom L. R 454.

—provident fund is not liable to attachment 24 C. W. N 288 46 C 962, but when it is actually paid off it is attachable. 92 I C. 673 : 29 O C 278.

—the mere right to sue for damages in the case of a bankrupt is restricted to damages arising from bodily or mental suffering or injury to his person or reputation as contradistinguished from injuries to his estate. 76 I. C. 657.

—policy of insurance for the benefit of another is attachable, 37 B. 471 ; 19 I. C 736

—*interest under the policy of insurance is attachable.* 37 B. 471 : 15 Bom. L. R. 320 : 19 I C. 736.

S. 60. Saleable—*contd.*

——there is nothing in s 60 to prevent the creditors of the sons of the deceased policy-holder from attaching the money payable under a life insurance policy. *32 C. W N. 634 : 47 C. L. J. 587.*

——the pay of an officer of the Indian Army can be attached. 39 A. 308 39 I C. 92, 50 I. C 683 ; 21 Bom L. R. 143, *Contra*, 38 B. 667 · 23 I C. 575, 16 Bom L. R 233.

——the salar[illegible] attachment 37 [illegible]

——a debt c[illegible] debtor's debtor [illegible] C. L J 533 ; 36 I. C 457, 16 C W. N. 402 ; 36 C. 104.

——*money deposited in the bank can be attached although it has been transferred to the Head Office beyond jurisdiction.* 4 P. L J 141 . 48 I. C 943.

Wrong attachment.

——damages resulting from wrong attachment are recoverable from the decree-holder though he acts in good faith. *94 I. C. 573 : 1925 Nag. 390.*

S. 62. Seizure of property in dwelling house

——a shop as a godown is not a "dwelling" within the meaning of this sec 3 B 89.

S. 63. PROPERTY ATTACHED BY SEVERAL COURTS.

——a prior attachment by one D. Hr in the inferior court gives him the right of rateable distribution when the same property is subsequently attached by another D. Hr. in the superior court. 25 C W. N. 740 · 63 I. C. 11.

——where the same property is attached by two courts of superior and inferior grades the sale should be held by the court of superior grade. 46 C 64 ; 27 C L. J. 145 : 44 I. C. 249.

——when the property is attached by two courts *of different* grades *the sale held by the court of lower grade is not invalid* 38 C. L J *266 . 75 I. C. 325 :* 1924 Cal. 168, and the *subordinate Judge* cannot direct the Munsiff to transmit the proceeds *to his* court but should move the Dt. Judge. 46 C. 64 ; 27 C. L. J. 145 : 44 I C. 249.

——an attachment and sale by an *inferior court* of immoveable property subsequent to an attachment *in execution* of a decree of a superior court is not necessarily illegal and without jurisdiction. 33 M L J 217 : 22 M. L. T. 119 ; 41 I. C. *612 : 1915* M. W. N. 505. 34 C. 836. *Dist.*

——[illegible] der attachment by two courts of [illegible] the court of lower grade is [illegible] asses to the purchaser. 34 C. 836 [illegible] 651, 25 C. 46, 22 B. 89, 22 M. 295) *Ref.*

——where a court of the lower grade has actually held a sale in ignorance of the fact that proceedings in execution of another

S. 63. Property attached by several courts—*contd.*

decree had already been taken in the court of a higher grade and that the property brought to s[illegible] attachment effected in that C[illegible] can have the sale proceeds [illegible] distribute it rateably under [illegible] 917 : 89 I. C. 980 : 1925 Bom. 420.

——this sec. does not protect the sale of the property with notice of prior attachment in execution of prior decree. When the *property is attached by two courts and sold, inspite of protest*, by the court not entitled to sell under s 63 the aggrieved party should apply to the District Judge for the transfer of the sale-proceeds 6 P. L. J. 332 : 2 Pat. L T 719 . 62 I. C 33.

——effect of sale by inferior Court earlier though attachment by it is later [illegible] purchaser in execution of decree of inf[illegible] it sale,—applicability of sec. 47 [illegible] to bring the property to sale. 25 [illegible]

[illegible]s of different courts attaching the property in execution of decrees are entitled to rateable distribution in the court of highest grade without transfer of decree. 26 M. L. J. 406 23 I. C. 999.

——where certain properties were attached and sold in two courts of different grades and the sale by the superior court was compromised before confirmation, in a suit by the auction-purchaser under the sale by the inferior court it was held that the plff was entitled to a decree because until the sale becomes absolute the property cannot be said to have vested in the purchaser who has only an inchoate right which becomes permanent only upon the sale is made absolute 27 Bom L R 393 88 I C. 962 1925 Bom. 483

——where the same property was attached by the Civil Court and then attached and sold by the Revenue Court, in a suit by the auction-purchaser against the sale by the Civil Court it was held that s 63 applied only as between Civil Courts or as between Revenue Courts of different grades and not between a Civil Court and Revenue Court, therefore the plff was entitled to a decree 19 A. L J. 643 3 H. P. L R. 115 63 I C. 909 43 A. 612.

——where a fund in court has been attached by several creditors none is entitled to preferential treatment by reason of priority of attachment 33 C. L. J 7 . 62 I. C 167. 15 C 202

§ 64. PRIVATE ALIENATION AFTER ATTACHMENT IS VOID.

——an attachment creates no charge or confers no title on the attached property, it merely prevents a private alienation. 3 Lah. 414 : 1923 Lah 261 : 69 I C 720, 42 C 72, 25 C 179

——an attachment of immoveable property in execution of a money-decree forwarded by an order for sale does not create any

S. 64. Private alienation after attachment is void—*contd.*

charge on the land. An attachment prevents and avoids any private alienation, but does in invalidate an alienation by operation of law such as is effected by a vesting order in the Official Assignee of the insolvent. 42 C 72. 18 C W. N 1058 · 27 M. L. J. 150 : 16 Bom. L. R. 814 · 20 C. L. J 555 24 I. C. 304 P. C.

——the effect of s. 64 is not to invalidate for all purposes the alienation of the property by the Jt. Dr after attachment. the transferee of property from Jt. Dr after attachment can make an application under Or. 21 r 89 to cancel the sale. 28 C. L. J. 127 : 36 I. C 510

——an order absolute for attachment before judgment cannot be made in the absence of a proper guardian but a conditional order that simply prevents the property from alienation pending the disposal of the application cannot be said to be invalid merely because the guardian proposed comes and says that he is not willing to act. If the order is made absolute the attachment would prevail. 106 I. C. 142 1928 Mad 1

——a private transfer contrary to an attachment is not absolutely void but void only against claims enforcible under the attachment including claims for rateable distribution. 33 C. L. J 7. 63 I C. 167. 17 W R 513 14 M. I A 543. P C. 63 I C. 108 *contra* An alienation after attachment is void and not voidable. 85 I. C. 349 : 47 M L J 913 1925 Mad. 338

[illegible] nent is valid except against [illegible] 35 B 516. 8 C 279. 14 M [illegible] 99 I C 656 : 1927 Mad 190.

——a private alienation cannot be impeached by an applicant for rateable distribution unless he has himself attached the property claimed 43 A 398, 41 M 265 F B, 44 C. 662 *Ref*

——attachment by one decree-holder—application for rateable distribution by others—Jt. Dr. satisfying the decree of the attaching Dr Hr by private alienation of the attached property, others cannot question the alienation. 41 M. 265 F B, 44 C. 662. 19 A. L. J 221 : 43 A 399 60 I C. 846 34 P. L R 25, 66 I. C. 642, *contra*. 1922 Bom 241 24 Bom. L. R 364.

——prior contract for sale of property—subsequent suit for specific performance. 46 M. L. J. 361 19 L. W 455 · 34 M. L. T. 110.

——prior obligations created by the Jt Dr. are not affected by the attachment. 23 C L. J. 115 : 21 C. W N 158 . 34 I. C. 953.

——a mortgage executed during attachment under a money decree to pay a prior mortgage is binding on the purchaser under the decree. 1927 Mad. 703.

——the sec. being absolute in terms a transfer by consent of or with the connivance of the attaching decree-holder is not exempted from the sec 101 I. C 591 : 1927 Mad. 648 : 38 M. L. T. 310, 23 M. 478.

S. 64. Private alienation after attachment is void—*contd.*

——if any execution proceeding is struck off, the attachment [illegible] 63, 23 A. 114, 32 [illegible]

[illegible] property at a [illegible] *the attachment* the Jt. Dr. had transferred the property to a creditor *for good consideration* and five years prior thereto the D. Hr had attached the same property in execution of another decree but the execution had not been proceeded with, held that the creditor's private transferee had acquired a good title to the property. 44 C. 662 · 32 M. L. J. 425 : 21 C. W. N. 585 : 21 M. L. T. 344 ; 25 C L. J. 508 . 40 I. C. 242 P C.

——when an attached property is alienated during attachment but the execution application is dismissed for default a fresh attachment will not affect the alienation. 4 Pat. L. T. 409 1923 P 564.

——the default of the D. Hr. contemplated by Or 21 r. 57 as a ground for dismissal of an execution application must be default in the discharge of some obligation laid on him by the Code The omission of the D. Hr to attend the sale or bid at the sale does not constitute such default and an execution being dismissed on that ground it does not terminate the attachment. 45 M. L. J. 315 : 1923 Mad 703 : 1923 M. W. N 529 : 75 I. C, 491.

——the release from attachment on a claim being allowed is only provisional and is revived if the result of the suit under Or. 21, r 63 be favourable, 45 M. 84 69 I. C. 642 : 1922 M 176.

——when a claim against an attachment is allowed the decree in a suit by the defeated Dr Hr. revives attachment. 41 M. L J. 393 ; 1921 M. W. N 642 14 L. W 371,

——renewal of 'existing obligation is not 'transfer,' thus a mortgage-debt may be renewed pending the attachment. 4 M. 417. Similarly a mere assignment of a mortgage pending the attachment is not a transfer. 29 C. 154, 29 I A 9 P C.

——a court-sale of property attached in execution of another decree releases it altogether from attachment Attachment preventing private alienations by the Jt Dr granted solely for the purpose of protecting the attaching creditor's right which ceases by court's sale in execution of another decree, 40 M L 65 1921 M. W. N. 53 : 62 I. C. 121.

——the right of an attaching creditor to redeem a mortgage under s 91 Tr. P. Act is not a charge and comes to an end on the sale of the mortgaged property in execution of the mortgage.decree. *Above case.*

——[illegible] party in a mortgage [illegible] 39 M. L. J. 456 :

[illegible] 30 from attachment does not put an end to the attachment so as to leave the claimant free to deal with the property as he likes. If the Dr Hr. establishes his right to attach the property in a suit under Or. 21 r. 63, original

S. 64. Private alienation after attachment is void—*contd.*

attachment is maintained uninterrupted, any private transfer by the claimant after the release becomes in that case void 25 C. W. N. 544 33 C. L J 201 62 I C 348

——but a different rule has been adopted with regard to attachment before judgment Upon the dismissal of a suit an attachment before judgment is cancelled and it is not revived by the reversal of the judgment of dismissal in appeal. 25 C. W. N. 544 : 3 C. L. J. 201 : 62 I C 348 *contra* 42 A 39 52 I C. 343 . 17 A. L. J. 901.

——an alienation of property validly attached before judgment is void under s 64 But where the attachment was made without the formalities under Or. 38 r. 5 the alienation is not bad. 1925 Nag 238 : 68 I. C 188

——an agreement entered into by the D. Hr. with the private alienee of property which has been attached not to bring the property to sale is enforcible against the assignee of the D. Hr. 31 M. L. T 423 16 L W 988 44 M L J. 80 . 1923 M. W. N 51 : 1923 Mad. 230 . 72 I C. 839.

——non-attaching D Hrs who have applied for rateable distribution of assets that may be realised are not entitled to question a private alienation made during the continuance of such attachment 41 M 265 · 33 M. L J 707 43 I C 539. **F. B**

——an order of attachment takes effect from the date of its promulgation 32 I C 276, 42 M 844 53 I. C. 207 **F. B.**, 42 M. 565 · 50 I C 261

——the order of attachment is one thing and the fact of attachment is another thing Actual attachment must be proved 9 Pat L. T. 523, 32 C W N. 821 **P. C**

——a morgage executed while the property was under attachment is in operation against the auction-purchaser though the D. Hr was not in any way prejudicially affected. 20 I. C. 241, 7 C. 109, 29 C 154 *Ref*

——a decree on award does not constitute a private transfer of attached property and cannot be avoided by s. 64, 41 M. L. J. 559 : 14 L W. 524

——a prohibitory order restraining the payee of a pro-note from receiving money is invalid and s. 64 does not apply. 46 M. 415 : 44 M. L. J. 206 ; 1923 M W. N 317 17 L W. 314 : 72 I C. 189.

——there is no conflict between s. 64 Expln. and Or. 21 r. 48 (c) C P. C., 14 Bom. L. R 633 : 16 I. C. 640.

§ 65. WHEN TITLE PASSES BY SALE.

——when immoveable property is sold in execution it vests in the purchaser from the date of the sale and he has to bear any loss by destruction or injury arising thereafter. 88 I C. 693.

——when a mortgagee purchases the mortgaged property in execution of decree the property becomes his from the date of sale and any accretion to the property thereafter would belong to him and his interest will be affected if the property is sold for arrears accruing due after such purchase. 40 C. 89 : 16 . C. W. N. 985 : 23

S. 65. When title passes by sale—*contd.*

M. L. J. 311: 16 I. C. 210: 16 C. L. J. 606: 1912 M. W. N. 244, 18 C. W. N. 136 23 I. C. 101.

——failure to obtain sale certificate does not vitiate the title of the auction-purchaser. 25 I C. 8, 95 I. C 965.

——the property vests in the auction-purchaser from the date of sale. 95 I. C 965.

——the auction-purchaser in execution of rent decree and not the Jt Dr. is liable for the rents accruing after the date of sale and before its confirmation. 18 C. W N. 136 · 23 I. C 101

For other cases see, "*C. P C. attachment.*" *and* "*sale certificate*"

§66. SUIT AGAINST BENAMI-PURCHASER.

Scope of this sec.

——this sec. discourages benami purchases, so the suit is not maintainable 20 C W. N. 147, 23 C 699, *Doubted.* 23 A. 175. *Apprd*

——this sec shall be strictly construed and shall not be extended to affect a previous agreement between parties. 1921 Pat. 20 · 62 I. C. 720, 24 C. W. N. 51, 23 A. 175 *Ref.*, 50 I C. 546 *Dist.* 66 I. C. 559

——sec. 66 applies only when the plff attempts to enforce his secret title as against the certificated purchaser or in other words when the benamdar himself claims under the sale-certificate. 27 C. W. N. 208. 75 I. C 196. 37 C. L J. 403, 1923 Nag. 11.

——the whole object of sub-sec. (1) is to prevent a real owner from relying on his secret title as against a person claiming title under a certified purchaser. 32 C. W. N. 759 108 I C 585 · 1928 Cal 448.

——this sec is no bar where fraud has been practised. 18 C. W. N. 128n, 1331

——this sec has no retrospective effect and does not avail in execution purchase perfected under the old Code. 36 C. L. J 396 · 27 C. W. N. 305; 70 I. C. 555, 47 C 1108 *Ref*

——the essential difference between s. 317 (old) and this sec. is that the legislature did not approve of the narrow construction given to s. 317 by decisions of which 21 A 193 is an example. S 66 prevents actions against certified purchasers and their transferees 42 A. 416 · 19 A L J 227: 62 I C 725.

——the chief difference between this sec. and the old sec. is that where under the old Code a suit would be against the heirs or assignees of a benamdar under this sec no suit would lie against any one claiming title, under the certified perchaser. 32 C. W. N. 112: 107 I. C. 67 1928 Cal. 338.

——when sale was confirmed under the Old Act, sec. 66 of New Act would not affect and a suit against the benami-auction purchaser was maintainable. 24 C. W N 1011 31 C L J 463: 47 C. 1108 26 C 950: 3 C. W N. 657 21 M. 7, 21 A 196. *contra.* 43 A. 416 · 19 A. L J. 227: 62 I C. 725.

——this sec. contemplates a real sale in execution of a real decree in a real suit 18 C. W. N 133.

S. 66. Scope of this sec.—*contd*

——s. 66 does not apply to a sale by a Receiver with the approval of the court which appointed him. In such a sase there is no sale certificate issued nor any order of confirmation of the sale, 90 I. C 116. L R. 6 A. 610

——the sec. is no bar when the certified purchaser does not contest plffs claim 82 I C 344 : 1925 All. 47.

——suit against a certified purchaser by a person not claiming through the beneficial owner is not barred by sec 66, 35 A. 131.

——the sec is not restricted to *benami* purchases made by or on behalf of the Jt Dr. 24 C W. N 1024, 1920 M. W. N. 389 P. C., 20 C W. N. 147 *Fol* 22 C. L. J. 508 P. C., 12 B. L. R. 317 P. C. *Ref contra* 10 O L J. 481

Claim by beneficial owner in possession

——beneficial owner in possession may sue for declaration of his right against the certified purchaser. 23 C. 699, 19 C. 199, *contra* 23 A 175 *and next case*.

——the fact that the plff is in possession and asks only for confirmation of possession after declaration of the purchases as *benami* does not take the case out of the section 30 C. W. N 160

——but it has been held by the Madras H C. that when property is purchased in the name of manager and the beneficial owner is allowed to possess the property and subsequently his possession is disturbed by the manager, beneficial owner may sue 11 M 234, 17 M 282, 18 M. 436 *contra*. 23 W R. 358, 23 A. 254.

——but the 11 M. 234 case has been *disapproved* by the Calcutta H. C where it has been held that the failure of the *benamdar* certified purchaser to assert his rights against the real purchaser in possession cannot be regarded as waiver or transfer of right 24 C. W N 1024 11 M. 234 *disapprd* 23 A 175 *fol.*

——real purchaser remaining in possession for more than 12 years can sue certified purchaser for title and possession. 28 C 370, 3 B. L. R. 15 F. B., 14 M. I A 495, P.C

——real owner being in possession, can set up benami by way of defence in a suit by certified purchaser. 15 M I A 496. 23 W. R. 353 · 2 I A. 154, 27 A 443.

Purchase in the name of one member of Hindu Joint Family.

——property being purchased in the name of one member of Hindu joint family—others may sue, 12 B. L. R 317, P. C., 19 C W. N. 1175, 37 A. 545 ; 22 C L. J. 508 ; 29 M L. J. 329 : 13 A. L. J. 999 · 17 Bom. L. R. 998 ; 30 I C. 265, P. C. ; the same principle applies when the member of Hindu joint family purchases at court-

S. 66 Purchase in the name of one member of Hindu Joint Family—contd.

——but in a joint Hindu family female relations are not members of the joint family in " " interest in the estate, so a purcha cannot be taken out of sec. 66 on tion of property by a joint fam I C. 676.

——s. 66 is no bar to a suit by a member of joint family for partition of a property which the managing member of the family has purchased in auction in the *benami* of another person. 45 M. 856, 6 M. 135, 9 M. L. J. 298, 20 M. 349. *fol.*, 40 A. 159 44 I. A. 201 *Dist.*

Previous agreement of joint Purchase.

——where there is agreement to buy jointly, suit for specific ... 21 C. W. N. 97

ase not

Purchase by co-Decree-Hr.

——purchase in execution may be for co-D. Hr. as trustee who may bring declaratory suit 19 C. W. N. 1175, 1179 37 A 545 · 22 C. L. J. 508 : 30 I. C. 265, **P. C.**, this becomes clear when the purchase-money is set-off against the entire amount of the debt, 29 A. 557,

Purchase by joint mortgagee

——when out of two joint mortgagees one alone sues making the other *proforma* deft. and obtains a decree in execution of which he purchases the property the other cannot claim share. 1923 A. 405, 27 A. 557, 37 A. 545 **P. C.** *Dis.*

Benami Purchase to defraud creditor

——benami purchase to defraud creditor—if object is carried out beneficial owner cannot sue. 28 C. 370, 33 C. 967 10 C. W. N. 950 : 4 C. L. J 22, 11 B. 708, 31 B. 405, 20 M. 326, 29 M 72, 31 M. 97, 485.

73. RATEABLE DISTRIBUTION

N. B.—to entitle to rateable distribution the following conditions are to be considered (1) *Whether applications for execution is necessary.* (2) To which court the application is to be made. (3) when the application is to be made, (4) for what assets (5) for what decree, (6) against same J. Dr. or not.

(1) Whether application for execution is necessary.

——a mere application for attachment of property is not sufficient to entitle the applicant to share in the rateable distribution of the assets. He must make an application for execution to the court before assets are received. 90 I. C. 527 : 1926 Cal. 249, 64 I. C. 53 : 17 N. L. R 143.

S. 73. (1) Whether application for execution is necessary— *contd*

——before a person is entitled to rateable distribution an application for execution must be made. Where no regular application for execution is made but the prayer is only for rateable distribution of the assets, it cannot be ordered. 87 I C. 1025 : 1925 Nag. 382. *contra* the sec being imperative no application for execution is necessary 4 Pat. L T. 373 : 74 I. C. 626 : 1923 Pat 216

——when execution of a decree is stopped by an order of a superior court such decree holder can apply to that court for rateable distribution without a fresh application. 29 C. W. N. 375 : 1925 Cal. 966 . 87 I C. 783.

——the D Hr himself must apply for rateable distribution in execution of his decree 19 C W N 535 : 19 I C. 226, 21 C. L J. 614 30 I. C. 38, a person by simply obtaining an order for attachment before judgment is not entitled to rateable distribution. 21 C. L. J 614 30 I C. 38

——a D Hr. is not entitled to rateable distribution if the application for exemption is dismissed or time-barred or the decree is satisfied 21 C L J. 624 30 I. C 49.

——dismissal for non prosecution of a decreeholder's application for execution does not affect his right to a share in rateable distribution under s 73 C P C, 18 C W. N. 1311 24 I C 83

(2) To which court application is to be made ?

——by which assets are held 5 B 198, 201, 62 I. C. 857, 95 I. C. 151 . 1926 Lah. 538, and not to any other court 18 B. 456.

——no transfer of the decree from other court is necessary 21 C. 200, 2 C. W. N. 126, 37 M 568, 590, 26 M. L. J. 406 *Contra* transfer of decree is necessary 16 B 683

——in case of rival decree-holders, the earlier attaching creditor in an inferior court has the right of rateable distribution against a later one in a superior court 25 C. W. N. 740 27 C L J. 145.

——when a property is attached before judgment but it is sold in execution of another decree it cannot be resold, remedy being by an application for rateable distribution 2 Pat L. T. 240 . 1921 Pat 205 . 61 I C. 922.

[illegible] urt for the transfer of an [illegible] court cannot be treated [illegible] N 740 (14 C. W. N. 396.

(3) Before the receipt of assets—

——in cases under this section the general equity appears to follow the common maxim "first come first served." 107 I. C. 293 : 1928 Mad. 129.

——receipt of assets is on the date on which the balance is deposited by the auction-purchaser. 14 C. L. J. 50, 25 C. L. J. 595, 21 C. W .N .887.

S. 73 **(3) Before the receipt of assets**—*contd.*

——when a decree-holder applies for rateable distribution after an auction-sale of the property but before the balance of purchase money is paid into court he is in time, the sale becoming complete only on the payment of the balance and it is only then that there is a *receipt of assets* within the meaning of the sec. 29 C W. N 575: 87 I. C 783, 1925 Cal. 966, (14 C. W N. 396, 15 C. W. N. 872) *Ref.*

——application must be made before the receipt of assets and when the property is sold in execution of a decree in separate parcels the sale proceeds are not deemed to be realised until the entire amount of purshase money in respect of all the parcels is paid into court 33 C L. J. 7, 26 M 179, 62 I. C. 857, 64 I. C. 53, 101 I. C. 908 : 1927 Pat 252

——where a sum of money deposited in a court is attached by another court or several courts, the custody court after determining the question of priority among attachments should transfer the [illegible]

44 C 1072 *not followed*

——receipt of entire purchase-money by an auctioneer who conducts the sale under order of the court from the purchaser under Or 21. r 65, C. P. C. is receipt of assets under this sec. 25 C L. J. 303

——it is the point of time when the entire purchase-money is paid by the purchaser, 25 C. L J 303

[illegible] ribution is maintainable when [illegible] before the receipt of assets [illegible] Pat L. T 296 1921 Pat. 284 :

——it cannot be said to be held by the court until the whole of the purchase-money has been deposited. 15 C. L J. 50.

——application must be made in the prescribed form in the court where assets are in deposit and must be made before the receipt thereof. 38 M 221.

——"assets" should now include any assets held by the court irrespective of the manner in which they come into possession of the court. 35 C L J 327, 26 C W N. 169 1923 Cal 19

——when the moneys in the hands of the court of inferior grade are transferred to the court of superior grade in pursuance of order under s. 63, the rateable distribution of the assets by the superior court should be made as on the date when the latter actually receives the assets 101 I C. 411 1927 Bom 247 29 Bom L. R 319

——when money is deposited in court in execution of attachment before judgment and several D. Hrs claim it, it shall be distributed amongst all 46 M 506 · 44 M L J. 413 . 32 M L. T 198 : 1923 M. 505 ; 17 L. W. 390 : 72 I C 820

S. 73 (3) Before the receipt of assets—*contd.*

——money deposited by the sureties for the release of an attachment may also be rateably distributed. Assets are not restricted to what is paid in by virtue of a process taken in execution 26 C W N 169 1922 Cal 19, 40 C 619, 36 B. 156 *Ref.* 41 M, 616 *discussed*

——every person who applies to the court previous to the realisation of assets, for execution of the decree obtained by him, is entitled to come in under s 73 C P C and have rateable distribution 87 I C 390 48 M L J 409 1925 M W N. 173.

(4) Assets held by the court.

——where money is deposited by J Dr under Or 21 r. 89 there cannot be rateable distribution 19 C W N 1125, 17 C. W. N 630

——where *money is deposited by the J Dr to avoid arrest* it is payment for specific purpose and is not attachable by other D Hrs 14 S L R 164 61 I C 424

——*where the property in the custody of court* is the subject matter of several attachments the custody court must award priority to the first in point of time If the other D Hrs want to share *in the rateable distribution they must apply in time to the* first attaching court The power conferred on the custody court by the provisions of Or 21, r 52 to determine claims to priority *does not entitle it to distribute the assets rateably among* the attaching D Hrs 44 M 100 39 M L. J 608 28 M. L. T. 412 · 1921 M W N. 14 60 I C 302 F B , 38 M 221 *overruled*, 44 C. 1072 *not fol.*

——where the attaching court and the custody court is the same there is a receipt of assets within this sec only when so much of the money standing to the credit of the *Jt Dr* as is necessary *to* satisfy the D Hrs who have applied for execution is ordered to be transferred to the credit of the first attaching creditor's suit. *above case*

——*when money was realised by sale, in pursuance of* an attachment before judgment of the movables of a common debtor the assets realised were not assets realised in execution before judgment and *other creditor may claim rateable distribution* 1921 M W N. 817 · 14 L W. 582, 44 M. 100 F. B fol. 42 M 682 *not fol*

——this sec does not apply to deposits by Jt Dr. for a particular *decree-holder* 1925 Nag 157

——moneys paid by the judgment-debtor under Or. 21, R. 43 are assets held by this court under the sec , 93 I C 852 1926 Bom 242 . 28 Bom L R 237

——money paid into court in execution of decree is assets which can be rateably distributed but such distribution is limited *to the amount of decree and cannot* be extended to costs of the application for execution unless there was order prior to the receipt of the money. 47 C. 515 ; 59 I C. 458.

——*in case of rival D. Hrs. when permission is* granted to one D. Hr. to bid at the sale and set-off his claims and the latter

S. 73. (4) Assets held by the court—*contd.*

purchases some property while the others are purchased by a stranger who deposits the purchase-money, the other D Hr. is entitled to rateable distribution 12 L. W. 328 : 59 I C 86

——a D Hr. having attached the property before judgment cannot come under this sec. unless he has, after judgment, made a fresh application for execution. 34 M. 25, 12 B 400

——when there are several attachments before judgment and the moneys are realised before any of the plffs obtains a decree, the moneys should be held to the credit of all and distributed amongst all. 21 M. L. T. 70 : 1922 M W. N. 262 : 15 L. W 531 : 1922 M 236 68 P. C. 714

——attachment of same property by two D Hrs in superior and inferior courts when rateable distribution should be allowed. 25 C. W. N 740.

——where at an auction-sale the highest bidder pays in 25 p c. deposit but fails to deposit the balance and on resale loss occurring the decree-holder attaches the deposit, it becomes "assets" within this sec and the other decree-holders are entitled to share in it. 49 M. 570 : 97 I C. 83 : 1926 Mad 872

——compensation money paid into court by the Govt for apportionment among claimants to a land acquisition case is "assets held by court". 49 M. 38 . 97 I C 496 1926 Mad 307.

(5) Decree must be for payment of money.—

——decree for the payment of mesne-profits is a decree for payment of money although mesne-profits were not ascertained 5 M. 123.

——[illegible]

P. Act [illegible]

——[illegible]

paymen [illegible]

25 C. 580.

(6) Same Jt. Dr

——decree must be against the same Jt Dr. 18 C W N 1202

——all the Jt Drs in the several decrees should be identical and the fact that in one there is an extra Jt Dr does not make the sec inapplicable 4 Pat L J 373 : 1923 Pat 216 1923 P 521 74 I. C. 626, *contra*. the words "same Jt Dr" do not mean that all the Jt. Drs. in all the decrees should he identical It is enough if there are common judgment-debtors, 107 I C 169 : 1928 Rang 96 : 5 Rang. 757

——two decrees against same estate but different executors, one being common—rateable distribution may be allowed 27 C. L J. 100

——twc [illegible]

the sec. 9 [illegible]

——an [illegible]

though the [illegible]

same, under [illegible]

S 73. (6) Same Jt Dr.—*contd.*

reported in 30 C. 583 which has not been affected by the insertion of the word "passed" in sec 295 C P. C. 23 C. W. N. 704 : 51 C. 761 39 C L J. 439 78 I C. 731 1924 Cal 801.

——where assets were realised in execution of a decree against two persons and another person who had obtained a decree against one of the two judgment-debtors, alone applied for rateable distribution, he was entitled to such of the assets as could be found to belong to the common judgment-debtor 93 I C 222 : 1926 Bom 150 28 Bom L R 78

——decree-holders against one of many Jt Drs may apply and get proportionate assets from the joint property. 30 C 583, 27 C. 151 26 M 179 But see 42 C 1 *Quære*

——decree against legal representative of J. Dr comes under this sec 11 C 718, *contra* 25 B 494, 33 M 465

——an application for rateable distribution is not an application for execution 64 I C 53

——moneys orderd to be rateably distributed amongst the D Hrs are properties of the D Hrs and not of the Jt Dr. 42 M L J 361 1922 M W N 51 1922 M 31 15 L W. 37 : 68 I C 512

——where there are two decree-holders of one Jt. Dr and the objection of the Jt Dr that the property was non-transferable against one is disallowed and against the other is allowed, the latter is entitled to rateable distribution of the sale proceeds on execution by the former 21 C L J 624 30 I C 49

(7) Mortgage.

——when the property is sold free from mortgage under s 73 (1) the *mortgagee has the same interest in the proceeds of the sale as in the property sold but to enforce his mortgage he must bring* suit 13 Bur L T 210 46 I C 417 5 Lah L J 279

——s 73 (1) (b) applies only to a mortgagee whose charge is valid against the executing D Hr when he holds a money-decree apart from his mortgage, he can apply for rateable distribution. 74 I C 140

——*neither s 73 nor Or 34, R 13 are applicable to a case* where the question is whether or not a subsequent incumbrancer *is to be paid out of the surplus assets arising from the auction* sale. The surplus sale proceeds cannot be paid to a subsequent incumbrancer without the consent of the judgment-debtor. 49 A. 636 : 101 I C 505 1927 All 467 25 A L. J 390.

——the words "any property" in clauses (a) and (b) of the *proviso as contradistinguished from "immoveable property"* in cl (c) shows that a mortgage of moveables is included in them. *1924 Cal. 990*

(8) Insolvency.

——*order made under the sec will not be affected by the J. Dr. being insolvent subsequently.* 27 C. 351.

(9) Benami and fraud.

——executing court can determine whether the applicant is a benamdar of the J. Dr. 17 C W N 326 : 16 C. L. J. 582 : 16 I. C. 795. 1 C. W. N. 633, 13 B 134, 16 C. L. J. 582. 11 C. 42 or whether any decree is fraudulent 19 C W. N. 903. 46 B 635 1922 Bom 31 : 65 I. C. 600. *contra.* 46 B. 635 1922 Bom. 31 : 24 Bom. L. R 1 65 I C. 600. **F. B.** 13 B. 154 *overruled*

——suit for declaration attaching a decree as benami and collusive may be brought by one D. Hr. against another asking for rateable distribution. 1920 M. W. N 92.

——the act of distribution under s 73 being a ministerial act where the first decree-holder objects to rateable distribution on the ground that second decree-holder's decree is collusive and urges for judicial pronouncement on the point, the prayer should be disallowed 1926 Pat. 497, 5 Pat. 445: 23 A 313 **P. C.** *fol.*

(10) Appeal and Revision—

——the H. C will not interfere in revision with the orders allowing or disallowing rateable distribution save in exceptional circumstances. 60 I C. 371, 17 I. C 254 . 171 P. W. R. 1912 176 P. L. R 1912, 104 I C 735 1927 Mad. 944 . 39 M L T 609, 32 M. 334 1926 Mad 179, 1925 Mad. 587.

——where there is a manifest error in an order made under s. 73 the H C. will in revision interfere to put that error correct 91 I C. 11 : 49 M L. J 753, 22 L. W 744 1926 Mad 179

——an order under s 73 C P C is not appealable unless it also comes under s 47 C P C and satisfies all the requirements thereof In order to be appealable the order must decide a question arising between the D Hr on the one band and the Jt Dr on the other hand [illegible] to execution, d [illegible] decided by t [illegible] W. N 704 : 5 [illegible]

(11) Miscellaneous.

——order for rateable distribution amongst rival decree-holders the Jt. Dr raising no objection is not an order under s 47. 42 M L J 473 · 30 M L T 178 1922 M W N 184 15 L W 421 . 1922 Mad. 99 : 67 I C 546

——the cause of action for a suit for the recovery of money wrongly distributed arises without relation to the manner in which those assets were obtained. 65 I C 230

——where assets are not liable to be rateably distributed s 73 (2) does not apply [illegible] 473 30 M L. T. 178 : 1922 M W. N. [illegible] I. C 546

[illegible] distribution is not an application

——an application to the superior court for the transfer of an execution case to itself from an inferior court is not application for execution to the superior court within the meaning of sec 73: 25 C. W. N. 740, 14 C W N 396, 21 C. 200 *Ref.*

S. 73 (11) Miscellaneous—*contd.*

——this sec 73 is imperative and does not imply that an application for execution is necessary to obtain the benefit of it, the word "passed' does not restrict the sec. 4 Pat. L. T. 373 ; 1923 Pat 216; 1923 P 521 · 74 I C. 626.

——the proceedings under this sec. are non-judicial in character and the court cannot inquire into the validity or otherwise of the decree under which payments are claimed. 19 N. L R 172.

——D Hr is not disentitled to rateable distribution on account of his execution petition having been dismissed for non-prosecution. 18 C W N 1311.

——any payment order cannot be postponed on the ground that a certain person may in future claim rateable distribution. 42 M. 692 50 I C 925

——if a fund in court has been attached by several creditors, none can claim preferential treatment owing to priority of attachment 33 C L J 7 62 I C 167

——where moneys have been allowed to various decree-holders by an order for rateable distribution and stand to the credit of their respective suits, those moneys are no longer the property of the various decree holders even though the amounts have not been paid out to them. 42 M L J 361 1922 M W N 51 : 68 I C. 512. 1922 Mad 31.

——"received" meaning of, decree-holder applying for set-off, application to the transferee court. 95 I C 205 1926 Nag. 380

——where the pltf's. father and the deft. applied for execution of their decrees against the same judgment-debtor and before the assets were received the pltf's father died and the judgment debtor's property having been sold the deft. was allowed to set-off the purchase money against the decretal amount and the pltf's application for substitution in the place of his father having been allowed he applied for rateable distribution but it was dismissed and the pltf brought a suit, held that the suit was not maintainable. 30 C. W N 735 96 I C 3-8 1926 Cal. 957

——in a proceeding under this sec. the court cannot inquire into the validity of the decree sought to be executed. 104 I C. 735 : 1927 Mad 944. 39 M L. T. 609.

§ 80. NOTICE.

Scope of the section.

——the object of this sec. is merely to inform the deft. substantially of the ground of complaint, so the words "cause of action" in the section should not be taken in the narrow sense, but the cause of action should be stated with some precision. 54 C. 969. 107 I. C. 360 ; 1928 Cal. 75.

——object of the notice is to give Secretary of the State or public officer an opportunity to settle the claim without litigation. 5 C. L. J. 148, 7 C. 499, 24 M. 279

——the provisions of the sec. must be complied with, otherwise the plaint will be rejected. 25 A. 187.

S. 80. Scope of the section—*contd.*

—the sec is express ...
plication or ex
725: 32 C. W
29 Bom. L R

Government servant.

—when the services of a govt. servant were temporarily lent to the Municipality his lien on his original service being retained, he is a Govt. servant within the meaning of this sec. 104 I. C. 762 : 1928 Nag. 33.

When notice is necessary.

—public officer not acting in official capacity is not entitled to notice. 36 C. 28, 26 A. 220.

—a public officer who is sued in respect of an act done in bad faith is not entitled to notice under s. 80 C. P C 16 C W. N. 145 : 13 I C. 721.

—but acting even *malafide* in the discharge of ...
entitled to 28 C. W
173, (7 C 499 3 I. C
357 F. B. *fol. dissente*
584, 46 I. C. 86, 41 M
M. W. N 414. F. B
499, 26 A 220

—no such distinction in case of suit against Secretary of State. 25 C 239, 242.

—when the public officer is sued as individual trespasser no notice is necessary. 36 C 28, 38

—but in such suit against Secretary of State notice is indispensible 37 M 113 unless ...
injury
B. 362,
ing for

—in case of Secretary of State notice should always be given, 48 B. 87, 26 Bom. L R. 1 1924 Bom 1, 37 M. 13, but in case of public officer notice is necessary only when suit is founded upon tort and not contract or any other cause of action 25 C 239, 34 B 583, 7 C 499, 394, 13 B. 342, 14 B 395, 20 B. 697, 24 C 584, 35 B 42

—a suit against a State Railway must be brought against the Secretary of state and notice is a necessary requisition and a notice under s 77 and 140 of the Railway Act not sufficient. 30 Bom. L. R. 970

—in emergency cases injunction may be issued without notice. No notice is necessary in a s. it for ... not as to prevent a threatened act ... 3.
362.

tive ...
necessary for amendment of the plaint with respect to a matter

S. 91. Sub-sec. (2)—*contd.*

Court may pass a decree for the removal of the nuisance notwithstanding that an order for the same purpose might be made by a Magistrate. 3 C 20

S. 92. PUBLIC CHARITIES

Object of the section

——the object of the section is clear. Persons interested in any trust were, if they could all join, always competent to maintain a suit against any trustee for his removal for breach of trust but when the joining of all persons interested in any trust was inconvenient or impracticable, it was considered desirable that some of them might sue without joining the others, provided they obtained the consent of the Advocate General or of the Collector of the District, this conditi n was imposed to prevent an indefinite number of reckless and harrassing suits being brought against trustees by different persons interested in the trust 24 C. 418 As to whether this section is mandatory or enabling *see notes under "sub-sec. (2)"*

——s. 92 is intended to be an exhaustive statement of law applicable to suits based upon any alleged breach of any express or constructive trust, created for public purposes of a charitable or religious nature. 20 A. L. J. 557: 44 A. 622. 1922 A 349. 67 I. C 658, 111 I. C. 93 : 1928 All. 660.

——this sec. regulates suits where there is a breach of an existing trust ; where the suit is to establish the existance of a trust itself and the whole question [illegible]
or not, the suit does not co[illegible]
Pat. 321 : 5 Pat. 539 : 7 Pat. L. [illegible]
presupposes the existence of a t[illegible]
M L. J. 183

——s 92 deals with completed trusts and is incapable where that stage has not yet been reached 31 M. L. T. 63 : 16 L. W. 922.

——a suit for a declaration that the properties in the suit are wakf properties does not come under this sec. 99 I. C. 756 : 1927 Lah 350 : 8 Lah 111 : 28 Punj L. R. 486

——this section does not apply to a suit to establish the right to office of Matwalli. 1925 Pat. 544 : 7 Pat. L. T. 4.
[illegible]

tm [illegible]
thi [illegible]

ma [illegible]
for [illegible]
2 C. L. J. 431.

S. 92. Any alleged breach of any express or constructi[ve] trust—*contd.*

or waste and neglect of duty or shows a total lack of capacity [to] manage and has from old age left the management in the hands [of] incompetent persons. It is so even where the *mutwalli* is t[he] founder of the mosque 28 C W. N. 781 : 81 I. C. 850 : 1924 Cal 10[.] (21 M. 10, 1918 M. W. N. 552) *Ref.*

——the circumstances under which the power of heredita[ry] trustee should be exercised are clearly stated by the Privy Coun[cil] in 43 C. 1085 · 14 A. L J 741 : 18 Bom. L R. 611 : 24 C. L. J 19[..] 20 C W. N. 1118 : 35 I C. 30, P. C. 1922 M. W. N. 620 : 19 M. 409.

——a suit under s 92 is primarily a suit against a trustee a[nd] can only be instituted either on the ground that there has been [a] breach of trust or that direction of the court is necessary for th[e] administration of the court. 23 C. W. N. 115 : 49 I. C. 355, 46 B 101 64 I C 353

——the Parasamaya Kolarinutha Madam situated in Tinnevell[y] is a constructive trust as contemplated by s 92 C. P C 50 M. 567 1927 M W N 233 · 101 I. C. 420 : 1927 Mad. 614 : 52 M. L [J] 415

Persons having an interest in the trust

——in a suit under s 92 the question whether the plffs have an interest in the trust or not is a question of fact. Living within [...] le owning property at the[...] [...] occasionally, are circum[stances] [...] by this sec. 49 M. L J [...] [...]2 M. 360, 47 M. 884 P. C

Ref.

——the consent in writing of the Advocate General to the institution of a suit will not bring the suit within the meaning of sec 92 C. P. C, unless the plff has an interest in the trust in respect of which the suit is instituted. The object of the legislature in inserting the words "persons having an interest in the trust" in s. 92 was to prevent people interfering by virtue of the sec in the administration of charitable trusts merely in the interest of others and without any real interest of their own. 29 C. W. N. 154 ; 40 C L. J. 454 ; 47 M. 884 : 1924 M W N 749 ; 22 A. L. J. 983 ; 82 I C. 804 ; 26 Bom. L. R. 1121. 1924 P. C. 22 P. C

——*the words "an interest" were substituted for the words "a* direct interest" It must have appeared to the Legislature that the limitation of a 'direct' interest was not expedient in India. *above case.* See also 24 C 418, 23 B. 339, 14 B. 247, 24 B. 50.

——the effect of the amendment has been to widen the class of persons entitled to sue under this section, 2 C L. J. 460.

——the "interest" must be an existing interest and not a mere contingency ; the possibility of succession to the management of trust properties in respect of which the suit is brought is not sufficient to give a right to sue 20 C. 810 2 C. L. J. 431, the interest" contemplated must be present and substantial interest

S. 92. Persons having an interest in the trust—*contd.*

and not sentimental or remote one Thus public Hindu temples are *prima facie* to be taken to be dedicated for the use all Hindus resorting to them. But the bare possibility, however remote, that a Hindu might desire to resort to a particular temple does not give him an "interest" in the trust sufficient to entitle him to sue under this sec. 42 M. 360 50 I C 693, approved in the above P C. case. *contra.* 5 Lah. 455 . 85 I C 111

——worshippers at a temple are persons having an interest in the religious trust and entitled to sue 10 O. & A. L. R 1, 50 M. 726 : 102 I C. 270 . 1927 Mad 462 : 1927 M W N 197.

——persons having a right to worship in a temple are within the scope of s 539, 24 C 418, 12 B 247 *approved* 23 B 659, 15 B 612

——persons who are *ex officio* concerned in the performance of the *seba* or worship of a public idol and who are entitled to maintenance from the funds of the trust have a 'direct interest in the trust, 2 C L J, 448.

——worshippers in a mosque have an 'interest' in the trust of the mosque within this sec 7 A 178, 29 C. W N. 154 ; 40 C. L J 454 : 47 M. 884 82 I C. 804 P C.

——the right to worship in a mosque is not equivalent to "interest" The test is only to be applied to actual user of the mosque. 92 I C 950 · 1926 Mad 466 . 23 L W 240.

——a suit by some members of the caste living in the *Mohalla* in which the institution was situate can maintain a suit 1923 Lah. 518 : 73 I C 302.

——the descendant of a founder, though in the female line may institute a suit for the enforcement of an endowment 29 C. W. N. 154 · 40 C L J 454 47 M 884 82 I C 804 P C.

——the fact that the pltf belongs to the family of the founder of the charity gives rise to the presumption of his interest under this sec. 41 M L. J. 20

——the followers of Guru Gobinda Singh who do not profess to be Hindus have no interest in an *udasi* shrine and cannot maintain a suit under this sec. in respect of that shrine. 94 I C. 695 · 1926 Lah. 100 : 7 *Lah* 275

——as the possession of an interest in the trust is an essential condition precedent to the maintenance of a suit under s 539 the plaint ought to contain a specific statement of the grounds upon which the plaintiffs claim an interest in trust, and such ground if challenged, should be clearly established by the evidence 2 C L J 431

(*Suit must be representative one.*)

——

is a sui[illegible]
interest[illegible]
43 M. L[illegible]

——

the beneficiaries to secure the proper administration of a public trust either by the removal of the existing trustees or by the settlement

S. 92. Persons having an interest in the trust—*contd*

of a scheme by which the object of the trust can be properly car: out. 44 A 721 : 20 A. L J 712 : 1922 All 499.

——a dispute between rival claimants to the office of trus does not fall within this sec In order to bring a case wit this sec the suit must be a representative one brought for the be fit of the public and to enforce a public right 20 A. L. J. 712 : 1 A 449 . 68 I C 786

——there is nothing in s. 92 C P C. to prevent one of the p or even both the plffs being trustees of the temple, the subj matter of the suit So long as the p ffs, whether trustees or not, vindicating a public and not an individual right, the suit is ma tainable under s 92, 87 I C 194 . 48 M L. J. 534

——this sec governs suits for the vindication of the rights of public in public charitab[illegible] the vindication of the [illegible] or to disputes between [illegible] management 41 M. L [illegible] 439 - 62 I C 761

——where a suit is brought by the plffs not in assertion of th own rights but on behalf of the general public for the settlement a proper scheme of management of the charities there is no bar limitation 43 M. L J 1922 *Mad.* 394 - 1922 M. W. N. 464 : 31 L. T. 125 16 L W 122, 69 I. C 15.

(*Suit against stranger*)

[illegible] nees from the trustee [illegible] trust, this section does [illegible] 227, 21 A 187, 8 B 365, [illegible] 16 M 31, 2 C. L J. 431) [illegible] 24 C 418 *Dist.*

——a suit for the recovery of possession of trust property fr person other than the trustee, for instance, from trespasser or fr transferees from trustees does not come under s 92, 28 C L. J. (2 C L. J 431 and 20 C 810, 33 C 789 10 C W. N 581, 41 C. 7 8 B 365, 15 B 148 24 B. 170, 36 B. 29, 37 B 95, 35 B 470, 21 A 1[illegible] 28 A. 112, 25 A 631 33 A 660, 16 M. 31, 26 M. 450, 26 M. L. J. 5[illegible] 27 M L J 266 1914 M. W N 52, 28 M L J 326) *fol.* (11 C.[illegible] 24 C 418) *Dissented from*, other cases on the point 40 M 21 38 I C 73 F B, 19 A L J. 236 : 62 I. C 741, 45 A. 335 : 71 I. 767, 4 Lah. 295 : 73 I. C. 615.

——a suit by an idol in his juristic capacity against persons w[illegible] are interfering unlawfully with his property or with his income not governed by s. 92 C. P. C 45 A 215 : 20 A. L J. 977 : 1923 A. 1[illegible] 71 I C. 420.

——but if a suit is brought under this sec. with the sanctio of the Advocate General the addition of a stranger as deft do not render the suit bad. 80 I. C. 44 (c).

——but it is outside the power of a Judge to make use of O I. R. 3 C P. C. for joining a purchaser of a trust property as a part to the proceeding under s 92. 28 C. L. J. 4.

S 92. Persons having an interest in the trust—*contd.*

——the Madras and the Calcutta High Courts have held that an alienee is not a proper party to a suit under this sec. and if he be joined, suit against him must be dismissed But the transferee is not bound by the result of the suit and if a suit is subsequently brought against him for possession he may contend that the property is not trust property 27 M L. J 266 25 I C. 794, 28 M. L. J. 326 : 28 I. C 898, 2 C L J 431, 33 C. 789, 28 C L J 4.

——the Allahabad H C has held that the alienee is a proper party if not a necessary party, 28 A 112, 20 A 46 and he will in a subsequent suit for possession be bound by the declaration that the property is a trust property, 33 A 752, but the Bombay H. C has held in a case that he is a necessary party and no such declaration can be *made in his absence, 35 B 470, but at any rate a decree can* not be passed in such suits against the alienee to deliver possession of the property to the plff though he is a party to the suit as such relief is not contemplated by this section 92.

Consent of the Advocate-General.

——for the institution of a suit under s 92 C P C the essential requisite is the obtaining of the sanction of the Advocate General and leave of the court under Or 1, r 8 is not necessary. 1925 M. W. N. 505 ; 1925 Mad 1070

——sanction is necessary where the reliefs asked for indicate that the suit relates to a trust. 1927 Mad 886 26 L W 274

——but the mere consent of the A G does not bring the case within this sec 29 C. W N 151 : 40 C L J 454 : 47 M. 884 82 I C 804 **F. C**

——consent must be given to all the applicants by name, permission to some by name is not sufficient. 26 A 162

——a suit by co trustee for declaration of his right to join in the management of the charity does not come under this sec. and no sanction is necessary 105 I. C 194 1927 Mad 948 39 M L T 214, 45 M. 113 *Rel on*

[illegible] addition of plaintiff with [illegible], 36 B 168 But contrary [illegible] H C which has held [illegible] parties or the Advocate [illegible] 450, 10 M. 185, 43 M 707 55 I. C 546

——if a suit is brought under s 92 with the sanction of the Advocate-General, the addition of a stranger as deft does not render the suit bad 80 I C 44 (c)

——but a sanction obtained against persons who are not the trustees, cannot be used against the real trustee who is added as a party subsequent to the sanction as the scope of the suit would thereby be altered. 97 I C 462 1926 Mad 970, 1926 M W. N 626, 1928 Lah. 717

——when sanction has been obtained by more than two persons, any two of them cannot sue or appeal, fresh sanction should be obtained for deviation 76 I. C 345, 31 I C. 236 : 29 M. L J. [illegible]

S. 92. Consent of the Advocate-General—contd.

——*defect in consent cannot be cured after the institution of the suit.* 16 B. 626, 26 A 162

——*where a new party is added as defendant and possession of the trust property is claimed from him without the sanction of the A G the court must dismiss the suit* 36 B. 168 . 11 I C 726

——*a suit for the appointment of new trustee requires sanction under s 92 C P C*, 1911 M W N 142 9 M L. T. 301 ; 9 I. C. 168 : 21 M. L. J 450

——a suit by reversioner to recover trust property alienated by the founder's wife during the lifetime of the founder's wife is not maintainable without the sanction of the Advocate General. 92 I C 813 1926 M W. N. 117 : 1926 Mad 280.

——relief must be confined to consent of A. G. 21 B. 257, 1919 P R. No 144 P 370 51 I C 611

——*the plaint must follow the terms of the sanction* 85 I. C. 1045 1925 Mad 636 21 L W 71

——*consent may be in general terms though specifically asked for and the original plffs dying, the suit continues as they represent the general public* 48 C 493 25 C. W N 794 : 1921 M. W N 24 13 L W 318 62 I C 737 48 I A 12 P C.

——*consent of the Advocate General is not required to set aside a compromise decree in a scheme suit.* 55 C 519 · 32 C. W. N. 482 26 A L J 464 108 I C 361 48 C L J 55 : 54 M. L. J 609 : 1928 P. C 16. P. C.

——the Collector (s 539) before granting sanction should exercise his judgment and consider (1) whether the trust is a public trust (2) whether there has been a breach of the trust (3) whether the person suing has interest , but failure to consider these matters does not invalidate sanction 60 I C. 570, 24 C 418 , omission to exercise judgment exhibited in the language of the permission, may be regarded as a mere irregularity falling within the scope of s. 99 (old 578 C P C), 24 C. 418

——an *exparte* sanction of the Advocate Generel is not bad because the Collector had refused sanction previously But in such case *bonafides* should be considered 106 I. C. 375 : 1928 Mad 401

——*no sanction is required for a plff suing as a trustee for obtaining a decree for an account against his co-trustees* 45 M. 113 : 41 M. L. J 608 69 I C. 304 74 I C. 45 . 6 N L J. 209 : 1923 Nag 98 *contra in such suits sanction of the Advocate General is necessary* 1922 M W N 83 : 68 I C. 837 16 L W. 155

——*a sanction given by the Dt Judge on an application by the mutwalli may be sufficient authority for the mutwalli for letting out the wakf property for more than three years. It is not necessary to bring suit under s. 92 for obtaining such sanction.* 21 C W. N 339 : 47 C 592 : 56 I. C 475.

——variance between sanction and the plaint is not always fatal unless the omission is material. 107 I. C 130 : 1928 Mad. 205 : 39 M. L. T. 628.

S. 92. Consent of the Advocate-General—*contd.*

——where sanction was obtained for a suit to remove a trustee, order for the appointment of new trustee might be made by the court as it was incidental to removal but order for taking accounts could not be made. 106 I. C. 134: 1927 Mad 1033: 1927 M. W. N. 759.

——this section does not warrant the court holding that defts to become parties to a suit require the consent of the Advocate General 103 I C 261 1927 Rang. 180. 5 Rang 263

Public purposes of a charitable or religious nature.

——a trust for a public Hindu temple is a trust for a public purpose of a religious natures within this sec 12 B 247.

——a trust is not the less a trust for a public purpose because the main object of the trust is the support of *fakirs* of a particular sect and the propagation of the tenets of that sect. 34 A. 468. 14 I. C 698.

——where a member of the public had always used a temple and there was attached to it a *Dharamsala* and the surplus funds not required for the service of the temple are to be applied to feeding travellers and maintaining a sadabrat, the intention of the founder was held to devote the property to public purposes of a religious and charitable nature 23 B 659

——a mutt that is otherwise private does not become public simply because some persons are fed when Guru puja is performed and a water pendal is maintained in the *mutt* during the hot season 14 M 1

——whether a particular temple is public or private is a question of fact to be decided on the evidence of dedication, actual user and public repute When all castes of the Hindu public have for centuries been freely using the temple without obstruction or any sort of permission from any one, very strong evidence is necessary to rebut the presumption that it is a public temple. 1928 M 879.

——a Mahamedan mosque is *prima facie* a public trust and in the absence of proof that it was private mosque and that the public had no right to congregate therein without special permission s 92 would apply. 5 Lah 59: 79 I. C 120 1924 Lah 432

——a graveyard being wakf or trust property and all Mahamedans using to bury their dead in it, it was a public trust but as the plff was not trustees they could not sue under sec 92, 19 A. L. J 236: 62 I C. 744

——the gift of the income of the property to a charity without limitation is a gift of the property. 41 M L J 20

——the word "Devadayam" is a very strong piece of evidence that the *inam* in connection with which the word is used is a public endowment 46 M L J. 245 19 L. W 174

"where the direction of the Court is deemed necessary for the administration of any such trust."

——the direction referred to in this section are such as are necessary for the carrying out of the trust, and as are given

S. 92 "Where the direction of the Court is deemed necessary for the administration of any such trust"—*contd.*

to a trustee, either the existing trustee, when there is one, or the new trustee, when one is to be appointed The nature of the reliefs specified in the section shows what is meant by the words "deemed necessary for the administration of any such trust." 10 C. W N. 581 : 33 C. 789

——trustees may be orderec [illegible]
that it is necessary in the in [illegible]
trust, although there is not suff [illegible]
their removal from office 1925 [illegible]

——these words must be interpreted as meaning that when the court has to give direction in the nature of framing a scheme or otherwise for the administration of the trust the mere appointment of a mutwali of a wakf is not such a direction as is contemplated by the sec. So the court can appoint a mutwali without a suit, under s. 92, 1928 Cal. 368, (33 C 789, 1928 All 759, 26 M 450) *Dist.* 23 C W. N 115, 47 C 592, 1924 Cal. 473) *fol.* 1928 Cal 368

" Whether contentious or not."

——these words have given effect to the decision of the case reported in 20 C 810 approving 12 C 546, where it was held that s 539 applied not on y to non contentious cases but also to contentions cases So also in 14 M 186

Cl. (9) Removing any trustee

——the clause has been introduced giving effect to the decision in 24 C. 418, 20 A 46, 21 A 200, 21 B 48, 14 M 186

——a suit under s 92 to remove the deft from trusteeship is maintainable, even though the plff. challenges the appointment of the deft as a trustee under the deed of trust 1925 Cal. 1106 : 86 I C 799.

——where a scheme does not provide expressly for the removal of a trustee a petition for his removal does not lie 22 L W. 796 : 94 I. C. 610 : 1926 Mad 799

——in a suit by two trustees of a temple against a co-trustee for his removal the court has the power to investigate charges of misconduct made by the deft. against the plffs. and even to remove them 48 M L. J. 534 : 87 I. C 194

——when a trustee may be revived discussed and illustrated 1928 Cal. 225.

——mere lax and improvident management on the part of the manager of a shrine, fostered by the belief that he was entitled to manage the trust property free from control and very much as though he was its obsolute owner is no ground for removing him from the trust. 21 B. 556, 1628 Cal 225.

——in case of doubt as to the existence of trust, failure to keep accounts without any wilful default is no ground for their removal 16 L. W 839, 1918 M. W. N. 786 *fol.* 16 L. W. 247 Dist.

S. 92. Cl. (9) Removing any trustee—*contd.*

——each case must be decided with reference to circumstances, there is no hard and fast rule that because a manager of a shrine has arrogated to himself the position of owner he should be removed from his office of trustee 22 B. 493

——but the court will be guided solely by the consideration of the welfare of the trust and will not hesitate to remove a trustee who has purchased the trust property or concurred in a breach of trust or has wrongfully alienated trust property or has been guilty of wanton waste and neglect of duty or shows a total lack of capacity to manage and has from old age left the management in the hands of incompetent person This is so even where the mutwali was the founder of the mosque 28 C W. N 781, 1924 Cal 1024 81 I. C. 850.

——where it appeared that the defts had not applied the inam granted for the mosque in the proper manner and they had denied the title of the mosque to the inam, they ought not to be allowed to continue to manage in the same way as before 34 M. L T 347: *46 M L. J 245 77 I C 777. 1924 Mad 491*

——where the trustees of a temple asserted their own rights and transferred the *archaka* service Inam Lands of the temple, they were liable to be removed under s 92 1927 Mad 1033 106 I. C. 134. 1927 M. W N. 759

(" *Trustee " within the clause*)

——a person appointed by the Court as trustee is a trustee within the meaning of Cl (a) though his appointment may be impeached as being illegal 35 A 98 1- I C 573, a person who is not appointed a trustee but takes charge of the trust property and *purports to manage it as trust property is a trustee de son tort.* 23 B. 659, 47 A 17.

——a suit under s 92 C. P. C is maintainable against a trustee desontort who has without title chosen to take upon himself the character of trustee 44 A 652, 21 A L. J 866. 1924 A 884, 1925 Mad. 212

——a constructive trustee within s 92 C P C would include a person holding a particular fiduciary position whose obligation as such can be enforced in a court of law. 84 I C 808. 1924 Bom 193

——the Acharya of a temple is a constructive trustee 25 Bom L R. 747. 84 I C 808

Cl. (b). Appointing new trustee.

——a suit for appointing new trustee on the ground that the defts are not lawful trustees is a suit under this clause. 26 M. 450

[illegible] the court may provide [illegible] though such [illegible] constitution

S. 92 Cl. (b). Appointing new trustee—*contd.*

——so long as the rights of the members of the family to take part in the management can be given due effect to without detriment to the interests of the constitution, nothing can prevent the court to appoint additional trustees in the place of a sole trustee, although the deed of trust enjoins only one trustee at a time. 1928 Mad. 935

Cl (d). Directing accounts and enquiries.

——this new clause gives effect to the decisions in 21 B. 48, 10 Bom. L R 87.

——where a decree provided that the defts. should make good the deficiency ascertained as the result of taking the accounts held that the decree was not merely declaratory but was executable 100 I C 841 1927 Mad. 416. 1927 M. W. N. 204: 52 M L J 182

——it is general principle that back accounting cannot be decreed unless dishonesty and malversation are proved. When the trust property can be traced to the posssession of the *tarwad*, then and only then, the tarward can be called upon to restore it 1928 Mad. 879, 1921 Mad. 651 *Ref*

——claiming damages on account of misconduct on the part of the trustee does not fall under this sec; this stands on a different footing from the accountability of the trustee 92 I. C. 526: 1926 Mad. 509.

Cl (e). Apportionment of income,

——a suit for a declaration as to what proportion of the income of the trust property should be allocated to the *pujaries* and what to the temple servants relates to this clause. 45 B. 683: 60 I. C 924.

Cl. (f) Authorizing trust property to be let, sold etc.

——a mutwali asking merely for sanction of the court to grant a lease is not bound to come under this sec 47 C. 592. 56 I. C. 475.

Cl. (g). Settling a scheme.

——the power of appointing a new trustee and of making a scheme for the administration of the property is restricted to s. 92 C. P. C. *only*. 4 Pat. 741: 88 I. C. 1035: *1925 Pat. 544*.

——in appointing new trustee and setting a scheme the court is entitled to take into consideration not merely the wishes of the founder as can be ascertained on the past and present history of the institution. 43 C. 1085: 35 I. C. 30 P. C.

——in settling a scheme the court should primarily look to the interests of the institution rather than the right of individuals 92 I. C 556: 1926 130.

——where the trust is a private one *i. e.* for a family idol settlement of scheme under this sec. is inappropriate, 49 C. 459: 67 I. C. 561 P. C., but the court can frame a scheme in respect of a public temple though it is under the control of a Temple Committee

S 92. Cl. (g) Settling a scheme—*contd.*

constituted under the Religious Endowments Act. 20 of 1863. 39 M. 700 : 32 I. C. 211

——the court may refuse to fram a scheme where no mismanagement is proved 24 Bom L R 1060 84 I C 759

——where a decree in a scheme suit contained a clause that the provisions of the scheme may be altered or mo ified as if it were in execution held that the clause was *ultra vires* and the alteration of the scheme decree must be made only in a first scheme suit under s. 92 and not by a petition as that suit came to an end with the settlement of the suit. 49 M 580 : 95 I C. 720 1926 Mad 559: 1926 Mad 226

——successive suits for settlement of schemes is maintainable. When there has been a breach in the provisions of a scheme drawn up by the court the proper remedy is by petition to the court that framed the scheme and not by regular suit. 1922 M W. N 477 1922 Mad. 413, 21 B 4› · 43 I C 722 *Ref.*

——rules fra ed by a temple committee in pursuance of the power given under a scheme decree becoms part of the scheme and can be altered by the court. 94 I C. 47 28 Bom. L R 309 1926 Bom. 179

——if good cause be shown a scheme may be varied. 28 M. 319, 36 M. 364 : 12 I C. 449

——where a court has sanctioned a scheme for the administration of a religious or charitable trust it is competent to the court to vary the scheme from time to time according to the exigencies of the case A clause in the decree settling a scheme giving liberty to the persons interested to apply from time to time for its modification, if necessary, does not entitle the court to vary the rules of succession to the offices of the highest priest which had been determined on the suit according to ancient usage and custom as such variation cannot be said to be a modification within the clause 37 C. L. J. 281 : 76 I. C. 220 1924 Cal. 330, 43 I C 772 (c), 28 M. 319, 30 M 138 *Ref.*

——but when the H. C. confirms the scheme the H C alone can modify it with necessary direction of the Dt. court 17 C W. N 841 : 16 C L. J 431 · 17 I C. 969

——only on substantial grounds can a court alter a scheme once settled by court in respect of a public trust 36 M. 364 . 21 M. L. J. 952 : 10 M L. J 356 : 12 I. C 449

——in framing scheme the superintendence over temples should not be vested in courts but should be vested in the temple committee having jurisdiction over the place. 106 I. C. 134 1927 Mad 1033 : 1927 M. W N. 759

——a scheme decree is in general declaratory but in some particular circumstance provisions may be made for the execution of parts of the scheme. 107 I. C. 136 · 1928 Mad. 61 39 M. L T. 579

——reservation by the *court to a person* or persons to apply for a relief coming under s 92 is *ultra vires* but if such reservation

S. 92. Save as provided by the Religious Endowments Acts—*contd*

——a suit, which, in England would be instituted only in the name of the Attorney General, may be maintained in India by a person interested in a religious endowment in their own name and without joining the Advocate General 23 M 28 p 30: 7 M. L. J. 281.

——where the plffs claimed to have the general management and control of the Religious endowments belonging to the Degumbary Sect of Jains and to form the committee for the management of all the Jain charities in Calcutta and elsewhere in India and where what they substantially sought was to have the trusts of a will ascertained and the performance of these trusts secured, the suit was not brought under Act XX of 1863 but under the ordinary original jurisdiction of the H C, inherited from the Supreme Court by its Charter 3 C. 563: 2 C L R 121.

——the Religious Endowments Act applies only to public religious endowments as did the old Regulation of 1817 A suit which does not charge the trustees or member of a committee with misfeasance, breach of trust or neglect of duty, does not fall under sec 14 of the Act 42 M 668 53 I C 605

——unless the endowment was one which would have fallen under the provisions of Reg VII of 1817 it will not fall under the provision of Act XX of 1863 17 M 95, and the latter Act applies to every public religious endowment to which the provisions of the old Regulation applied, that is to say, to every public religious endowments created by the preceding Governments of this country and by individuals whether the management of the endowment was taken over by the Board of Revenue or not 8 C. 32; 9 C L R 433 18 A 227

——procedure in a suit under the Religious Endowments Act. 37 M 184, 42 B 742.

Jurisdiction of the Court.

——it is an elementary principle that when the jurisdiction of a Court to take cognizance of a suit instituted before it, is disputed, the court can adjudicate upon the question If in a suit instituted under s 539 the deft disputes the jurisdiction of the Court to make any decree under that section on the ground that the trust alleged by the plffs does not exist, the court is not ousted of its jurisdiction and must determine the question upon the evidence 2 C L. J. 431, 2 C L J 460, 36 C. 713: 13 C W. N 654; 9 C. L J. 563, 3 C L. J 160.

——to apply sec. 92 it is not necessary that the existence of the trust for public, charitable or religious purposes alleged by the plffs should be admitted by the deft If the trust is disputed the question falls to be decided by the court upon evidence. 3 Pat 842, 5 Pat L. T. 305: 80 I C. 980: 1924 Pat 657, 2 C L. J. 431: 9 I. C. 358 *Ref.*

——where the trustees and the trust found are within the jurisdiction of a court, but the charity is to be founded in a territory out of the jurisdiction of that court, the court has jurisdiction to

S. 92. Jurisdiction of the Court—*contd.*

pass a decree declaring the trusts upon which the fund is to be

Dt. Judge. 48 C. 53.

——a suit under this sec must be instituted either in the principal civil court of original jurisdiction or in any other court empowered in that behalf by the Local Govt. But the Local Govt cannot direct the transfer of a particular suit pending in a District Court to a particular Judge The authority must be a general one to receive suits under this sec. 39 C. 146.

——a suit against an executor for the administration of the

until the Advocate General obtains the direction of the District Court. 40 B. 439.

——this court can appoint a *mutualli* in respect of wakf even without a suit under s 92 1928 Cal 368, (1925 All. 759, 26 M. 450, 33 C. 789) *Dist*. 1924 Cal. 441 *fol.*

Procedure.

(*Appointment of receiver.*)

——the court may appoint receiver of trust property though the trustee is removeable after regular inquiry only. 41 M. L. J. 545.

(*withdrawal*)

plus 53 I. C. 233

(*Further relief*)

——an application for further relief is not an application in execution. 75 I. C. 189, 24 B 15, 1 Bom. L R 509 12. I C 567, 28 M. 319; 15 M. L J. 133, 38 I. C. 415 1917 M W N. 420 *Ref* and *Dist.*

(*Stranger joined as deft.*)

——a stranger may be joined as deft. 1925 Cal 187.

(*Death of party does not abate the suit or appeal*)

——a suit brought under this sec being a representative suit, there is no question of abatement, and the court has power under Or 1. R. 10 (2) to add other persons interested in the trust as parties. not because they are the legal representatives of the deceased pliff,

S. 92. Procedure—*contd.*

but because they had become parties to the representative su[it] by the very fact of its being instituted on behalf of all person[s] interested in the suit, 40 M 110 · 34 I. C. 384, similarly in 191[5] P R No. 97 p 321, but the Allahabad H C. held a contrary view. 3[?] A 296 28 I C 681, while it has been held by the Privy Counci[l] that where one of the two plaintiffs dies the suit does not abate a[s] a suit under this section is a representative suit. 48 C. 493 · 3[?] M. L. J 194 · 62 I C. 736 P C

——where during the pendency of an appeal against a *decre[e]* in a suit under s 92 C P C one of the plffs. appellants dies there i[s] no abatement resulting from such death 47 M. L. J. 745 : 20 L. W. 882 85 I C 665 ; 1926 Mad. 244

——on the death of the deft. the cause of action survived to ... 688 . 1925 M W. N. 569.

... suit, his successor ... 28 M. L. J. 174 : 27 I. C ...

(*Limitation*)

——where a suit is brought by *plffs.* not in assertion of their individual right but on behalf of the general public who are interested in the institution for the settlement of proper scheme of management of the charities and for other relief there is no bar of limitation, *1922* Mad 394 : 43 M. L J. 448 : 69 I. C. 15.

——a suit for accounts under this sec. against a trustee *de son tort* is governed by the Art. 120 of the L Act. Such a trustee is therefore, liable to render accounts for 6 years only preceding the suit. 47 A. 17 1924 All 884

(... of sec 42 *Specific Relief Act*)

... the provisions ... 450, 16 ... under ... of this ... s. 42 Specific Relief Act ... sec. 244 A. 620 · 57 I. C. 659 1922 All 349.

(*Res judicata.*)

——where a suit is brought by certain persons under s 92 with the sanction of the Advocate General for a scheme a finding in a prior suit by them that the deft. was hereditary trustee does not operate as *res judicata*, specially where the court which tried the prior suit is not competent to try the subsequent suit. 43 M L. J. 448 69 I. C 15 : 31 M. L. T. 125 : 1922 Mad 394.

——a decree obtained under s. 5 of the Religious Endowments Act does not bar a suit under this sec. 63 I. C. 418: 25 C. W. N. 504.

Appeal.

——when the original appellants do not present the appeal after it is returned for re-presentation, others interested may present

S. 92. Appeal—*contd.*

it even after it is time barred, delay being excluded under s. 5 L. Act, 108 I. C. 298 : 1928 Mad. 456 : 54 M. L. J. 629.

——In a suit under s 92 all the persons authorised to sue constitute one plff. so all must combine to take any material step and consequently all the plffs must prefer an appeal, otherwise it is incompetent. 100 I. C 838 : 1927 Lah. 382.

Arbitration.

——a suit under this sec. does not concern the private rights of the parties thereto and consequently it cannot be referred to arbitration. 6 N. L J. 7 : 1223 Nag. 112 : 72 I. C. 1016.

Compromise.

——where certain worshippers sued for a declaration that a prior scheme suit had been fraudulently compromised and for a declaration that the properties belonged to a wakf, held that the reliefs claimed were not those prescribed by s. 92 and that therefore the sec. did not apply to the case and that there was no need for obtaining sanction of the Advocate General. 55 C 519 : 32 C. W. N. 482, 108 I. C. 361 : 48 C L J 55 : 1928 P. C 16 · 55 I A. 96 : 26 A. L. J. 464 : 30 Bom. L R 744 P. C.

——a compromise decree in scheme suit is not binding on others i. e the public, *above case.*

S. 94

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94 I. C 871 : 1926 Cal. 604

——the court has not wider powers under this sec. in the matter of granting temporary injunction than it has under Or. 39 R 1. 92 I. C. 615 : 1926 Mad. 258 : 23 L W. 85.

§ 95. COMPENSATION FOR ILLEGAL ARREST, &c.

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——where a temporary injunction has been granted on an undertaking by the plaintiff to compensate the deft for any loss that may arise by reason of the injunction, the undertaking is to be enforced by an application under this section to the court which

are equivalent to "without

ts damages in the case of
ıfficient grounds does not

S. 95. Compensation for illegal arrest, &c.—*contd.*

bar a suit for damages for injunction obtained maliciously and without reasonable and probable cause. 30 C. W. N. 465 : 94 I C 444 : 1926 Cal. 757.

——no suit for damages can be maintained against a deft *for* obtaining maliciously and without resonable cause a perpetual injunction which was dissolved on appeal. 42 C. 550 : 18 C. W. N. 1189 26 I. C. 296. 21 C. L J. 68.

——it is doubtful if an award of compensation can be made in a case where the order of injunction was passed after hearing both the parties and it was found that there were sufficient grounds for making the order 71 I C. 450 1923 Mad 352 · 17 L. W 150

——to justify an attachment before judgment it is not enough that the deft. is in straightened circumstances but it must be proved that he was actually about to dispose of his property. 25 M. L. T. 46 · 49 I C. 86.

——a claim for compensation for wrongful attachment of property before judgment made in a counter affidavit disputing the propriety of the *interim* order is no bar to a suit for damages 27 M. L T. 259 55 I C 786 1920 M W N 192.

——if a deft. is arrested before judgment he is entitled to apply for compensation under this sec though he has not been served with the writ of summons in the suit. 15 B. 160

——expense or injury in s. 95 for wrongful arrest includes also general damages such as damages for injury to reputation or humiliation 32 I. C 592 1916 M. W N. 76 · 3 L W. 30.

——an order for compensation under s. 95 is one independent of the decree and the right of appeal is determined by s. 104 C. P. C. and no second appeal lies. 21 I. C. 756.

——a provincial Small Cause Court has jurisdiction under this sec. 26 M. 504, 26 I C. 359.

——application made within 3 years from the date of the dismissal of the suit on appeal in which injunction was obtained is not time-barred. 16 C. L. J 34. 16 I. C. 413

Ss. 96—112. Appeals see, **"C P. C Appeals."**

S 114. Review, *see Or 47, rr. 1-9.*

S. 115. Revision

Scope of the section

——the word case in s. 115 does not necessarily in every case mean the whole case but may mean a particular branch of a case. 59 I. C. 680, 69 I. C. 658.

S. 115. Scope of the section.—*contd.*

——"a court subordinate to H. C" is one over which the H. C. has appellate jurisdiction. 47 B. 699 73 I C. 354: 1923 All 290, a District Registrar is not a "court" within this sec 30 M. 326, a Judge of the H C sitting singly is not a court subordinate to the H. C. therefore no decision by him can be revised under this sec. 43 C. 90: 33 I. C. 745

——the H C has powers of superintendence over all courts which are governed by the C. P C as they are civil courts 49 M. 499: 94 I C. 164: 1926 Mad. 450 1926 M W N 131

——the H C may treat a memorandum of appeal as petition for revision. 33 C L J 384 37 C L J 395 27 C W. N 720 · 1923 Cal 612, 64 I C 712 1922 P 368 64 I C 496, 28 C W N. 271 80 I C 210 · 39 C L J 532 1924 Cal 487, and an application under Or. 9 as one under Or 47 43 C L J 285 95 I C 172 1926 Cal. 735.

——powers of the H C under s. 115 should be liberally construed specially where there is no other remedy. 15 S. L. R. 135 65 I. C 37

——the section has been advisedly framed in indefinite language in order to empower the H C to interfere and correct gross and palpable errors of subordinate courts 91 I C 839 1926 Cal 530

——t[illegible] technical grounds
63 I. C. [illegible]
suit. 63 [illegible]
——[illegible]
60 I. C. [illegible]
108: 19 [illegible]
69 I. C. [illegible]
43 M. L J. 211, 64 I C 361 67 I C 85: 24 Bom L R 744

——the H C should not exercise the powers of revision when a more appropriate and far more complete remedy is open 45 C. L. J. 213 31 C. W N 615 98 I C 89 1927 Cal. 114

——the exercise of the powers of revision is discretionary and must be adopted to the circumstances of each case There are cases in which justice requires interference even though another remedy e g. by a suit, is open 63 I C 46, 1921 M. W N 507, 63 I C. 809, 1921 Pat 204, 60 I C 371, 1 Pat. L T 268: 5 Pat L. J. 400, 69 I. C. 719 4 Pat L T 718 1 Pat. L R 370, 85 I. C 660 · 1925 All. 264, 1925 Cal 293, 29 C 543, 1919 Pat 81 F. B.

——as a general rule the H C will not interfere in revision where the aggrieved party has another and adequate remedy 30 C W. N. 907 53 Cal. 767: 1926 cal. 1149, 8 Pat L. J. 677 103 I. C. 32 1927 Pat. 316

——the existence of another remedy cannot be an inseparable obstacle in the way of interference by the H C in revision 48 A. 175: 90 I C 180 · 1925 All 610 F. B., 96 I. C 359 8 Lab L. J. 323: 1926 Lah 612 *contra* 93 I. C 868, 96 I C 173, 94 I C 70 22 N L. R 30: 1926 Nag. 290, 92 I C 684: 1925 Pat 760

——what cannot be obtained in appeal should not be granted in revision. 103 I C 670: 1927 Mad 859.

S. 115. Scope of the section—contd.

——the H. C. will not act on the affidavit of a pleader's clerk. 66 I. C. 127.

——a person aggrieved and party to a proceeding is entitled to file a revision petition 1928 Mad. 592.

——though as a matter of practice the H. C. exercises revisional jurisdiction only on the application of the parties, the jurisdiction itself is not confined to such cases. 1928 Mad. 528.

——grounds of revision seeming to be after-thought does not affect the maintainability of the revision. 1928 Mad. 528.

Arbitration & Award

——against a decree passed in terms of an award there is no obligation on the H. C. to interfere under s. 115 even if facts are proved which bring the application within the sec. 27 Bom. L. R. 423 49 B. 535 · 1925 Bom 341

——order superseding arbitration is not revisable 47 A. 121 · 1925 All. 458, 47 A. 916 · 87 I. C. 173 · 23 A. L. J 656; 1925 All 566, 89 I. C 808 : 23 A. L. J 891.

——where the arbitrators exceed jurisdiction or act with material irregularity the H. C. can interfere in revision. 78 I. C. 335(c)

——where objections are raised as to the proceedings before the arbitrators and they are decided by the court, the order of the court is not open to revision, but where the proceedings of the court itself are attacked, the order is open to revision. 48 A. 239 · 91 I. C. 930 : 1926 All. 238 24 A L J. 235.

——the H. C may in revision interfere with a decree passed in terms of an award where no notice of filing of award was given 94 I C 115 1926 Cal 1018, 63 I. C. 243 or where no time was allowed to file objection. 59 I C. 811.

——but interference in revision in such case should be rare. 1921 M W N 509, 59 I C 811

——where an award is impeached on the ground that the very reference was incompetent the H. C. may interfere in revision. 110 I. C. 881 : 26 A. L. J. 1009

——an order setting aside award for misconduct of arbitrator is not open to revision. 25 Bom. L. R. 443 : 47 B 721 : 1923 Bom. 402, 64 I. C. 934, but see 1923 all 69 · 20 A. L J. 125.

——decrees in terms of awards being final no revision lies unless the court has exercised jurisdiction wrongly 105 I. C. 105 : 1928 Mad. 48.

——where the court refused to pass a decree in terms of a partial award there were dissentient judgments of the Judges of the Calcutta H. C. as to the power of the H. C. to interfere. 106 I. C. 93 : 1928 Cal. 174.

Adjournment.

——order allowing adjournment on condition of payment of costs and deciding the case *ex-parte* is not revisable, 1 Pat. L. R. 270, order refusing adjournment is not revisable. 20 A. L. J. 1005.

S. 115 Adjournment—contd.

——order refusing to adjourn case is open to revision. 45 A. 218: 1923 A 118: 69 I. C. 921, but the order refusing to issue interrogatories is not. 1923 Lah. 252: 69 I. C 417.

——order staying or refusing to stay execution is not open to revision 25 C W. N. 555, but refusing to stay suit under s. 10 C P. C. is 1923 Mad. 88 : 70 I C. 5

——where an execution case is dismissed without giving reasonable time to file processes, the H. C. may interfere in revision. 92 I. C. 298 ; *1926 Cal 1017.*

——an executing court cannot repeatedly postpone the execution of the decree to the prejudice of the decree holder, where such a course is adopted the H. C. may hold in revision that the executing court has failed to exercise jurisdiction. 31 C. W. N. 653 : 102 I C. 513. 1927 Cal. 581.

Order setting aside *exparte* decree.

——the H. C. can interfere in revision with an order of the appellate *court directing the setting aside of a decree exparte* as the order is a "case" within s. 115. 90 I. C 180. 1925 All. 610. 48 A. 175 : 24 A. L. J. 56, F B.

——an order setting aside *exparte* decree is a "case decided" and is a subject of revision 27 Punj L R 321 · 7 Lah 161 · 1926 Lah. 379 : 8 Lah. L. J. 267, 92 I C 776 : 1926 Mad 256 1926 M W. N 112, 101 I C 936 1927 Lah 342, 32 C 507 1928 cal. 397, 1928 M. W. N. 49 . 1928 Mad. 815, 109 I. C. 82. *contra* 19 A. L J 907

Order refusing to restore a case.

——revision lies from an order refusing to restore a case dismissed for default. 95 I C. 260 1926 Nag. 409 9 N. L J 145, 101 I. C. 677 : 1927 Lah 239.

Plaint.

——where the allegation in a plaint discloses a cause of action however weak it may be and leave to sue is granted, the order cannot be interfered with in revision 87 I. C 737 : 1925 Cal 990

——no revision lies against the decision of the District Judge revising in appeal the order of the Subordinate Judge returning plaint. 43 A. 334 19 A L. J. 110.

——order of court accepting the plaint valuation is not revisable. 29 C. W. N. 627 1925 Cal. 814

——an order of dismissal of a suit for failure to amend plaint and pay costs of adjournment is a material irregularity and is revisable, 96 I C. 312 · 1926 Lah 571.

Interlocutory orders.

S. 115. Interlocutory orders—*contd.*

663, 5 Lah 288 : 1924 Lah. 425 F. B., 5 Pat. L. J. 425 · 3 Pat. 930 : 80 I. C. 667 ; 1924 Pat. 673, 110 I C 78.

——interlocutory order should not be interfered with when appeal lies from the decree 71 I C 911, 1923 Lah. 301, 75 I. C. 107, 4 Pat L. T. 401 , 1923 P. 518 ; 72 I. C. 148, 1928 Mad. 43, but where remedy by way of appeal would entail unnecessary hardship or involve multiplicity of proceedings or would give less complete and efficacious relief, *revision would lie.* 108 I. C 539 . 1928 Mad. 416. 27 L. W, 286

——it is no doubt the settled practice of the H. C. to interfere as little as possible with interlocutory orders where an alternative remedy exists But in case of failure of justice the H. C can and will interfere 28 C W. N 991 82 I. C 1008 ; 40 C. L. J. 191, (14 C 768, 14 C. W N 147, 15 C W N 353 42 C 926,) *Ref* and where matters of principle or jurisdiction are involved. 106 I. C. 57 : 1928 Nag 131

——the H C will interfere where temporary mandatory injunction is given without going into merits 99 I C 383 : 1927 Mad. 188 24 L W. 839.

——the H. C will not interfere with an interlocutory order which decides whether certain evidence is admissible or not 101 I C. 385 · 29 Bom. L R. 304, (11 I A. 237 P. C. and 44 I. A 261 P. C) *Ref*

——interlocutory orders do not amount to the decision of a case within the meaning of s. 115 C P C and are *not revisable.* 5 Lah. 288 ; 1924 Lah. 425 F. B.

——interlocutory order directing the plff *to pay* additional court fees and granting time for the payment thereof is not to be interfered with in revision 50 M L J 497 . 1926 M. W. N. 441 : 95 I. C. 424 . 1926 Mad 763.

——the H C will interfere with an interlocutory order directing piecemeal trial of certain issues. 2 Pat L T 154 . 60 I. C. 528.

——an *order refusing to examine a witness on commission* though interlocutory can be interfered with in revision, if the refusal of the prayers would amount to a denial of justice, 85 I. C. 619 : 1925 Cal 1118, so also when the examination of witness on commission is allowed without sufficient grounds 1927 M. W. N. 218 : 1927 Mad. 524

——in the absence of a provision in the Provincial Insolvency Act the order of the lower court refusing "an *ad interim* protection order' in the exercise of its inherent powers, is not open to revision. 30 C. W. N. 834 : 96 I. C. 131 : 1926 Cal. 1011.

Meaning of "Court."

——the District Judge [illegible] District Municipal Act remains a [illegible] court" within this sec. 50 B 357 [illegible] 1926 Bom. 344 so also the Chief [illegible] Small Causes at Madras acting under R 4 of the Rules framed under the Madras City Municipal Act is not a "Court" and no revision lies

S. 115. Meaning of "Court"—contd.

to the H. C. against their decisions. 50 M 121 : 51 M. L. J. 738 · 24 L. W. 773 ; 99 I. C. 148 · 1927 Mad. 93, 47 M. 369 · 46 M. L. J. 201 F. B., *Dist*, 3 Rang. 560 *fol.*

——the Chief Judge of Rangoon Small Cause Court acting

Estates Land Act can be revised by the H. C. 1926 M. W N 351 · 95 I C 963 : 1926 Mad. 760, 1926 M. W N 131 : 94 I C. 164 : 1926 Mad. 480 · 23 L W. 320, 96 I C. 768. But see 1928 Mad 1032 F. B.

——it is doubtful whether the H. C. can under s 115 order the [illegible] of the Bombay Hereditary [illegible] 760 1926 Bom. 308

[illegible] vise an order passed by a [illegible] Rent Act when it is without [illegible] 1926 Cal. 708

——where in an appeal against an order refusing to prosecute a person for an offence under ss 471 and 193 I. P C. the Collector reverses the order and directs prosecution, he acts as a "Court" and his order is revisable. 90 I. C 445 7 Pat. L T 199 1926 Pat. 25

Withdrawal

[illegible]

[illegible] , 1926 All 98.

——when a suit was dismissed on technical grounds namely omission to file a power of attorney, and the appellate court allowed the suit to be withdrawn with permission to bring fresh suit the order was n t revisable 92 I C 558 1926 All. 294 24 A L. J. 313.

——the H C may interfere in revision when a Court decides a case in deciding to allow or refer to allow withdrawal of the suit. 61 I. C. 584 *contra*. 74 I C. 112.

Amendment.

——order allowing amendment of plaint cannot be questioned in revision 1923 Mad 321 · 61 I. C 167, 103 I C 701, 9 Lah. L J. 357, 11 C. 6 P. C *fol.*

——the question of allowing amendment of the pleadings is discretionery and the H C will not interfere in revision unless there has been material irregularity as far as jurisdiction is concerned and either there has been a failure to exercise jurisdiction or a wrong exercise thereof 30 C W. N 928 : 1926 Cal. 1112.

S. 115. Amendment—*contd.*

——where the lower court erroneously and without jurisdiction purported to amend a final decree the H. C. set aside the order in revision converting an appeal into revision petition. 27 C. W. N. 720 : 37 C L. J. 395 : 1923 Cal 612.

——as amended decree supersedes the original decree and an appeal lies against such amended decree, no revision lies against the amending order. 45 C L. J. 223 : 31 C W. N. 615 : 98 I. C. 89. 1927 Cal. 114

——it is open to the H C. to interfere in revision with an order of the lower court refusing an amendment. 1925 M. W. N. 469 : 87 I. C 90 48 M. L. J. 349

——amending sale certificate without notice is material irregularity. 1922 M W. N. 130 : 65 I. C. 732

Court fee.

[illegible] of revision in cases where [illegible] pay additional court-fees [illegible] 276 : 87 I. C. 660 : 48 M. [illegible] as to court-fee is not [illegible] M L. J. 497 : 95 I C. 424 ; [illegible] 145 : 1927 Mad. 1021 : 33 [illegible] I. C. 539 : 1928 Mad. 416 : 27 L. W 268

——the H C can interfere with the order of the lower Court determining the court-fee payable for a suit. 51 M. L. J. 67 : 96 I. C 129 : 1926 Mad. 678.

——an order directing payment of *advalorem* court-fee is open to revision. 1923 Mad. 270 17 L W 623 71 I. C 173.

When the court acts in the exercise of its jurisdiction illegally or with material irregularity

——where a court has jurisdiction to determine a question and it has determined that question, it cannot be said to have acted illegally or with material irregularity merely because of its wrong decision of the case. 11 C. 6 11 I A. 237

——a decision of a competent court whether right or wrong which by law is final and without appeal, cannot be set aside in revision, when the court has not acted in the exercise of its jurisdiction, illegally or with material irregularity. 16 C. 749 : 16 I. A 104 P. C.

——the above P.C. case of 11 C. 6 was *explained* in 1 C. W. N. 617 where it was held that the words "acting with material irregularity" imply only the committing of an error of procedure, but [illegible] same thing and it was *commented* [illegible] held that in 11 C. 6 it was not [illegible] court which erroneously decides [illegible] act illegally or with material [illegible] jurisdiction, and therefore, its decision cannot be set aside upon revision. The P. C. case was *discussed in* 2 C. W. N. 474 where it was held that the H. C. can

S 115. Where the court acts in the exercise of its jurisdiction illegally or with material irregularity—*contd.*

Interfere in revision where the lower court adopted a wrong course [illegible]

[illegible] In such a case the [illegible] in the exercise of the jurisdiction vested in him by law, illegally and with material irregularity; similarly it was distinguished in 105 P. R. 1888 and 25 A. 509.

——the words refer to errors of procedure as distinguished from errors of law. 17 M. 410, 41 C 323

——the words "acted illegally" have relation to gross and palpable errors [illegible] injustice. 51 C. 690 : 83 I C [illegible]

——the [illegible] one, the irregular exercise of it or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved. 40 M. 793 · 40 I C. 650 : 44 I. A. 261 P. C

——improper exercise of discretion does not amount to "illegality or material irregularity." 111 I. C. 141.

——where an appellate court reverses the decision of the trial court without assigning any reasons, it amounts to acting illegally in the exercise of jurisdiction. 91 I C 839 1926 Cal. 530

——when a trial court decides a case without going into the merits but on a question which is not warrantable by the law, he has acted illegally in the exercise of jurisdiction and the H C. can interfere. 44 C. L J. 565 99 I. C 946

——where the trial court had failed to grasp the fundamental point in the case his decision is revisable 106 I C. 226 : 1928 Lah 299, 109 I C 151 5 Rang 803 · 1928 Rang. 67

Jurisdiction

——the word jurisdiction means a jurisdiction local, pecuniary, personal or with reference to the subject matter of the suit. An erroneous decision upon a question of limitation or any question of like nature does not fall under this sec. 101 I. C 514 : 1927 Mad.

S. 115. Where the court acts in the exercise of its jurisdiction illegally or with material irregularity—*contd.*

660. 26 L. W. 15, 49 A. 454: 101 I. C. 638: 1927 All. 358: 25 A. L. J 399.

——refusal or failure to [illegible] with in revision 26 C. W. [illegible] W. 498, 46 M 938: 44 M. I [illegible] A 577 44 M L J . 16 L [illegible] 445: 1922 P 525

——where an appellate court entertains an appeal against an order not appealable, the H C can interfere in revision 97 I. C 306 1926 Cal 1236

——where an appellate court entertains an appeal from an order from which there is no appeal its order is without jurisdiction and is open to revision 4 Pat 718 6 Pat. L. T. 795: 1925 Pat. 525, 25 Bom. L. R 147 72 I. C 256

——objection to jurisdiction of a court cannot be taken in revision for the first time 14 L. W. 226 · 61 I C. 537.

——where a small cause suit is by mistake tried on the original side and the decree is confirmed in appeal it cannot be interfered with in revision 14 L W 349, 19 N L R 179, 21 C. 249, 25 A 135 *Reid on* 38 M 323, 25 B 417 *Dist*

——the H C may interfere in revision in case of want of territorial jurisdiction. 60 I C 481, 14 A. 413.

——the H C may *interfere in revision when a court administering the* Succession Certificate Act, appoints a receiver. 46 A. 372 · 79 I. C 363 · 1924 All. 376

——where a court allowed a reversioner to make a deposit he exercised a jurisdiction not vested in him and his order was liable to be set aside in revision 26 C W N. 167: 1922 Cal 95, 67 I. C. 256

——*revision lies from an order granting leave to sue as a pauper in a case where the applicant did not adduce any evidence of* pauperism 95 I. C 175. 1926 Mad 958.

——*revision lies where on wrong view of law jurisdiction has been refused.* 1925 Cal 320 · 85 I. C. 570.

——*an order allowing the trial of a suit which ought to have been stayed under s. 10 C. P. C. is revisable.* 1928 Oudh. 355: 5 O. W. N. 604 F. B.

——*where the decision of a court is the very basis and foundation of jurisdiction, the case falls within s.* 115 C. P. C.. 5 Pat. L. T 107: 75 I. C 856: 1924 Pat. 506.

——an order dismissing a suit after decree when it is remitted to the lower court for further action, for the non-appearance of the plffs., is an order without jurisdiction 35 M. L T. 143: 40 C. L. J. 439: 81 I. C. 747: 1924 P. C. 198. 5 P. L. T 623: 22 A L. J. 990 P C

——*where a District Judge hears and disposes of an appeal without jurisdiction, the H. C. can interfere in revision and for this purpose convert an appeal into a revision petition*· 28 C W. N 271: 80 I. C. 210: 39 C L. J. 532: 1924 Cal. 487, 37 C L J. 395: 27 C. W. N. 720, 33 C. L. J. 384.

S. 115. When the court acts in the exercise of its jurisdiction illegally or with material irregularity—*contd.*

——refusal to accept deposit is refusal to exercise jurisdiction. 2 Pat. 715 : 74 I C 102

——where an *exparte* decree is set aside on the application put in 30 days after, without the applicant proving his knowledge of the date of decree, the order is revisable 27 Punj L. R. 321 : 8 Lah. L. J. 267 : 95 I. C. 124 1926 Lah. 379.

(*Error of law.*)

——this sec. applies to jurisdiction only, the irregular or non-exercise of it or the illegal assumption of it. Error of law is not a matter of interference by the H C in revision 46 C L J. 527 · 106 I C 851 1927 Cal. 965 39 C L J. 532 P C *Ref*

——failure to construe a sec or error of law is no ground for revision. 2 Bur L J 275 1923 A. 465 71 I. C 472 . 71 I. C. 31 : 1923 Cal 322 1923 Cal 280 2 Pat L T 491 2 Pat 800: 75 I C 430 : 1923 P. 90 1923 A 269 46 M 536 45 M L J 551, 96 I C 251 1926 Nag. 472. 1926 Oudh 31, 1928 All 392 26 A L J 477, 110 I C. 78

——error of law or judgment is no ground of revision. 30 C. W. N 570 19.6 Cal 773 35 C L. J 327 . 64 I C. 563, 65 I. C. 696 : 1922 All 441. 66 I C 509 · 68 I C 430, 65 I C 512, 9 Lah 308 29 Punj L R 51 106 I C 901 1928 Lah 140, 9 A 104 F B . 95 I. C. 838, 91 I C. 379. 46 C L J 182 103 I. C 468 . 31 C. W N 818.

——where the lower court after hearing the parties decides that Or. IX R 4 C. P C does not apply to execution proceedings, it may be right or wrong , if wrong, it is an error of law only and is not open to revision, 53 C 679 30 C. W N 570 96 I C 705 1926 Cal. 773

——but ignoring an express provision of law is sufficient ground, L. R 3 A. 257 · 5 N. L J 1 1922 Nag 104 . 67 I C 806, 44 M. L. J. 1 16 L W 848, 1928 Mad 484

——a question as to the meaning and effect of a document is one of law. 64 I C 563

——an error on the question of limitation does not necessarily bring the case within this sec 47 C L. J 62 107 I C. 733; 1928 Cal 189.

——refusal to exercise jurisdiction owing to error of law is revisable 29 C. W N. 76 : 52 C 128 . 85 I. C. 870 1925 Cal. 320. 1925 Cal 357

——assuming jurisdiction on a wrong view of the law gives the H C. the power of revision 43 C. L J 576 : 97 I C 286 · 1926 Cal. 1030, 43 C L J. 574 : 97 I C 246, 27 Punj. L R 710 · 94 I. C. 117 : 1926 Lah 344

——a perverse and wilful error of law or fact is an illegality but not mere error of law for which the H C can interfere 63 I. C. 838 : 28 C W N 292 80 I. C 205 1924 Cal 493

——where by an erroneous construction of certain sections of the Court Fees Act and Suits Valuation Act a court refuses to exercise a jurisdiction vested in it by law the order is revisable. 29 C. W. N 76 . 52 C. 128 85 I. C. 870, 1925 Cal 357.

S. 115. When the court acts in the exercise of its jurisdiction illegally or with material irregularity—*contd.*

——an order of the lower court following the decision of the Calcutta H. C. cannot be said to be illegal so as to justify its setting aside in revision. 23 L W. 603

——where the decision is based on a ruling which has no application to the facts of the case it must be set aside in revision 48 A 432 · 1926 All. 346 · 24 A. L J. 430, 92 I. C. 40 : 1926 Nag 257.

——an exercise of jurisdiction owing to a wrong interpretation of a rule is revisable. 48 M 676 : 49 M. L J. 366.

——the court has jurisdiction to construe its own order and the H. C would not interfere if there is no irregularity. 3 Pat. L. R. 100 : 6 Pat L T. 481 . 86 I C 107.

——misconstruction of rules is no ground. 2 Pat. L. T 314 : 65 I. C. 355, 1927 M W. N. 842, 47 M. 369 F. B. *considered*, 106 I C 398 39 M L. T. 654 ; 1928 Mad. 199.

——misconstruction of pleadings is a ground of revision. 95 I C. 294

——construction of a legal provision in one way while it admits of another construction, is not revisable 1927 M. W N. 838 : so also no revision lies in case of misconstruction of a document admitting double meaning 107 I C 273 ; 1928 Lah. 284

——wrong interpretation of a decree was held to be open to revision although there was another suit pending. 53 C. 913 : 99 I. C. 718 . 1927 Cal 156.

Wrong procedure.

——where substantial justice has been done in a case even if there was wrong procedure the H. C will not interfere in revision 86 I C. 756 (c)., 85 I C 750 1925 Cal. 1223.

——the interference in revision under this section in cases where the lower court has acted illegally or with material irregularity should be confined to the cases where the illegality or irregularity is such as has occasioned or might occasion a substantial failure of justice, 17 M 410, 31 B 138, so a judgment should not be interfered with upon a mere technicality. 24 C 729 P C.

[illegible] against an order [illegible] te in so may [illegible] C 377 : 1927 [illegible]

Refusal to add parties.

——order rejecting application for addition of parties is not open to revision. 64 I. C. 563 (C), 4 Pat 723 : 93 I. C. 932 : 1925 Pat. 207 : 7 Pat. L T. 499, 50 A. 276 : 25 A. L. J. 991 ; 108 I. C. 735 : 1928 All. 97.

——where the trial court refuses to add tenants as parties in a suit between the co-sharer landlords, there is no interference in revision, 1923 Mad. 690 : 1923 M. W. N. 403 : 45 M. L. J. 703.

S. 115. When the court acts in the exercise of its jurisdiction illegally or with material irregularity—*contd.*

——where the mortgagee claimed through the mortgagor lands from third party, and the court disposed of the case, without impleading the mortgagor in the suit, there was material irregularity to decide the case and revision lay. 54 C. 338 31 C W. N. 413 25 A. L. J. 61 : 28 Punj L. R. 113 1927 M W. N. 84 : 38 M. L. T. 43 : 29 Bom L. R 755 : 8 Pat L T. 251. 99 I C. 749 1926 P C 142

Some other revisable cases

——where a lower appellate court erroneously entertains an appeal against an order under Or 21 r 101 the H C may interfere. 25 Bom. L. R. 147. 1923 Bom 214 72 I. C 256

——an order refusing to order partition *inter se* among the defts in a suit for partition can be interfered with in revision. 86 I. C 765

——order of the District Judge allowing sanction to prosecute reversing the order of the munsiff is open to revision. 1923 A 490 : 71 I. C. 617.

——where a second appeal is dismissed on the ground that it is not competent, the original decree is revisable. 85 I. C. 760. 1925 Cal 1237

——order of dismissal of application to set aside an order of dismissal of a suit for default without considering the ground for non-appearance of plff. is open to revision 1923 Mad. 177. 70 I. C 38.

——a claim is not entertainable under Or 21 r 59 to property ordered to be sold under mortgage-decree and there is revision against the order of refusal of such claim even if in an execution case it was once allowed. 26 C W. N. 50.

— [illegible] in *forma pauperis* is open to re[illegible] 548 73 I. C 539, 104 I C. 364 : [illegible] 927 Lah 56, 104 I C 198. 1927 [illegible] R 165, 21 N. L R 98, *Contr*[illegible].

— [illegible] ution is revisable 32 M 334, but not unless it is obviously wrong 1927 M W. N. 795 · 1927 Mad. 1030.

——the H C can revise the order of reference to arbitration when the court's jurisdiction to make such order is challenged. 44 C. L. J 224 · 1927 Cal. 52

——an anomalous order of remand by an appellate court may be interfered with in revision 45 C L. J. 194. 102 I. C. 384. 1927 Cal 401.

——but the *merits of the order of remand* cannot be gone into by the H C. in revision 39 M. L. T. 120, 17 M. 10 *ref.*, 38 M. L. T. 15 : 100 I. C. 135 1927 Mad. 335, 1928 Mad. 984

Some cases not revisable.

——an appellate order of the District Judge setting aside the sale held in execution of rent decree is not revisable. 32 C. W. N. 57 : 45 C. L. J. 566 ; 104 I. C. 199 1927 Cal. 633.

S. 115. Some cases not revisable—*contd.*

——order correcting items of property in a mortgage decree is not open to revision. 74 I. C 1020.

——order extending time for payment of money under a compromise decree is not capable of revision 2 Pat. 906

——an order finding security insufficient is not revisable. 90 I C. 1051.

——an order setting aside an order of abatement cannot be interfered with in revision. 63 I C. 230

——an order of dismissal of suit under Or. 17 r. 3 cannot be revised. 4 Pat. L. T. 46 : 1923 P. 223 : 73 I C. 373

——order of rateable distribution is not revisable. 74 I. C. 140. 26 *C. W N 169, but order refusing rateable distribution has been* held to be revisable 32 M 334.

——an order of a lower court refusing to grant a review of its decision is not revisable under this sec. 26 Bom. L. R. 284 : 80 I. C. 267 . 1924 Bom 344

——an order allowing examination of witness on commission is discretionary and so is not revisable 32 C. W. N, 128.

Delay in applying for revision.

——an application will not be entertained unless it is made without delay. 4 A. 154, 6 A. 125.

——delay in applying for revision is sufficient ground for non-interference. 10 O L J 206 1923 Oudh. 271, 86 I. C. 329 : 1925 Oudh. 608.

——as a general rule the H C. does not entertain revision petition after 3 months 1922 M. W N. 130 : 1922 Mad. 63 : 65 I. C. 732

——in an exceptional case mere delay is no ground for rejecting a petition of revision. 1928 Mad. 528

S. 129. POWER OF CHARTERED HIGH COURTS TO MAKE RULES AS TO THEIR ORIGINAL JURISDICTION.

[illegible] I. C may make rules to [illegible] of its original civil juris- [illegible] ent with the provisions in the body of this Code while the Rules made under s. 122 must not be inconsistent with the provisions in the body of the Code, but the Rules made under this section also must not be inconsistent with the Letters Patent establishing it. 28 C. W. N. 916 : 51 C 905 : 81 I. C. 1048 : 1924 Cal. 1025.

S. 131

——Rules framed by the H. C. come into force from the date of publication or from such other date as may be specified. 110 I. C. 719.

S. 135. EXEMPTION FROM ARREST UNDER CIVIL PROCESS.

—the exemption is not the privilege of the person attend-

10th November in execution of a decree against him, held that he was privileged from arrest 4 M. 317

—but where a native of Bombay went to Benares and put up at a Dak Bungalow, and attended the court and returned to the Dak Bungalow, and on his way to Allahabad was arrested in the train, held that arrest was not illegal as much as he was

ot arrested on his returning

A. 3.

ng the period reasonably

returning from the place of

not forfeited by deviating

from the shortest route by adopting a more convenient road 5 C. 106, but it cannot be claimed by a witness to return by any route he pleases. It cannot possibly be open to a witness claiming privilege to dictate as to how far out of the straight route he may or may not go. 46 A. 663 . 1924 All. 676 22 A L. J. 638.

—when a debtor is released from jail on the ground that the order of his committal was illegal, he may be re-arrested immediately after he is released. He is not privileged as returning from court 13 M. 150.

M. L T. 102

—it has been held in the above case that when the person arrested claims exemption from arrest and the court negatives his contention the order is one under s 47 and is appealable.

—the privilege extends to a defendant in a suit under a summary procedure section of the C. P. C and who has not obtained leave to defend therein 5 C 106

—where exemption from arrest under a writ of a Presidency Small Cause Court is claimed, the matter must be governed by the English Law and not by this sec corresponding to which there is no section in the Small Cause Courts Act. 5 C. 106.

§ 141, MISCELLANEOUS PROCEEDINGS.

History of the section.

—under s. 647 of the Code of 1882 in which there was no explanation added, successive application for execution was held to be tenable in respect of the same decree. 18 C. 635, but to

S. 141. History of the section—*contd.*

supersede the contary views in 6 B. 681 and 12 A. 179, Act VI of 1892 introduced the explanation to s 647. Shortly thereafter reversing the Allahabad case the judicial Committee held in 17 A 106 22 I A 44, that s. 467 of the Code of 1882 was on its true construction, inapplicable to execution of decrees, and the explanation was superfluous Consequently the explanation was omitted in the new sec 141 On the construction of the new sec. it has been held that successive application for execution of a decree are admissible even though a previous application may have been dismissed for default 13 C. L J. 532 This case has been distinguished from 12 C L. J 6 where the above history of the Law was over

principles of the case of 13 C. L. J 532 it has been held in 18 C W N 343 . 41 C 1 that Or. 9, R 3 is not applicable to a proceeding under R 100 and 101 of Or. 21.

Applicability of the sec.

——this sec applies *only to* original matters in the *nature of* suits such as proceedings in probates, guardianships and so forth "Original matters" means matters which originate in themselves and not those which spring up from a suit or other proceeding So the section does not apply to an application under Or. 9, R 9, 54 C 405 · 31 C. W. N. 576 ; 1927 Cal 534 103 I. C 69, 17 A. 106 P C., *Rel. on*

——s. 141 does not make the provisions of Or 9, r. 4 and all cognate provisions applicable to execution proceedings. 4 Pat. L. T. 93 : 1923 Pat. 78 . 1 Pat. L. R 134 2 Pat. 372 : 71 I. C. 484.

——s. 141 applies only to proceedings in original suit. 1923

17 A 106 P C.

——this sec. does not apply to objections made under Or. 21 to the execution of a decree. 41 C. L. J. 236 : 1925 Cal. 510 : 79 I. C. 351.

——the word "suit" in this sec. is used in a comprehensive sense so as to include appeals which are only continuations of suits 1929 Lah. 488.

——successive applications can be made for the execution of a decree, as sec. 141 is a re-enactment of the old sec. 647, 13 C. W.

S. 141. Applicability of the sec.—*contd.*

N. 532. This Construction of sec. 141 was applied in 18 C. W. N 313 : 41 C. 1. where an application for rehearing under Or. 9 r. 9 of a proceeding under Or. 21 rr. 100 and 101 which was dismissed for default was disallowed and also in 19 C. W N 25 (where proceeding to set aside a sale under Or. 21 r. 90 was held not to come within the p

But in 19 C.

N. 20 : 24

under Or 9

case reported in 21 C W. N. 769 which discusses the earlier decisions,

wider and the other holding that there has been no change except the superfluous portion being omitted.

——by reason of the provisions of this sec. none of the provisions of this Code is made applicable to execution proceedings. 53 C. 679 : 30 C. W. N 570 . 96 I. C 705 · 1926 Cal. 773

——s 141 has no application to proceedings under Or 21, r. 90 C. P. C. 83 I C. 749.

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Or. 43 r 1. 50 C. L. J. 184, 11 A 100 ...).

——where an applicatio

for default was itself dismi

restoration was made held

case and if there was no

C P. C applied. 47 A

1925 All 773.

——an opplication under Or. 9 is not a petition in a suit but is an original matter in the nature of a suit covered by s 141. 50 M. L. J 75 : 92 I. C. 802 : 1926 Mad. 325.

——s 141 applies to restitution proceedings under s. 144 C. P. C 20 A. L J. 226.

——s. 141 is wide enough to make the provision of s 10 applicable to arbitration proceedings 1922 Sind 6 : 66 I. C. 796

——but s. 146 dealing with procedure and procedure alone, does not touch the substantial law of arbitration. 1928 Rang. 137, 30 A. 137 *fol.*

——s. 141 does not apply to proceeding under s. 105 B T. Act as they are filed in Revenue Court. 1923 Pat. 273

——proceedings under the Company's Act are proceedings in a court of civil jurisdiction, therefore a liquidation court can make an order of attachment before judgment under this Act. 106 I. C. 508 : 1928 Lah. 37

S. 141. Appeal and Reference.

——there is no appeal from an order dismissing an applicatio which is put in for restoration of an application for setting asid an *exparte* decree Such a right of appeal is not given by s 141 (P. C. 46 A 538 22 A L. J 427 1924 All 682. 79 I. C. 323 : 36 (L J 184 69 I C 1003 1922 C 572, 38 C L J 356 ; 77 I. C. 907 1924 Cal. 327, 7 Lah L J 281 90 I C 611 1925 Lah. 489, 36 M. 1(nor does the sec confer upon any court entertaining such proceedin a power not expressly given elsewhere by the Code *e g*, the lowe to refer questions to the H C 36 M. 16

§ 144. APPLICATION FOR RESTITUTION.

Scope of the section

——the word "restitution" implies restoration to a party o what has been lost to him in execution of a decree or directly n consequence of that decree 104 I C 817 9 Lah L. J. 359 : 192 Lah. 625 8 Lah 356

——s 144 does not define the full measure of the power of th court to make an order for restitution The sec may be taken a a guide to determine in what class of cases an order for restitution may be made 26 C W N 408 64 I C 864 35 C. L J. 53 : 192 Cal 28

——it is the duty of the court under this sec. to place th parties in the position which they would have occupied, but for such decree or such part thereof as has been varied or reversed 27 C. W. N 582 37 C L J 351 4 Pat L T 61 1923 M. W N 368 ; 69 I. C 278 · 25 Bom L R 653 1922 P C 269

——parties must be placed in the original position irrespective of any other rights accruing to any of the parties during the litigation. 12 C W N. 642, 108 I C 111 1928 Oudh. 208, 10 I C 639.

——s. 144 gives no discretion to the court , restitution must be ordered as a matter of course to maintain *status quo*. 1928 Rang 293, 96 I. C. 804 1926 Lah 685

——this sec is not confined to cases when restitution is claimed on the reversal of the decree in first or second appeal , this sec. applies wherever the reversal or variance has been effected 1922 M. W. N. 186 16 L W 587 1922 M. 70 65 I C 797.

——restitution of amounts paid and interest on costs follow as a matter of course under this sec. inspite of the fact that there are no express directions to that effect in the order of His Majesty in Council. 26 A. L. J. 587 : 1928 All. 293, 7 Lah 232 · 93 I. C. 954 : 1926 Lah. 483.

——s 141 applies to restitution proceedings 20 A. L. J. 226.

——s. 144 does not cover relief in respect of acts done before the decree and not under the decree 4 Lah. L J 333 : 68 I. C 807

——where the applicant was not in possession of the property before suit and therefore where no property was taken out of the possession of the applicant s. 144 had no application. 51 C. 324 : 81 I. C. 571 : 1924 Cal 769.

S. 144. Scope of the sec.—*contd*

——but restoration can be ordered although the plff. did not take possession through the court 23 C. L. J. 411 33 I. C. 505, 28 Punj L.R. 62 ; 8 Lah L. J. 551 . 1927 Lah 37, 8 Lah. 41

——this sec. does not apply where the original decree holds good. 1923 Oudh 16 : 72 I C 879.

——restoration against restoration ordered on the basis of the lower appellate court's decree or order is allowable 43 B 433, 492 F B. 16 M 287 *Dist.*

Inherent power of the court irrespective of the section.

——s 144 does not define the full measure of the power of the court to make an order for restitution, the sec is a guide to determine in what cases an order for restitution may be made to do complete justice to the parties by restoring them to *status quo* The executing court can, in its inherent power, make an order for restitution to prevent what would be essentially a miscarriage of justice even in cases not coming under s 144 (15 C L J 187 *Ref.*) The court has inherent power to recall money improperly paid 26 C W N. 408 . 35 C L J. 53 · 1922 Cal 28 : 64 I C 864.

——the court has inherent power of restitution irrespective of this sec 21 C. 989, 14 C 481, 28 A 665, 29 A 143, 41 M. 316 : 42 I. C. 835, 2 Pat L. J. 149 : 39 I C 22, 103 I C 657 1927 Lah 615.

——the court has inherent power to recall money improperly paid out. 26 C W N 408 ; 35 C L. J 53 1928 Cal 28 64 I C. 864.

——apart from this sec the court has jurisdiction to order restitution. 46 A 767 . 1924 All 713 22 A L J 673, 5 P. L T 553 . 78 I. C 410 · 1924 Pat 800 . 26 C W N 408 35 C L. J 53 · 64 I C. 864 : 1922 Cal 28. 41 I C 910

——the courts have inherent power under s. 151 to apply the principle of sec 144 to cases which are not strictly within its terms. 63 I. C. 43, 27 C W N 582 37 C L J 351 · 4 Pat L T. 61 1923 M. W. N. 368 69 I. C 278 25 Bom L R 653 1922 P C. 269.

——it is well settled that the court may in order to shorten litigation or t[illegible] take notice of events whic[illegible] ings and may [illegible] conditions 20 [illegible]

When the claim for restitution may be splitted up.

——where the application for restitution of property was allowed, a subsequent application claiming mesne profits was not held to be barred on the ground that the former application should have contained the claim for mesne profits. 3 Pat L J 367 47 I. C. 47 [illegible] for restoration of a sum of [illegible] bar a subsequent application [illegible] period for which the latter had [illegible] C. 806.

S. 144. When the claim for restitution may be splitted up—contd

——it has been held that a second application for restitution is substantially a continuation of the first and saves limitation. 19 A. L. J. 549 63 I. C. 184 3 U P. L R. 91.

"Any party entitled to any benefit by way of Restitution or otherwise"

(The applicant need not be a party to the appeal entitling restitution).

——it is not necessary that a person asking for restitution should be a party to the appeal If the appeal is in effect and substance in his favour he is entitled to the benefits arising out of the decree in appeal and the court may direct restitution of the property in execution 12 C W N 642, 93 I C. 1042 ; 1927 All. 182 This is specially the case where the decree appealed from proceeds on a ground common to all the piffs or to all defts. 18 M. L J. 39.

(An assignee of a decree can claim restitution).

——the assignee from a decree-holder is his representative within the meaning of s 244 (Old) and is a party entitled to the benefits by way of restitution or otherwise under the decree within s 583 (old) 33 C 857 3 C L J 192

(A stranger auction-purchaser can apply for restitution)

——where in execution sale property was sold and purchased by a stranger and the sale proceeds were rateably distributed amongst the creditors, and subsequently certain claimant who unsucessfully intervened in the execution proceedings obtained a decree for possession against the auction-purchaser and the latter applied for refund of purchase money distributed rateably, held neither s 144 nor s 151 authorised the court to order refund 42 M L. J 308 1922 M. W. N 255 : 1922 Mad 228 15 L W 303 67 I C 369, 3 Rang. 251 : 89 I. C 603 . 1925 Rang 215

(When the Jt Dr. can apply.)

——where an execution sale was confirmed in India but set aside by the Privy Council after a lapse of a year and in the interval the auction-purchaser had obtained possession and paid off certain incumbrances and then the Jt. Drs applied for restitution under s. 144 and the auction-purchaser claimed refund of the purchase money and value of the incumbrances discharged held (1) that Jt Drs. were entitled to possession only on their payment to the purchaser the amount of the purchase money less the mesne profits enjoyed by the purchaser (2) that the interest on the mesne profits would be set off against the interest on the purchase-money (3) that as the purchasers discharged the incumbrances of their own accord and without any order of court they were entitled to the benefit of the security but not to a refund of the amounts as a condition precedent of their surrendering possession. 1922 P C. 269 : 49 I A 351 : 27 C. W. N. 382 : 37 C. L. J 351 - 4 Pat. L. T. 61 : 1923 M. W N. 368 : 69 I. C 278 : 25 Bom. L. R. 653 P.C.

S. 144. "Any party entitled to any benefit by way of Restitution or otherwise"—*contd.*

——where sale is set aside in appeal reversing the order of the lower court under Or. 21 r 90 the J. Dr. cannot apply under sec. 144 as no *decree* was varied or reversed 41 M 467: 47 I C. 628. So also where the decree is neither varied nor reversed but the sale only is set aside under Or. 21 R. 92, this section does not apply, but the Court may grant restitution in the exercise of its inherent power. 2 Pat L. J 2v6: 39 I C 653.

——but the Jt Dr is entitled to restitution under this section when the sale is set aside in a proceeding in which the auction-purchaser is a party. 18 N. L R 24: 1922 Nag 82 64 I. C 732

——where after an auction-sale the decretal amount is reduced by the decision of the appellate court, and some of the properties sold in several Items are found not necessary to be sold if they were put in a different order and reserved to be sold last, held that there was no case of restitution as the position of the Jt Dr. as regards sale of those items were not affected by the variation in the decree. 42 M L. J 315: 1922 M W. N 141: 1922 M. 96. 16 L W. 355: 68 I C 516.

——where a decree was reversed in appeal and consequently the execution sale set aside, the deft. was entitled to restitution of mesne profits, interest and commission paid to the auctioneer, 6 L L. J. 142.

——restoration may be allowed to the deft when his property has been sold away as the property of the plff on the basis of the decree of the lower court and has been purchased by the outsider. 27 C L J. 489.

(*Restitution to defendant*)

——order as to cost being reversed on appeal the deft. is entitled to the restitution of the cost with interest thereon 19 A L. J 771. 3 U. P L R 12h 63 I. C. 513

——deft. being successful in appeal, may ask for possession *through* court, 17 C W. N 240 n., 23 C. L J 411.

——an appellate court can direct refund where a Subordinate Court mistakenly orders payment to decree-holder, when that order is set aside 21 C L. J 624 30 I. C 49, 18 C. W N 1299 22 I. C 839

——restitution is to be granted though there is no such direction in the decree of the appellate court 9 C W N 381. 13 B 45, 18 A. 262. It is not merely a matter of discretion with the court but is a matter of legal effect. 33 C 927 934, 942

Against whom restitution may be allowed and against whom not.

(*Auction-purchaser.*)

——where the decree-holder is the auction-purchase at a sale in execution of a decree which is subsequently set aside, restitution must be allowed against him under this section notwithstanding that the decree holder has subsequently to his purchase settled the

S. 144. Against whom restitution may be allowed and against whom not—*contd*

land with a tenant 24 C. W. N 50 (In this case objection to defect of parties was not timely taken)

——as a matter of policy the court has a tender regard for honest purchasers at sales held in execution of its decrees though the decrees may be subsequently set aside where those purchasers were not parties to the suit and the decree had been passed without jurisdiction. But the same measure of protection is not extended to purchasers who are themselves the decree-holders, nor can purchaser from such decree-holders claim that the Court owes them any duty or to be within the policy which prompts the extension of protection to the strangers since they have bought from one whose title is liable to be defeated 20 C W N 667, 15 I A 12 10 A. 166 *Rel.*

——the assignee from the decree-holder who has purchased property in execution of his own decree is in no better position than his assignor 20 C W N 667, 15 I A, 12 10 A 166 P C, 30 M. 295, *not approved*

——where a decree is set aside subsequently to a sale in execution of the decree, the sale will be cancelled if the purchase has been made by the decree-holder but not when the purchaser is a stranger The sale will also be cancelled when the purchaser though not the decree-holder is one who was a party to the proceeding 19 C. W. N 537

——restitution cannot be ordered under s 144 as against a *bona fide* auction-purchaser at auction sale held by a court having jurisdiction to hold the same 79 I C 57 38 A 240 34 I C 303

——the sec does not allow restitution to be made against a third party and does not apply where the auction purchaser is not the decree-holder A suit for restitution is not barred by the sec when the plff is not a party to the decree 75 I C 238 (A), 38 A 240: 34 I C 103 14 A L J 302, 39 A 47 36 I C 281 14 A L J. 846, Dist 1925 Lah 176

——restitution under this sec cannot be had against a third party such as a stranger auction purchaser I. R 4 A 526: 75 I C 238 39 M L J 497 31 I C 760, 16 O C 225 21 I C. 570, 1925 Lah 176

——the protection which is given to a *bona fide* purchaser should not be extended to a party to a suit even though he gets no benefit directly under the decree 48 M 767 91 I C 16 49 M L J 452

(*stranger*)

——a D Hr attached property in execution, a stranger filed suit for declaration of his title in which a Receiver was appointed and the suit was finally dismissed, the D Hr cannot get restitution of this property under this sec. but must bring suit 1924 A. 64: 73 I. C. 602.

(*Persons acquiring title for plaintiff*)

——when an *exparte* decree is set aside the deft. is entitled to restitution not only against the plff. but also against all persons who

S. 144 Against whom restitution may be allowed and against whom not—*contd*

have acquired title from the pltf. 2 Pat. 277 · 1923 P. 371 : 1 Pat L. R 338 ; 1923 Pat. 1 : 72 I. C. 912.

(Surety).

— [illegible] sentatives but does [illegible] restitution cannot [illegible] A 228 42 A. 158 : [illegible] I. C.

Place the parties in the position etc.

——the word "parties" used in the sec does not mean parties to the suit but parties to the application. The sec is very wide in terms, it includes matters which an execution court or appellate court could not ordinarily deal with Proceedings under this sec. are not proceedings though they are in the nature of proceedings in execution. 44 A. 555 . 20 A L J. 456 : 66 I C. 545 . 1922 All 238

——the person against whom restitution is sought for cannot plead his rights acquired during the pendency of the litigation in some other capacity, by way of defence, his remedy to establish such rights is by independent suit 108 I C. 111 . 5 O. W. N 162 : 1928 Oudh. 208, 12 C W. N 642

"Decree is varied or reversed."

——where the suit is set aside in appeal reversing the order of the lower court under Or 21 R 90 the Jt. Dr cannot apply under this sec. as no decree was varied or reversed. 41 M 467 47 I C. 628 Similarly where the decree is neither varied nor reversed but only the sale is set aside under Or 21 R 92, this sec. does not apply, but the court may restitute in the exercise of its inherent power. 2 Pat. L. J 206 : 39 I. C 653,

Sub sec. (2) Bar to regular suit.

——the application for restitution is no longer one for execution of the appellate decree and a separate suit is barred by the sub sec. The court is empowered to make such order as is deemed proper for restitution and the order, if not obeyed, may be enforced as a decree. 38 A. 163 ; 43 I. A. 43 33 I. C 505 P. C. 40 B 194 . 31 I. C 305.

—— [illegible]

s. 144 th[illegible]
successf[illegible]
which in [illegible]
1922 A 465 . 20 A L. J 636 . L. R 3 A. 408

——if the compensation claimed is not consequential on the variation or reversal of the decree, a separate suit for such compensation will not be barred *above case.*

[illegible]

S. 144. Sub-sec. (2) Bar to regular suit—*contd.*

——where the property cannot be restored the original D Hr. must be made good to the loss L. R. 3 A. 443.

Defect of parties.

——the liability to make restitution being joint, in the absence of some of them the claim must fail as against all. 2 Pat. L T. 234 · 60 I. C. 722.

Jurisdiction of the court to allow restitution.

——when the damages claimed exceed pecuniary jurisdiction of the court, the court can award such damages. 13 B. 485

——where the original court has ceased and a new temporary court is established that court is the court of first instance within this sec.; it is used in contradiction to court of apeal, 13 L. W. 67 : 61 I. C. 962, 1926 M. W N 395 95 I. C. 587 : 1926 Mad 813

——the sureties not being parties to the suit or their representatives ss 47 and 144 do not apply 42 A 158 : 38 M. L. J. 302 · 13 L. W. 82 18 A. L. J. 263. 22 Bom. L. R. 521 : 55 I C. 550 P. C.

What the court may allow in restitution.

——In restituting court may order for *refund* of *costs* : 1 C. W. N 196 n for the payment of *interests* 3 C 161 P. C. 20 A. 430, 18 A. 262, 9 M. 506, 35 B 255, for the payment of *damages.* 13 B 485, for the payment of *compensation* and *mesne profits.* 21 C. 989, 14 C 484, 31 A. 551 P C 31 A 79, 24 M. 341

——mesne profits can be granted by way of compensation 21 C. W. N. 50, 18 C. W. N 1299.

——the court has inherent power to award mesne profits to the D. Hr for the period during which he has been kept out of possession by the court's order staying execution 63 I. C. 43.

——where there was no claim for mesne profits in the plaint and there were other remedies open, the court had inherent power to disallow mesne profits by way of restitution 39 M L. T. 94 : 104 I. C. 768 : 1927 Mad. 898.

——where in a suit for specific performance of contract only damages for breach of the contract was allowed and the deft deposited the amount in court but the plff who neither took the money nor communicated his refusal, appealed and was successful and applied to the trial court for recovering certain amounts out of the sum deposited by the deft, *held* that the deft, was entitled to have the interest claimed by way of restitution in as much as the paintiff retained the benefit of the payment in court by the defts during the pendency of the appeal. 87 I. C. 713 : 27 Bom. L. R 485 : 1925 Bom. 313.

——if the damages claimed be too remote they do not come within the purview of the sec. 95 I. C. 630.

——where the Privy Council reversed the decree of the H C. and restored the decree of the trial court which dismissed the suit with costs and awarded interest thereon, but made no order as to

S. 144. What the court may allow in restitution—*contd.*

interest on the cost of the H C. the deft. was not entitled to interest on those costs. 63 I. C. 709, *contra* 26 A L J. 587 : 1928 All 293, 7 Lah. 232 - 93 I C. 954 : 1926 Lah. 483.

Procedure.

—the practice of using the forms prescribed for execution of a decree in application for restitution is not suitable. 19 A L J 549 - 63 I. C. 184 : 34 P L. R 91.

—restitution resembles execution only superficially. 3 Pat. 371 : 78 I C 200 - 1925 Pat 1 F B

[illegible] proceedings in execution [illegible] 102 I C. 614 6 Pat 252 [illegible] *contra* an application for [illegible] 51 M L J. 161 . 95 I C.

Appeal.

—an order under this sec [illegible]

—an order passed under [illegible] there is a right of second appeal [illegible]

—an order refusing restit[illegible] purchaser who is not a party [illegible] Lah. 176.

—where one of the issues was whether s. 144 applied, the [illegible] 73 I. C. 692

[illegible] P C. [illegible] C. P. C are not proceedings in [illegible] P. C applies to them 44 A. 407 [illegible] 223, 40 M. 780 *Diss.*

Limitation.

—an application under [illegible] of a decree and is governed by [illegible] L. R 480 62 I C 233, 19 [illegible] I. C. 238, 2 Pat 277 . 1 Pa. [illegible] 1 - 72 I C 912, 3 P. L. J. 367 : 1918 P. R. N 67 of 1912 *Dist. contra see below.*

—*contra* [illegible] application for execution and Art 181 and not Art [illegible] 6 Cal. 981, 1924 Pat. 33, 21 C. W [illegible] 151, 38 A 339, 42 M. 753 F. B, 2 [illegible] r. L T. 165 30 I C 680, 3 Pat 371 - 78 I. C. 200 . 1925 Pat. 1 F B, 43 B 235 : 48 I C 130, 3 Pat. L J 367 - 47 I. C 47.

—application for restitution of costs under the order of the Privy Council is governed by Art 182 L Act. 61 I. C. 806.

—where a decree reversing that of the trial court is affirmed in second appeal limitation for restitution runs from the date of the decree in second appeal. 1926 Cal 981 : 92 I. C. 960.

—a second application for restitution is substantially a continuation of the first and saves limitation. 19 A. L. J. 649 : 3 C. P. L. R. 91 : 63 I C. 184.

S.144. Court-fees

——an application under this sec for mesne profits by way of compensation relates to execution, discharge or satisfaction of the decree and in appeal from an order dismissing the application *ad valorem* court fees need not be paid but only a sum of as 8. 12 N. L R. 15 . 1922 Nag. 62 . 67 I C. 225, 1922 Nag 198 ; 67 I. C. 319, 13 B. 485, 28 M. 355, 45 B 1137, 25 A 441

——court-fees in appeal 47 A. 98 : 22 A. L. J. 881 : 1925 All 713.

§ 145. ENFORCEMENT OF LIABILITY OF SURETY.

Application of the sec.

——this sec deals with the execution of a decree ordered against a surety and with the question of refund of a sum deposited by the surety 95 I C. 139 1926 Lah. 544.

——the liability under this sec. attaches only in the case of a person who is surety for the payment of any sum under the order of the court and not a surety liable to pay owing to default, 97 I. C 787 . 1926 Mad. 1005 ; 51 M. L. J. 239 : 1926 M. W. N. 681.

Liability of surety

——a surety bond must be construed strictly, because a surety cannot be liable except to the extent to which he is clearly bound 52 B 72 30 Bom L R. 19 . 107 I C 710 · 1928 Bom. 42

——this sec. applies where the surety makes himself personally liable and not when he deposits security 19 C W. N 961 : 29 I C. 149, 54 C. 1 30 C. W. N 683 : 95 I C 908 : 1926 Cal. 889.

——when the surety hypothecates his own properties this sec. applies. 38 A. 327, 17 A. 99, 42 A 158 : 55 I. C. 550 P. C. 45 A 649 : 74 I. C. 927

——a surety for receiver is also liable to pay the sum which he has bound himself to pay. 13 Bom L R. 91 · 59 I C. 844

——s 145 applies to cases where the liability of a surety is incurred independently of the decree and is not contained in or declared by the decree itself which is sought to be executed 103 I. C 449.

How the security can be enforced.

——security bonds hypothecating immovable properties as security for the due performance of the decree can be enforced [illegible] where the equity [illegible] e primary person [illegible] and this sec. is [illegible] . C 927 : 1924 All [illegible] *Ref.* 50 B. 339 :

[illegible] ıg security both agreed that the security over the immovable property might be realised by means of execution and no separate suit was necessary, it is open to the decree-holder to proceed against the security in execution. 54 C. 1 : 30 C. W. N. 683 : 95 I. C. 908 : 1926 Cal. 889.

S. 145. How the security can be enforced—*contd.*

——the relationship between the decree-holder and the Jt Dr. who has executed a security bond under Or 41 R. 5, charging certain immovable properties for the due performance of the decree or order that may ultimately be passed in appeal, is not that of mortgagee and mortgagor and the appeal being dismissed the decree-holder is entitled to realise his decreetal amount by sale of the property without instituting a separate suit under s. 67 T P. Act. 51 C. 150 : 1924 Cal 485, (41 M 327, 42 A 158 38 M L. J. 302 : 55 I C. 550 P C. *Rel*

——the above P. C. case of 42 A 158 is authority for the proposition that although the case does not come within the terms of s 145 C P. C. the court has the inherent power to enforce its bond without recourse to a suit. When the question was whether the sureties who had executed a bond undertaking to produce, when called upon, the property of the judgment-debtor which had been attached in execution, could on default, be proceeded against in execution or be sued against, held that the security bond could be enforced by way of execution apart from the provision of s 145. 97 I. C 787 : 1926 Mad. 1005 1926 M W. N. 681 . 51 M L. J. 239.

——a surety for restitution by way of mesne profits pending appeal is not released by the disposal of that appeal Sureties not being parties to the suit or their representatives, ss. 47 and 144 do not apply But they are liable for the amount decreed in presence of the parties and the amount is recoverable not by separate suit but on an application to the court 42 A 158 38 M. L. J. 302 : 18 A. L. J. 263 . 22 Bom L. R. 521 13 L. W. 82 55 I C 550 P C.

——where a surety undertakes to pay the decretal amount if it is not realised from the judgment debtor, before proceeding against the surety the court should satisfy itself that this decretal debt cannot be realised from the principal debtor. 102 I C. 710.

——there is no warrant for the proposition that it is only a security bond in favour of the court that can be executed against the surety under this sec 53 C 515 : 30 C. W. N. 609 . 43 C. L. J. 493 : 95 I C 483 1926 Cal. 877

——where on the execution of a surety bond the Jt. Dr was released after arrest and his application for insolvency having been dismissed notice was given to the surety for the production of the Jt. Dr. held that the surety making himself liable for the performance of the decree or any part thereof the decree-holder was entitled to enforce the bond by executing the decree in execution proceedings which is in no
tion proceeding in which the
missed for default. 5 Pat L

——where a person beco
decree being set aside aga
might be passed on appeal and execution may proceed against the surety within 3 years of the appellate decree. 44 B. 34 : 53 I. C. 187, and no separate suit is necessary. 26 C. 222.

S. 145. How the security can be enforced—*contd.*

——but surety bond for the performance of a decree or for restitution in case the decree is reversed, is enforcible by a regular suit and the obligee need not enforce the bond by a proceeding in execution, 36 B 42 13 Bom. L R. 909, so also a bond passed by surety under Or. 32, R 6 (2) cannot be enforced by summary process under this sec, it can only be enforced by a suit. 41 M. 40 : 39 I. C 928, 33 M. L J 472 60 I C 134

——the court has discretion to refuse execution against surety 46 B 702 23 Bom L R 1263 64 I C 648

——where the property attached in execution of a decree is made over to a person for safe custody and production in court on his executing a bond with sureties, on failure of the production of the property D Hr cannot enforce the bond His remedy is to get the bond assigned by the Judge to himself and sue upon it 39 M. L J 472 1920 M W. N 784. 12 L W. 329 : 60 I C. 134, *contra* 19 A L J 247. 63 I. C 719,

Surety under the Guardian and Wards Act

——the procedure laid down in s 145 C P C is not applicable to the case of a surety under the Gurdian and Wards Act. 89 I. C. 342

Application of security money.

——decree-holder is entitled to security money and not the Govt. 39 C 1049, 46 B 702 64 I C 648 23 Bom L R. 1263

——the money is to be appropriated towards the satisfaction of the decree and not given to the decree holder over and above the *decretal amount.* 25 C W N 36 59 I C 778.

Notice.

——notice to surety is a condition precedent to the execution of the decree or order against the security. 2 Rang 567 : 84 I C. 998 · 1925 Rang 135 but it may be given by the court to which the decree is transferred for execution 29 B. 29.

——simultaneous issue of notice and warrant does not vitiate the notice. 99 I. C. 518 : 1927 Lah 131.

Application of s 47 C P. C.

——a surety is to be considered as party within s 47 C. P C 38 C. 754, 28 Punj L. R. 525

——s 145 in express terms provides that the surety shall be deemed a party to the suit within the meaning of sec. 47 only for the purposes of appeal and by implication excludes the inference that he is a party to the suit or proceedings before the original court [illegible]

—— [illegible]

meaning [illegible]

in the [illegible]

1925 Lah 618 *contra below.*

——if the surety seeks to set aside the bond on the ground of fraud or undue influence, he cannot proceed by an application under this sec. but must bring a regular suit. 43 M. 325 : 55 I. C. 363.

S. 145. Release of surety.

——when the Jt. Dr. dies before the application by Dr. Hr. to enforce the surety to produce the Jt. Dr, the surety is released. 17 C. W. N 1241.

——surety for producing the Jt. Dr. comes to an end with the end of the execution case, but the surety in a claim-case continues. 22 C. W. N. 12 n

——liability of the surety ceases with the dismissal of the execution case 22 C. W. N 919, 14 C 757, *contra*, 5 Pat L. T. 336 . 81 I C. 702 : 1924 Pat 487.

——this sec applies only to cases of personal liability 23 C. W. N. 769, 19 C W. N. 178, 961. 41 M. 40, 327 9 C W N 372 32 C. 494, *contra*, 38 I. C 13 (Pat), 1 P. L. W. 69 . 37 I C. 397.

——s 145 is no bar to a regular suit 23 C W. N 769, 30 C. 1060 : 7 C. W N. 914, 41 M 327, 55 I C 550.

——when a condition is imposed on a surety he can be compelled to fulfil that condition in execution proceedings under s. 145 without any second formal order being passed against the principal. 64 I. C. 430.

——w[illegible]
with the [illegible]
which he [illegible]
under the [illegible]
the Jt Dr [illegible]

——a surety is discharged by the death of the Jt Dr 41 C 50, 24 M. 637.

——where the sureties agreed to produce the Jt. Dr but failed without further notice, they can be made liable on their bonds. 1923 M. W N. 770

——D Hr can realise his dues from the Jt Dr without realising it from the surety 3 P. L J 176 43 I. C 454

——the liability of a surety ceases when the principal's debt is extinguished by an act which causes the merger of the estate of the debtor and the creditor. 44 M. L J 171 1923 Mad 340 17 L. W. 473 : 72 I C 194

——where the surety has renderd himself liable for any amount that may be decreed against the deft. the death of the principal debtor does not absolve him from liability. 71 I. C 46

Appeal

——an order under this sec is appealable. 19 C W. N 1085 38 C 754, p. 776.

§ 146. PROCEEDINGS BY OR AGAINST LEGAL. REPRESENTATIVE.

——an auction-purchaser under a simple money decree is a representative of the Jt. Dr. for the purposes of Or 21 r 98 against whom *proceedings under s. 146 can be taken* 1920 M W. N 787 : 12 L W. 350 · 59 I. C. 895.

——a transfer of a share of a decree makes the transferee a representative of the D. Hr. under this sec. and he can apply for.

S. 146. Proceedings by or against legal representati[illegible] —*contd.*

execution. 44 M. 919 : 41 M. L. J. 316 · 1921 M. W. N. 649 : 14 W 287 F. B.

——where a party dies after a suit is dismissed against him but before appeal, his legal representative can file an appeal with an application supported by an affidavit. 1 Mys. L. J. 46, 41 M. 510 : 48 I C 840, 20 O. C. 31 : 38 I C 511.

——the words "claiming under" are wide enough to cover even cases of devolution mentioned in Or, 22 r. 10, 76 I. C. 809, 48 I C. 840 41 M 510

——the legal representative is entitled under this sec not only to file a fresh suit or appeal but also to continue a suit or appeal pending 1926 M W. N. 287 : 1926 Mad 573 : 51 M. L. J. 10 93 I. C 831

——a transferee of a property covered by a decree can execute the decree though the decree itself has not been transferred. 76 I C 809.

——a private purchaser [illegible] set aside the sale under Or. 21 r [illegible]

——a purchaser may be [illegible] preliminary decree. 29 C L J [illegible]

——a transferee of the subject of the decree cannot execute the decree unless his name has been substituted. 1922 Pat. 256 : 3 Pat L T. 625, 1922 P. 562, 17 M. L J. 391 . 17 I. C 51[illegible] ; 30 I. C. 831.

——a private purchaser of properties after a court sale cannot apply under Or 21, r 89, to set aside the execution sale. *1924 M W.* N. 62 : 1924 Mad 470, 44 M. 554 F B. *Ref.*

——a transferee from an auction-purchaser is entitled to delivery of possession under Or. 21 r 95 C P. C, 40 A. 216 : 42 I. C. 936 : 16 A L J. 150.

——where merits are on the side of the appellant he can be allowed to appeal even though he is a transferee from a party after the decree. 40 I. C. 846 : 1917 M. W. N. 306.

——this sec. does not entitle a puisne mortgagee who is not a party to a suit by a prior mortgagor to apply under Or. 9. R. 13 to set aside an exparte decree passed in that suit. 92 I. C. 946 : 1926 Cal. 1015.

——the presentation of an execution petition by one of the surviving coparceners of a deceased decree-holder is not invalid so that the time taken up in execution would validly be deducted under s. 11 (3) of the Limitation Act. 51 B. 143 : 100 I. C. 619 . 1927 Bom. 123 : 29 Bom. L. R 75.

§ 148. ENLARGEMENT OF TIME.

The sec. recognises previous authorities.

——this sec. is legislative recognition of the rule laid down in 16 B. 263. 14 C. W. N. 882, 884, 12 C. L. J. 62.

S. 148. Enlargement of time by acceptance of fulfilment.

——accepting the fulfilment of a matter as though it was in time should be considered as if time was enlarged by the court, 20 C. W. N. 615 : 34 I. C. 625

Payment of court fee.

——the court can extend the time of filing deficit court fee after the time allowed has elapsed 12 C L J 62 16 R 263 13 C. L. J.

C. 890

is equal to

R. 22 : 78 I C.

479 : 1925 Pat. 299.

——once an order rejecting a plaint is set aside in review the court has full power to extend the time for payment of deficit court fee 26 C. W. N. 391 : 1922 Cal. 234 · 69 I C 43.

——but when time has been fixed by a decree for payment of court fee the court cannot amend the decree and enlarge the time. 27 C. W. N. 720 . 37 C. L. J. 395 : 1923 Cal. 612 : 74 I. C. 575.

Extention of period of limitation

——this sec. does not empower a court to extend the period prescribed by the law of limitation 4 Pat L. J 428.

——but when an application for execution is filed and returned by the court for amendment and refiled after period of limitation and is accepted, court acts under this sec. 20 C. W N. 615

——s. 148 empowers the court to extend time that has expired but it does not give power to the court to extend the time for the doing of an act which has already been done. 38 C 552 12 I C 13.

Extention of time of payment of money

——when *ex-parte* decree is set aside on condition of deft's paying a certain sum of money within certain time court has power under the sec. to enlarge that time, 36 A 77, 73 I C 648

——where an appellate decree fixes a time for payment of the decretal amount the lower court to which the decree is sent for execution cannot extend the time for such payment. 21 M L. J. 1018 : 10 M. L T. 284 1911 M. W. N 240 12 I C. 139

——when the appellate court's order enjoins the payment of cost within certain date and no penalty is fixed in default the time fixed may be extended by the court. 87 I C. 12 21 N L. R 111, but when the payment of cost becomes a condition to the acceptance of appeal the time fixed cannot be extended. 1925 Pat. 153

——when payment of the costs is a condition precedent to the withdrawal of a suit with permission to bring fresh suit, the court may extend the time under this sec, 5 Pat. 306 : 96 I. C. 942, 1926 Pat. 409 : 7 Pat L. T. 491.

Extention of time agreed upon by parties.

——where a comprom

an act and no assistance

extend the time, on any

66 I C. 273, *contra*. 23 C.

S. 148. Extention of time agreed upon by parties—contd.

——where a compromise is effected by parties for the depos of decretal amount in cour[illegible] extend the time, as time is th[illegible] parties. 6 Pat L. T 511 88

——time agreed upon by [illegible] amount of mortgage money proper case 23 C. W N 439 92 I C 822

Extention of time to apply for insolvency.

——where a judgment-debtor is *released* from arrest under 55 (4) C P C but fails to apply for insolvency within 30 days, th court cannot extend the period of one month as it is fixed by la[illegible] 1926 M. W. N 390; 95 I. C. 444: 1926 Mad. 689: 50 M. [illegible] J. 477.

Extention of time fixed by the judgment of the court.

[illegible] e, the court has [illegible] pow[illegible] 42 A. 639; 18 A [illegible] J 8[illegible] [illegible], 1922 Oudh. [illegible] 25 O[illegible] L. J. 511.

[illegible]

——the court cannot meddle with its *final decree*. 1926 M W N. 713 · 97 I C. 795 , 1926 Mad 1059.

——the sec. applies to proceedings before the passing of a decre and time for payment of money cannot be extended after the fin decree. 9 O. and A L. R 319 74 I C. 573.

——the time in conditional decree cannot be *extended* excep under reviews 1923 Lah 372.

——this sec. does *not apply* where time is allowed for doing a act by a decree of court 29 M 876, 15 C W. N. 685, 690, 35 A 5[illegible] 40 A. 579 47 I C. 4, *contra* 1 Pat. L. J. 92.

Pre-emption decree.

——this sec. does not apply to pre-emption suits. 73 [illegible] C. 891.

——the time allowed for deposit of the sale price in a pre em[illegible] tion decree cannot be extended under this sec. 19 N. L. R. 8: 19[illegible] Nag 210: 71 I. C 401, 35 A. 582, 1923 Lah 162; 71 I. C. 35, 64 I. [illegible] 242, 60 P. R. 1913.

——time fixed by decree under Or. 20 r. 14 for the payment [illegible] the purchase money in suit for *pre-emption* cannot be extended. 3[illegible] A. 582, 39 M. 876, *contra*. 36 A. 77.

Extention of time in redemption and foreclosure suit.

——extension of time of grace in redemption suit does not com under this sec 34 A. 388, 33 M. 876: 31 I. C. 240; 29 M. L. J. 708.

S. 148. Extention of time in redemption and foreclosure suit—*contd.*

—time may be extended in foreclosure decree. 8 N. L. J. 6 : 86 I C 397 : 1925 Nag 258, 82 I. C. 184 : 1924 All. 818 22 A. L. J. 791, but not in case of compromise, 92 I. C. 822 . 1926. Nag. 280. *contra* 23 C. W. N. 439 ; 50 I. C. 930.

Award

—the court cannot enlarge the term for the making of an award when time has expired and the award has already been made, 38 C. 552 12 I. C. 13.

Appellate court is proper court to extend time

—when the decree ordering the execution of a Kabulyat is appealed against, appliction for extension of time should be made to the appellate court 37 C 548

—when appeal is pending, the appellate court only can enlarge time for doing something within fixed time under order of lower court 37 C. 548

—when a certain point decided by the lower appellate court was not *appealed against by the party aggrieved, in time, but the* same point was allowed to be raised in an appeal admitted after time, the H C was deemed to have impliedly extended time for appeal. 43 M. 550 · 22 Bom L. R 568 . 28 M. L T. 28, 18 A. L J. 489 . 56 I C. 163 P. C.

Appeal and review

—no appeal lies from an order under this sec. 35 A. 582, 1923 Lah 162 : 71 I. C. 35. but the aggrieved party can apply in revision 1923 Lah. 162 : 71 I. C. 35.

§ 149. POWER TO MAKE UP DEFICIENCY OF COURT FEES

—unless there is mistake extension of time should not be allowed 41 C 1092 : 24 I C 276 · 18 C W N 1071, 44 I. C 398 75 I. C. 667 : 1923 Lah. 309, 67 I C 106 1923 Lah. 440, *contra.* The court has very wide power under sec. 149, 24 C L J. 38 ; 29 I. C 571 and the order is unchangeable in appeal 24 C. L. J. 88 . 29 I C 571, 27 M. L. J. 677 : 26 I C. 330, 56 I C. 47 (Pat)

—in case of *bonafide* mistake to pay full court fee the court can enlarge time 1923 Lah 629, 3 Lah L. J. 370, 84 I. C 946 · 6 Lah L J. 506 . 1925 Lah 246 *(appeal case)*, 92 I C. 319 : 1926 Lah. 509,

—the court [illegible]

S. 149. Power to make up deficiency of court fees—*contd.*

could not get stamp for the required value from the stamp ven and the next day he furnished the required stamp, held t

C. 1030 : 1924 Pat 66

ie plff for making g

45 A. 518 · 21 A.

I. C. 419, 38 B.

21 I. C. 337.

——the memorandum

plaint, so just as in th

court is bound to give

randum of appeal the cou

that Or 7 r. 11 cl. (c) is made applicable to appeals by sec 10 38 B 41, 21 A. L. J. 333 ; 1923 A. 349 · 74 I. C 757 *contra.* 3 P L J 74 42 I C 675, 27 M. L. J. 677 . 26 I. C. 33.

——where the appellant does not negligently make up deficiency pointed out before the appeal is barred he is not entit to the benefit under this sec. 21 P. W R. 1921: 59 I. C. 689, 4 P L. R 77 : 67 I. C 106.

106, 49 I. C 611, 5 P. L. J 74, 41 I C. 398, 1 Lah. 234. *Ref.*

——wher

fee the cour

C W. N. 720

——if an

dismissed the

18 : 18 L. W.

——when deficiency in a plaint is made good under Or 11 no question of limitation arises. 3 Pat. L. T. 142 : 1922 P. 89 I. C. 419.

Revision.

——the exercise of the discretion cannot be challenged revision, 89 I. C. 419. 45 A 218 . 69 I. C. 921 : 1923 All. 118.

§ 150. TRANSFER OF BUSINESS.

——application of the sec. when the business is transferred superior court. 37 M. 462.

——when the jurisdiction of subject-matter is transferred af

S. 150. Transfer of business—*contd.*

——to apply s 150 it must be shown that the business in question was transferred before the institution of the suit District Judge's order of distribution of civil court work has reference only to suits arising subsequent to the order and not to the decree or the execution thereof. The sec. is an enabling one. 6 Pat. L. J 304 2 Pat. L T. 347 : 1921 Pat 186 · 62 I C. 487.

[illegible] order can be punished only by the [illegible] N. 373, 26 C. W. N. 216 70 I C. [illegible]

[illegible] order can be punished for contempt by the court to which the jurisdiction is transferred. 46 M. 83 : 86 I. C. 650 : 1923 M. 92 : 43 M. L. J. 713 . 1922 M W. N 743. 26 C. W. N. 216 *Diss* 39 M. 967 *fol. contra*, 18 C. W. N 373, 26 C. W. N. 216.

——this sec applies to partial territorial adjustment of jurisdiction. 42 M L. J 344 · 1922 M. 10 ; 1922 M W. N. 349 31 M. L. T. 79 : 15 L. W. 458 46 M. 1 . 65 I. C. 727.

——on the transfer of territorial jurisdiction the court to which the jurisdiction is transferred may set aside an *ex parte* decree under Or. 9 r. 13, *above case*

——an assignment businenss under s. 13 (2) of Act XII of 1887 (Bengal and Assam Civil Court Act) is not the same thing as "transfer" of business within the meaning of this sec. So when the business of one court is assigned to another court that latter court cannot execute a decree passed by the former. 26 C W. N. 216 : 1923 Cal. 41 : 70 I. C. 210.

§ 151 INHERENT POWER OF COURT.

Nature of inherent power.

——the inherent powers of the court under this sec are such as are used to secure the ends of justice. *Quaere*, —whether this sec. [illegible]

When the inherent power can be exercised

——where there is no provision expressly providing for a remedy nor any prohibiting a remedy being administered and such remedy is called for in order to do that real and substantial justice for the administration of which the court exists, the provisions of this sec should be resorted to. 54 C. 405 : 31 C. W N. 576 . 103 I. C. 69 · 1927 Cal 534.

——an application for restoration of a prior application under Or. 9, R. 9 which is not maintainable as such can be treated as one for reviewing the prior order and relief can be give under this sec. *above case.*

S. 151 When the inherent power can be exercised—*contd*

——the inherent power is not limited to ss. *151 and 152 C. P C* 1925 Cal 420

——apart from s 151 the court has inherent power to correct its own mistakes 47 A 546 23 A L. J. 405: 87 I C. 225: 1925 All 622

——the court may *do what is fair and equitable in the absence* of express prohibition 48 M 494 84 I C. 134 : 1925 Mad 42.

——the court has inherent power to guard against an abuse of process 20 C W N 188, 24 B 467, 27 M. L J. 645, 652.

——the court can recall its order granting sanction to liquidator to sell privately, without notice to parties interested. *97 I. C. 295*. 24 L W 35

——the Code of Civil Procedure is not exhaustive. 34 C. 860, 17 A. 29, *31 and the court has inherent power to do real* and substantial justice 33 C. 927, 931 46 A. 144

——the court has *inherent* power to take cognizance *of question* affecting the subject matter of the controversy. 98 I. C 260 : 1927 Mad 143, 35 Mad 607 **P C** *fol*

——by *inherent power the court can stay cross suits* on the ground of convenience, 28 C W N 295 1924 Cal. 757, 33 C 927, 40 C 954, can add party, *35 B 393, 3 Pat L. J 409*, 33 C. 927, 40 C. 954, can apply the principles of *res judicata* to cases not falling within sec 11, 33 C 927, 40 C. 954, can stay proceedings pursuant to its own order subject to appeal, 5 C W N 781, can stay proceeding in the lower court pending the disposal of appeal, 2 Pat. L. T. 70 59 I C. 883, *can stay execution 40 C*. 955, can amend decrees and order not covered by sec 152, 19 C W N. 1021, can set aside an order obtained by fraud, *19 C W. N 419, 34 B 408, 27 M L. J.* 172, can rehear a matter, 37 C 259, can direct the refund of money withdrawn, 2 Pat. L J. 361, can restore execution petition dismissed for default 2 Lah 66

——a court has got inherent jurisdiction to restore a case if after an *inquiry it finds that the mistake was the mistake* of the court and not of the party, 108 I C. 603 . 1928 Lah 534.

——the court can stay a suit which appears to be *vexatious and* oppressive 25 Bom. L R 713

——the court has inherent power to stay proceedings of suit pending the *decision of a selected action and to stay a cross-suit* on the *ground of* convenience. 28 C. W. N. 295 1924 Cal. 757, 33 C *927, 40 C 965 Ref*

——the H. C. has power to order stay of suit to avoid multiplicity of proceedings. 93 I. C. 285 : 48 A. 356 : *1926 All. 212. 1924 All*. 446 ; 1924 All. 818.

——the court is justified in passing an *ex-parte* decree for nonpayment of *costs ordered*. 47 A. 538 : 23 A. L J. 212 : 86 I. C. 862 . 1925 All 280.

——*when a court restores suit under this sec. which* has been dismissed for default and which cannot be restored under Or. 9 r. 9 it does not act without jurisdiction. 63 I C. 440.

S. 151. When the inherent power can be exercised—*contd.*

——when the application is under s 151 for the ends of justice the question of *locus standi* can hardly arise. 28 C W N. 136 n

——when a property was sold for arrears of revenue and the purchase money was deposited in court and a mortgagee of the property sued on his mortgage and obtained an attachment before judgment of the money in court but the sale was afterwards set aside and the purchaser applied under s 151 C. P C. for the removal of the attachment over his money, *held* that the order was necessary in the ends of justice and no question of *locus standi* did arise 86 I. C. 882 : 1925 Cal 1145.

——under this sec. all courts have inherent jurisdiction to go beyond the law of procedure in the ends of the justice 48 A. 356 93 I. C. 285. 1926 All. 212. 24 A L. J. 375, 1924 All 446 *Rel. on*

——the court has inherent power under this sec. to apply analogous provisions of law where there is no specific provision, to prevent a failure of justice 44 M 919 41 M. L. J 316 1921 M. W. N. 649. 14 L. W. 287

——the court has inherent power to restore an appeal or application dismissed for default, for the ends of justice 45 B 648 23 Bom. L. R. 116 60 I. C 919, 95 I. C 260: 9 N L. J. 145. 1926 Nag 409.

——the court can investigate the correctness of a remand order though no appeal had been filed against it 1925 Pat 336

——it is an inherent power of every court to correct its own proceedings where it has been misled. 22 L W 629

——[illegible] der is purely [illegible] 9 Pat. L. [illegible]

—— [illegible] on certa[illegible] e confirmed by the court for [illegible] Pat 235. 1922 P. 511

[illegible] aside an order of dismisal for [illegible] fresh application under Or [illegible] on another application being [illegible] Or. 47, R 1 and s 151, it was held that it was a case in which the court could exercise inherent power under s 151 and that the previous Judge's order under s 151 was an error on the face of the record and the successor had jurisdiction under Or 47, R. 1 to set aside that order. 32 C W. N. 811.

——the court has inherent power to correct mistakes. 31 C. L J. 48. 56 I. C. 4, 19 C L J. 251. 19 I. C 916, 39 C. 265 14 C. L. J. 481, 15 C L. J 339 11 I. C. 102, 40 M. 259 37 I C. 414, F.B. 23 I. C. 950 : 13 P W R 1914, 37 I C 378.

——the court can rectify a decree to make it in conformity with the Judgment. 79 I. C 586 (C)

——obvious mistakes can be corrected by a court of its own motion 40 C. L. J. 24 : 82 I. C. 382 : 1925 Cal. 178

——the court can correct the mistake due to the accidental slip, under s 151 or sec. 152, 3 Bur. L. J. 47.

S. 151. When the inherent power can be exercised—*contd.*

——the court can allow the correction of an accidental mistake in the name of a party. 96 I. C. 11 : 8 Lah. L. J 393 : 27 Punj L R. 648

——the court has inherent power to rectify mistakes in judicial orders arising from the ignorance of the court, 69 I. C. 112 and to alter a decree to make it in conformity with the decision. 72 I. C. 679 : 1923 Lah 147.

——the H. C. has inherent power to consolidate appeals in proper cases. 1928 M. W. N 271 : 1928 Mad 463 · 54 M L. J. 595.

——the H C. can set aside wrong order of dismissal for default. 31 C W N 22 · 53 C 844

——dismissal of an application asking for an inquiry under Or 32, R 15 without any inquiry is an abuse of the process of the court and can be interfered by the H C. 50 A. 335 : 108 I. C. 141.

——the H C. can amend the plaint and decree so as to rectify a mistake in the description of the property. 1923 Pat 46 : 1923 P. 218.

——the H C. has ample power to transpose a respondent as an appellant on the application of the party. 44 C. L. J. 243 : 1927 Cal 37.

——the H C. has an inherent jurisdiction to take cognizance of contempt of a subordinate court 97 I. C. 108 : 24 A. L. J. 849 : 1926 All. 623.

——the H C. has an inherent power to grant an injunction in suitable cases irrespective of the provisions of Or. 39 C. P. C., 78 I. C. 802.

——the court has inherent power under this sec. to stay execution on receipt of an application for leave to appeal to the Privy Council pending the passing of orders on the application, 82 I C. 739.

——under the circumstances of the case the court can set aside an exparte decree under this sec 30 C W. N. 10.

——but where a suit which was dismissed under Or. 9, R 3, canno. be restored under R. 4 for want or sufficient cause for non-appearance, recourse cannot be had to s 151 to restore the same. 103 I. C. 620 : 1927 Pat. 369

——though a security bond does not fall under s 145, the court has inherent power to enforce the bond without recourse to suit. 97 I. C. 787 : 1926 M. W. N. 681 : 1926 Mad. 1005 51 M. L. J. 239

——the court can allow restoration under this sec. in cases that are not covered by s. 144, 75 I C. 858, 42 M L. J. 308, 35 C. L J 53, 42 M. L. J. 473 : 30 M. L. T. 173 : 1922 Mad 99 : 67 I C 516, 18 N, L R. 24 : 64 I. C. 732, 18 N. L. R. 152 : 64 I. C. 420, 31 C. W. N. 290 : 100 I C. 735 : 1927 Cal. 285, 28 Punj. L. R. 178 : 103 I. C. 328 : 1927 Lah. 346.

——the court has inherent power to order restitution if the interest of justice requires it. 5 Pat. L. T. 553 : 78 I. C 310, 35 C. L. J. 53 : 26 C. W. N. 408.

——apart from Or. 41, r. 23 an appellate court has inherent power to remand a case for the ends of justice. 73 I C. 915 87 I. C. 575 : 1925 Cal. 1157, 29 C. L. J. 419 : 52 I. C. 985, 40 C. 929

S. 151. When the inherent power can be exercised—*contd.*

21 C. W. N. 877 F B, 96 I. C 410 : 7 Pat. L. T. 811 : 1926 Pat. 516, 43 C L. J. 601 : 97 I. C 188 · 1926 Cal 1076, 9 Lah. L. J. 268 103 I. C. 854 . 1927 Lah. 480, 32 C. W. N 101.

——but when remand order can be made under some other provision of law the inherent power should not be exercised. 95 I. C. 169 · 1926 Lah. 537

——the court can reconstruct a lost record 46 M. 679 : 32 M. L T. 382 . 1922 M W. N 471 · 44 M L J 679 1923 Mad 647 : 18 L. W. 21 73 I. C. 1050 F B 16 M. L T. 399 : 26 I C. 244 38 M. 498 : 21 I. C. 467 : 8 C L J 521 11 C L. J. 243

——apart from the mandatory nature of s 144, s 151 gives power to order restitution. 96 I. C 804 . 1926 Lah 685, 46 B 235 *Dist*, 92 I. C 571 1926 All. 274

——when an application for execution is dismissed on default the court has inherent power to restore it without notice to the Jt. Dr. 87 I C 438, 95 I. C. 924 : 1926 Lah. 534.

——when an execution case is dismissed for default it can be restored under this section 1925 Cal. 184, 87 I C. 816

—— execution dismiss evives 68 I. C. 6

—— 4 Pat. L. T. 647 : 79 I. C. 668.

——but cannot restore a case dismissed for non-payment of court fee, remedy is in review 4 Pat. L. J. 261

——an *ex parte* order may be set aside under the sec 34 A. 518 10 A L. J. 140 : 16 I. C. 677, 38 I C 673 15 A L. J. 24, 29 I C. 673, 27 I. C. 812, 60 I. C 368 2 Pat L T 251, 62 I. C. 113 2 Pat. L. R. 270, *but with notice to party interested.* 17 C W. N. 862 16 I. C 567 43 M. 94 53 I. C 847 37 M L. J. 599 F B.

——an *ex-parte* order under Or 21 R 100 may be set aside under this sec. 47 C L. J. 87 107 I. C 729 : 1928 Cal. 179

——the court has power under the sec, to determine jurisdiction. 19 C. W. N. 84 20 C. L J. 213 · 26 I. C. 275.

——the court has inherent power to cancel an order under part 3 of Second Schedule to the C. P C. 6 P L. T. 488 86 I C. 540 : 1925 Pat. 720.

... of separate mahals

——where the compromise decree relates to matters outside the subject matter of the suit, the court has inherent power to execute the decree to prevent abuse of process 10 O. L J 443.

S. 151. When the inherent power can be exercised—*contd.*

——the court has inherent power to order refund of money withdrawn without right. 1922 Pat 53, and can allow refund of court fee 4 Pat L T 504 · 1923 P 600 · 73 I C. 405.

——though there is no provision under the C. P. C to transfer a decree out of British India for execution yet under s 151 it can send the necessary documents to the Foreign Courts to execute the decree under their own laws 13 Bur. L T. 145 : 61 I. C. 704

——for the ends of justice the H C. may in second appeal send the case back for retrial under this sec. 19 A L. J. 553 : 3 U. P. L R. 87 63 I C 501

When the inherent power cannot be exercised.

——the court cannot exercise inherent power as to matter forbidden by law When and how court can exercise such power discussed. 20 C L J 433, 33 C 927, 46 A. 631 : 1924 All. 668.

[illegible] remedy

p [illegible]
t [illegible]
P [illegible]

n [illegible]
power to set aside its own orders whenever it chooses to do so 4 Pat 704

——where the statute says that a thing should not be done s 151 cannot vest the court with power to direct that it should be done, but when there is doubt and difficulty in applying other provisions of the Code to a particular case s 151 can be applied. 4 Pat 180 . 1925 Pat. 435, 46 A 144 . 78 I C 416 : 1924 All. 446, 1924 Nag. 325.

——a stranger to litigation *cannot claim the protection* of the sec. 42 M. L J 563 : 1922 M W N 268 . 31 M. L. T 35 : 15 L. W. 686 68 I C. 910.

——This inherent power is not to be exercised capriciously or arbitrarily and is to facilitate that substantial justice for the administration of which alone the courts exist. 28 C. W. N. 295 : 1924 Cal. 757.

——where there is provision in the Code inherent power should not be exercised 44 C 929, 15 S L. R 61 : 63 I. C 131, 75 I. C. 198, 3 Pat 654 : 82 I. C. 813, 100 I C. 518 : 1927 Cal 420, 98 I. C. 70 : 1927 Cal 158, 28 Punj L R 554 · 103 I C. 425 : 1927 Lah. 622, 103 I. C 864 . 1927 Cal. 850 : 55 C 219 . 47 C. L. J. 69.

——this sec. was never meant to enable the court to contravene a distinct provision of law. 24 O. C. 215, 75 I. C. 198, 46 A. 144, 40 P. L. R. 1922.

——the court connot do what is prohibited by the Code. 3 Pat. 778 : 6 P L. T. 309 : 84 I. C. 320 : 1925 Pat. 36, 3 Pat. 654 : 82 I. C. 813 : 1925 Pat. 47.

——this sec. must be used very sparingly and only as the last resort. 5 N. L J. 265 : 1922 Nag. 125 : 67 I. C and not to evade law. 21 A. L. J. 447 : 1923 A. 603 : 73 I. C. 494.

S. 151. When the inherent power cannot be exercised *—contd*

——no order should be made under this sec. unless it is necessary for the ends of justice or to prevent abuse of the process of the court. 34 B 135.

——inherent power should not be exercised doing injustice to third person 20 N L. R 11.

——the court cannot introduce a new form of procedure not warranted by the Indian law 1922 Cal. 1.

——when the Code contains specific provision which would meet

[illegible]

——the court will not exercise inherent power where the party had other definite remedies open to him and he has failed to resort to them within the time allowed. 3 Bur. L. J. 47, 102 I. C. 543 ; 1927 Nag 262, 52 M L J. 670

——a judge has no power to exercise his inherent power in favour of a party who has a remedy by way of appeal. 27 Bom. L. R 1511

——the court cannot amend a decree which is in conformity with the judgment 101 I. C 142 . 1927 Lah. 403.

——when relief is obtainable by way of appeal there is no scope for invoking the inherent jurisdiction of the court 88 I. C 94 : 48 M. L. J 512 : 1925 Mad. 886.

——the inherent power of a court cannot be invoked to refuse to confirm a sale when the Code provides such a contingency only under Or. 21 rr 89 to 91 The fact that the property was since destroyed by fire is no ground for refusing to confirm a sale. 88 I C 693.

——inherent power should not be exercised in favour of a person absenting himself from court and unable to give satisfactory reason for his absence. 28 Bom. L. R. 686 : 50 B. 457 : 96 I. C. 411 : 1926 Bom. 377.

——the inherent power cannot be exercised to relieve a party from the consequences of his own mistakes or to enable him to evade the law of limitation. 43 M. L. J. 184 : 31 M. L. T. 135 : 1922 M. W. N. 514 . 1922 M. 417, 1922 Lah. 266 : 66 I. C. 270.

——where a period of limitation is fixed by law, a court cannot extend i[illegible]

—— [illegible] be rectified after three years s[illegible] 47 A. 304 : 22 A L. J. 1119 : 1[illegible]

——*the mere fact that there is no provision in the Code for* restoring an execution petition dismissed for default does not by itself warrant the application of the sec. 99 I. C. 954 ; 1927 Mad. 355 : 52 M. L. J. 123 : 25 L W. 192.

S. 151. When the inherent power cannot be exercised —*contd*

——where a compromise petition was filed and the court decided the suit in terms of the compromise it could not be set aside under this sec. on the ground of fraud. 23 A. L. J. 118, 42 M. L. J. 290

——the court should not exercise its inherent power to set aside a compromise decree on the allegation of fraud only. 46 A. 245 22 A L J 118.

——the court should not grant temporary injunction against Govt. Officers not subordinate to the court. 96 I. C 540 : 1926 Lah. 284 27 Punj L R 11.

——the court cannot entertain a suit relating purely to caste question as it is not of civil nature. 34 B. 467.

——the successor has no power to recall the perfected order of his predecessor. 1922 P 204

——where a subordinate Judge based his judgment on the Commissioner's report in a partition suit and an application for amendment on the ground of arithmetical error was made to *his* sucessor who made an enquiry and allowed the amendment under ss. 151 and 152, held that there was no arithmetical or clerical error which might be c[illegible] corrected in appe[illegible] could not take a[illegible] error. 44 C L. J [illegible]

——a portion of the claim cannot be decreed by inherent power *before the establishment of the right of the plff.* 2 Pat. L R. 159 : 5 Pat. L. T. 560.

——unless there be appeal or revision the H. C. cannot expunge the adverse remarks on the character and credibility of a witness from the judgment of the subordinate court. 44 A. 401 : 20 A. L. J. 261 : 1922 All. 107 . 66 I. C 1005.

——the effect of sec. is not to give absolute power to courts to summarily punish contempts by fine or imprisonment. 23 C. W. N. 389 · 50 I. C 981.

——the court cannot acting under this sec. set aside an *ex-parte* decree on the application under Or 9 r 13 being made out of time. 1922 Pat. 61 · 63 I C. 541, 43 M 94 F. B., 1 Pat. 277.

Application under this section may be dealt with as an application for review.

[illegible]

1924 Mad. 463 : 46 M. L. J. 543.

——but an application under s. 151 may be dealt with by the court as an application for review under Or. 47 r. 1, 43 M. L. J. 290 : 31 M. L. T. 132 · 1922 M. W. N. 495 : 16 L. W. 440 : 1922 M. 446.

——a petition under s 151 may be treated as one for review. 43 M. L. J. 290 . 31, M. L. T. 132 : 70 I. C. 425 : 1922 M. W. N. 495 · 1922 M. 446.

R. 151. Application under this section may be dealt with as an application for review—*contd.*

——a court has no inherent power to review a decree which was perfectly valid when it was passed. 89 I. C. 946. 23 A. L. J 1029, 3 Pat. 778 : 1925 Pat. 36, 3 Pat. 654. 82 I. C. 813.

Appeal.

——no appeal lies from an order under this sec 2 Pat. L. J. 361, 3 Pat. L. J. 253, 104 I. C 331 1927 Cal. 867.

——when after the setting aside of a court sale the court ordered restitution under its inherent powers, the order, though made under s. 151 C P C, is in fact on exercise by analogy of the jurisdiction under s. 144 C. P C, so an appeal lies from such an order 31 C W N 290. 100 I. C. 735. 1927 Cal. 285, 49 I A 351 P C. *Ref.*

——a remand order under sec. 151 is appealable. 1928 Cal. 218, 37 C. L. J 491 *Rel. on*, 31, C L. J 357 *Dist*

——where an appellate court remands a suit which was not disposed of by the trial Court upon a preliminary point, the order is one passed under the inherent powers of the court and not under Or. 41 R 23 and is therefore not appealable. 102 I. C. 28 · 1927 M. W. N 286, 96 I. C. 440 : 7 Pat L T. 811 : 1926 Pat 516, 92 I C. 684. 1925 Pat. 760, 73 I C 915, 87 I. C 575 · 1925 Cal 1157, 29 C L. J. 419. 52 I C 985, 40 C 929. 21 C W N 877 F.B., it is a subject of revision. 45 C. L. J. 557 : 104 I C 188. 1927 Cal. 657

——no appeal lies against the refusal of an application for setting aside an *ex parte* decree nor can time be extended under s. 151 1 Pat. 277. 65. I. C 341 · 1922 Pat 61

§ 152. AMENDMENT OF JUDGMENTS, DECREES &c.

Power of the Court to amend.

——the word "may" in the section does not make it discretionary with the court to order the amendment but merely enlarges the power of the court by providing that such correction may be made at any time, or in other words the section simply emphasizes that no lapse of time would disentitle the Court to make the correction 28 C. W. N. 873. 80 I C 55 : 1924 Cal. 895

——but under this sec. there is no right in any party to have a clerical [illegible] rrected The matter is left to the [illegible] rction has to be exercised in view [illegible] A 44. 82 I.C. 1030 1925 All 187. [illegible] lerical or arithmetical mistakes and cannot apply to a case where a party to suits has not been impleaded as party in the decree 97 I C. 338 8 Lah. L. J. 333. 27 Punj L R. 576 1926 Lah. 499.

——power of amendment under this sec. is discretionary and should not be exercised to effect the right of the third person. 43 M. L. J. 559 1922 M. W. N. 731 ; 16 L W. 623, 32 M. L. T. 98. 1923 Mad 57 : 69 I. C. 977.

——the sec. applies only to the correction of accidental slips or omissions. If the error is made deliberately, a court will not lend

S. 152. Power of the Court to amend—*contd.*

its aid to correcting the same and even accidental errors will be corrected if third parties have acquired rights under the judgm in the interval 78 I C. 96

——Or. 45 R. 13 does not restrict the operation of sec 11 C L J. 155.

——mistakes of law cannot be amended. L. R. 3 A 1.

——it is not competent to a court to amend the decree of anot court transferred to it for execution, even though the error n be obvious 1922 M 186, 15 L W. 301: 65 I. C. 710.

Court cannot amend when functus officio.

——when a decree for money has been finally satisfied discharged the court is *functus officio* and connot entertain an ap cation for amendment under this sec. 23 A L J. 518: 86 I. C. 3 1925 All. 556

——it is questionable whether a court would be justified making a correction which involved the payment of a larger s of money by one party to another long after satisfaction had b recorded and when nothing remained to be done and the decree l become dead 1926 M W. N 180

——where a property is sold in auction and made over to auction purchaser, the court cannot exercise its inherent po under this sec. to set aside the sale on the ground that the sale v ordered by mistake for a sum larger than what was due under decree 89 I C. 569: 27 Bom L R 657: 1925 Bom. 389

Amendment by successor in office.

——where a Judge delivers judgment and a decree is drawn conformity therewith *on the face of it*, the successor of the Jud cannot amend it so as to bring it in conformity with *the suppos real intention* of his prodecessor 96 I. C 195. 1926 Cal. 1100

——a clerical mistake can be amended by the successor in offi as the word used in the sec is 'court and "judge." 2 Pat L 296: 63 I. C. 840. 74 I C 110

When amendment should be allowed

——the court is empowered to set right its own decree a bring it into conformity with the judgment 37 C. 649, 12 B. 17 Bom. L. R. 909, 28 C. W. N. 873: 80 I. C. 55: 1924 Cal 895, 79 I C 5

——the court cannot vary or amend its decree when it is conformity with judgment. 22 M. 364 100 I. C. 142 1927 Lah 4 103 I. C. 284 *contra*, 1927 M. W. N. 38: 38 M. L. T. 24. 99 I. C. 65 1927 Mad, 435, not even if the judgment is erroneous in law. 20 A. 3

——apart from the power to correct clerical or arithmetic errors or to review judgment, a court cannot alter an order passed court. 74 I. C. 110 (c).

——where the amendment aims at something more than a me clerical or accidental error this sec. does not apply. 1927 M. W. 242: 103 I. C. 829: 1927 Mad. 720: 53 M. L. J. 38, (42 A. 277, 45 512, 43 M 423) Ref.

S 152. When amendment should be allowed—*contd.*

——when the whole system of calculation is challenged and on mere allegation of arithmetical or clerical mistake, the court purporting to act under this sec must be considered to have acted under Or. 47 r. 1 and appeal lies. 3 Lah. L J 341.

——where in a case a wrong sum is entered in the judgment itself [illegible]

——a mistake in the final form of an order may be due to an original mistake made by the party or his lawyer in making the application. That is not a reason for refusing to correct a mistake 78 I. C. 166 : 22 A. L. J 215 · 1924 A 520

——clerical error made in the plaint and repeated in subsequent documents may be amended. 14 L W 445 : 63 I C. 652, 73 I C. 674.

——the court should amend a misdescription in the plaint which has caused an error to creep into the record. 21 A L J 328 1923 A. 349 : 72 I. C. 483

——the court can add a necessary direction in its judgment accidentally omitted, after the judgment is signed. 97 I C 386 1927 Pat 25 1926 P H C C. 323.

——omission of some mortgage property from the plaint and decree through oversight may be corrected 74 I. C. 1020

——an obvious mistake may be corrected by the court of its own motion 40 C L J 24 . 82 I C 382 : 1925 Cal 178

——the court can correct an error in the judgment that a certain party being a *pro forma* deft was not liable to pay costs. 97 I. C 66 . 1926 Lah. 664.

——Or. 45, r. 13 does not restrict the operation of sec. 152, 11 C. L. J. 155

——where a Judge added a few words to make the decree clear but it appeared that even otherwise the decree was in conformity with the judgment, there was no alteration to make it a new decree 44 C L J. 121 97 I. C. 1003 : 1926 Cal. 1166

Amendment in Case of appeal.

——a trial court cannot amend the decree of the appellate court which is only decree in the case, 63 I. C 799, but the appellate court can amend the decree of the trial court 19 A. L J. 375 : 62 I. C. 910

——when an appeal is pending the trial court can amend the decree. 2 Pat L. R 6, 18 C W N 772, 48 A 224 : 92 I. C 264 1926 All. 309, but cannot modify the decree or extend the time for the execution of a *Kabulyat* 14 C. W. N. 584 : 37 C, 548 · 6 I. C 275.

——when a judgment has been affirmed by the first and the second appellate courts, the original court cannot amend the decree under s 152 The only court that can amend the decree is the High Court. 14 C. W N. 667 11 C. L J 560 6 I. C. 669 P.C., 11 C. L J. 153, 24 C. 759, 11 C. L. J 153 *fol.*, 24 B 548 *not fol.*

——it is settled law that after a decree has been confirmed, reversed or varied in appeal the decree of the Appellate Court is

S. 152. Amendment in case of appeal—contd.

the only decree, and if any amendment is to be made the a tion must be made to the Appellate Court. 11 C. L. J. 155, 11 18 B. 542, *fol.* 63 I C 799.

——a trial court can amend its decree even though the therefrom has been dismissed for default, 86 I. C. 396 · 23 518, 1925 All 556, 18 C. W N 963 P.C. or even if the appeal ing 2 Pat L R 6 78 I C 794, 18 C. W. N. 772.

No amendment in case of compromise decree.

——when a compromise decree is erroneous only, reme bring a suit to set it aside either on the ground of mistake or or some other ground *ejusdem generis.* 4 Pat. L J 205 ; 50 I

"At any time"

——there is no time limit to amend a decree to make it formity with judgment 28 C. W N 873 · 80 I C 55 : 1924 Cal

——the court can correct errors in judgment and decree moment when those mistakes are due to clerical mistakes plaint or other proceedings They may be rectified if real pc issue are not affected. 66 I. C. 693

——the court should amend even if applied at a late s decree passed against a legal representative making him per liable 1923 Bom 414.

——mistake in calculation up to the date of paymen redemption suit may be corrected at any time 74 I. C. 842.

——decree was allowed to be amended after 10 years 12 although it has been held that a decree enforced for five cannot be amended 1932 Nag. 109

——time for review being over no amendment should be a affecting personal liability. 15 L W. 393 1922 M. 192

——laches may also in the particular circumstances of t disentitle a party to relief under this sec. 47 A. 44 : 82 I C 1925 All. 187.

——a decree should not be amended after recording satis 94 I. C. 453 50 M L. J 655 1926 Mad. 516 · 1926 M W. N. 18

Appeal.

——no appeal lies from an order directing amendment. 28 16 M 424, 97 I C. 66 : 1926 Cal 664. Though no appeal lies fr order of amendment it has been held by the Madras H. C an appeal lies from the amended decree, 24 M 646 and whe whole system of calculation is challenged and no mere alle of arithmetical or clerical mistake, the court purporting to act this sec. must be considered to have acted under Or. 47 R. hence the order is appealable. 3 Lah. L. J. 341 : 66 I. C. 992.

S. 153. GENERAL POWER TO AMEND.

——this sec. gives the court general power to amend for the purpose of determining the real question or issue 1 Pat L J 393.

——s. 153 allows the court to give leave for amendment at any time in any proceeding in a suit. 25 Bom L R 888 . 77 I C 171

——obvious mistakes may be corrected by court of its own motion 40 C L. J 24 32 I C 382 1925 Cal 178.

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——in rectifying obvious mistake in the decree there is no limitation. 2 Pat L. T. 281

——misdescription of the mortgaged property may be amended by the appellate court 20 A. L J. 159 1922 All 81 · 66 I. C 208.

——amending a sale certificate without giving notice to the Jt Dr and other persons interested, is a material irregularity. 1922 M. W N. 130 . 16 L. W. 760 : 1922 Mad. 63 . 65 I C. 732

——overrating a suit to get round a previous decision is an abuse of the court. 83 I C 1 : 1925 All 142

——where in a suit on a mortgage the name of the village in which

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——upon the dismissal of an application for execution the attachment of property ceases and a subsequent petition only for sale is defective, but this defect can be remedied by amendment under s 153. 55 I. C. 883 1 L W 665

——want of signature and verification does not entail rejection of the plaint as they can be supplied at any stage. 25 M L. J. 174 · 17 I. C 580 : 1912 M. W N. 1207

——where the valuation in a subsequent suit was deliberately inflated

(civil).

——want of signature and verification does not entail rejection of the plaint as they can be supplied at any stage. 17 I. C. 580. 25 M. L. J. 174 : 1912.M W N. 1207

——upon the dismissal of an application for execution the attachment ceases and a subsequent petition only for sale is defective but the defect can be remdied by amendment under s. 153 C. P. C. 25 I. C. 883 : 1 L. W. 665 . (M).

S. 153. General power to amend—*contd.*

——where an appeal has been filed against a dead person his legal representatives can be substituted by way of amendment under this sec In such a case the court should not dismiss the appeal as incompetent But the appeal will be treated as presented against the legal representative on the date of the amendment. 49 M. 18: 1925 Mad. 1210 49 M. L J 590 F.B., (1923 M. W. N. 408: 75 I. C 739 1924 Mad. 56 45 M L J. 231) *overruled*.

Or. I. RR. 1—13 PARTIES TO SUIT

Subheadings of Notes

(1) General
(2) Account suit
(3) Appeal
(4) Contribution suit
(5) Declaratory suit
(6) Easement suit
(7) Mortgage suit
(8) Partition suit
(9) Partnership suit
(10) Suit against joint wrongdoers
(11) Suit between landlord and tenant
(12) Suit relating to public matters
(13) suit under the Hindu Law

(1) General

(A) Application of Or. I, RR 1—3,—when joinder is allowed
(B) Non-joinder
(C) Objection to non-joinder
(D) Effect of non-joinder
(E) Transposition of party
(F) Distinction between proper party and necessary party
(G) Misdescription of deft.
(H) Suit by or against wrong person
(I) Suit and execution of decree against dead person
(J) Suit against some if binds others
(K) Adding or substituting a party as plaintiff.
(L) Adding a party as deft on his prayer
(M) Effect of allowing a person to be added as party who is not proper party
(N) Suit by co-executor
(O) Prosecution of suit on behalf of other

(A) Application of Or. I, RR. 1—3 —when joinder is allowed.

——Or. 1, rr. 1 to 3, apply to questions of joinder of parties as well as causes of action. 21 C W. N 794 (34 B. 358 28 B 120), *Diss.*

——as to joinder of parties the question is whether the right to relief arises out of the same act or transaction and does any common question of law or fact arise 33 C. L. J. 369: 63 I. C 244, 45 C. 111 *Ref.*

Or. 1. General—*contd.*

——Or. 1, r. 3 is very wide, one question common to all the cases would suffice. 25 P. W. R. 1921 · 59 I C. 522.

——a single suit by two sets of plffs. asking for alternative relief is maintainable. 43 M L. J. 277: 1922 M. W. N. 316: 1922 M. 174.

——different causes of action may be joined in respect of several plffs or defts, 32 M. L T 46 1923 Mad 331 · 69 I. C 402, 49 Mad. 836 : 1926 M W. N. 642 : 1926 Mad 911 . 51 M L. J 194: 97 I. C. 212 F. B.

——Or. 2 r. 3. is to be read subject to the provisions of Or. 1 r. 1. 45 C. 111.

——a person can join as co-defts. persons against whom he has different causes of action in cases where any common question of law and fact are involved 55 C 164 . 32 C W. N 885 1928 Cal 199

——where if the two plffs brought separate suits there would be no common question of law or fact, single suit by them is not maintainable 1923 P 411 73 I. C 71

——the tests of propriety of joinder of parties are, firstly, could the right to relief [illegible] arising out of the [illegible] common question of [illegible] 33 C L. J 369 6[illegible] 1928 Bom 91.

——where the plff has distinct and separate causes of action against two defts. and cause of action against one arose within the jurisdiction [illegible] of the court, [illegible] r. 3 relates t[illegible] a suit in a p[illegible] suit. 49 C 89[illegible]

——joinder of suit for account against one person with a suit for recovery of loss caused by negligence, against another person, is bad 71 I. C 324 (c)

——the persons entitled to maintenance can bring a single suit 17 C. W N. 341

——parties may be added if they be thought necessary to be added [illegible] nature of the suit cannot be [illegible] 5 Cal. 26.

[illegible] parties cannot be added [illegible] W N 805.

(*B*) *Non-joinder*

——in determining non-joinder the court must confine itself to the claim before it 24 Bom L. R 1318

——in order to determine whether the suit is maintainable and whether certain parties are necessary parties or not, it is necessary to ascertain the nature of the plff's case as set out in the plaint 40 C. L J. 74

Or. 1 General—*contd*

——when the suit is for joint interest all persons interested n be made parties 39 M L T 442 · 1927 Mad 989.

——*if two parties contract with a third party, a suit by o*r them making the other co.deft should not be dismissed me because the plff has not proved that the co-deft had refused to as plff 1923 Cal 506

——a suit may be dismissed when all the co.sharers of the ma are not parties and relief cannot be given behind their b 1917 Pat 1

——when the decree is joint all the heirs of the deceased pondent must be brought on the *record* 24 C. W. N. 44 (6 C *N* 196, 10 C W. *N* 981, 11 C W *N* 504 19 C W *N*. 290, 28 C. I 201, 29 C L J 461, 22 B 718, 34 C 1021) *Ref*

——a suit against some of the executants of a handnot *maintainable* 2 Pat 466

(C) Objection to non joinder

——under Or 1 r 13 an objection to non-joinder *of* pa ought to be taken at the earliest possible opportunity and w not taken even in the appellate court it cannot be taken in sec appeal. 44 *M* 344 · 1921 *M* W *N* 229 40 *M. L J* 282 I. C 386

(D) Effect of non joinder

——non-joinder of party in particular capacity may be cu by amendment 21 C. W N. 939

——it is plain that a person may be added as a party to suit only in two cases firstly, when he ought to have been jo and has not been so joined *or* secondly, when without his prese the question in the suit cannot be completely decided 29 C. W. 805 · 82 I C 369 . 1925 Cal 26.

——the court is not justified in dismissing a suit for defec parties It may direct the plff to add parties. 8 O. L J. 310 I. C. 548

——*there is no provision that a party* cannot be added a his right of suit or liability to be sued is barred by the law limitation 45 B 1009 23 Bom L. R. 306 61 I C 590.

(E) Transposition of party (Or. I, R 11)

——under the new Code the court has ample power of tra position of parties. 20 C W N 752, 60 I. C 144, 52 I. C. 233

——when the plff withdraws the court may allow a deft to made plff. and to continue the suit. 60 I C 144, 59 I. C. 233.

——but where the *plff claims a sole right to a certain* sum money and makes a third party deft. who also makes sole cl the latter cannot be made plff. to continue the suit 19 A L. J. 8 63 I C. 773

——the court can transpose parties. 82 I. C. 649, 60 I 144 : (30 M. L. T 31 : but not in second appeal. 36 C. L. J. 9 1922 Cal. 459.

Or. I. General—contd.

——transfer of parties from one side to other should be granted when refusal would prejudicially affect the applicant 40 C. L. J. 535 : 85 I. C. 168 : 1925 Cal 421, 1925 Cal 328.

——the court may transfer a co-trustee from the list of deft to the position of plff 40 M. L. J. 208 1921 M. W. N. 108 : 13 L. W. 148 : 62 I. C. 360.

——Art. 181 L. Act. applies to a petition for transposition *Above case*

——under Or 1, R 10 (2) and s 107 C P C. an appellate court has the power to transpose a respondent to the category of appellants for the ends of justice. 44 C L. J. 243 1927 Cal 37.

——but in second appeal no transposition of parties was allowed. 36 C. L. J. 92 : 1922 C 459.

——in a suit by wrong person in *bonafide* mistake, right person may be substituted. 1923 M. 180 69 I. C. 413, 66 I. C. 873, 30 M. 419, 16 L. W 826, 43 M 707

(F) Distinction between proper party and necessary party

——there is distinction between *necessary* and *proper* parties in a suit Against a necessary party, (1) there must be a right to some relief in respect of the matter involved in the suit, (2) his presence must be necessary in order to effectually and completely adjudicate upon and settle all the questions involved in the suit 1922 Pat. 326, 3 Pat. L T. 238 : 1 Pat 361 . 67 I C 156, 16 C. L. J. 358.

——the expression "proper party" means the party who may be interested in the result of the suit and who may have a right to seek the assistance of the court in coming to a decision on the point in issue 89 I C. 57 : 1925 Cal 1257

——a pe [illegible] ary party to appe [illegible] W N. 196, 11 C. [illegible]

——in a [illegible] or transferee without title is not necessary party 1 Pat. 475 . 3 Pat. L. T. 352 . 1922 P 243 67 I C. 401

(G) Misdescription of deft

——the misdescription of a deft may be corrected by the court without any regard to the lapse of time, for in a case of misdescription the court will not have any difficulty in coming to the conclusion that the deft had been substantially sued though under a wrong name, that there is a great difference between misdescribing a party intended to be sued and suing a wrong party 3 Pat. 230 . 78 I. C 312 . 1925 Pat 37.

——misdescription can always be corrected But of two persons if wrong one is sued and no question of representation arises the case is not one of misdescription. 3 Pat 230 . 78 I C 312 · 1925 Pat 37

(H) Suit by or against wrong person

——suit instituted by wrong person may be continued by proper person in case of *bona-fide* mistake. 1923 M 180 : 69 I C. 413, 66 I. C. 873, 30 M. 419, 16 L. W 826 : 43 M. 707.

Or. 1. General—contd.

(I) *Suit and execution of decree against dead person.*

——in case of suit being brought against a dead person the court cannot allow *substitution* even in case of *bona fide* mistake 85 I. C 464 1924 Bom 109, 1923 Lah 652, 18 L. W. 54 (case o appeal), 24 I C 112, but see *contra* below in case of *bonafide* act.

——a suit instituted against two dead persons one of whom appears to have died before the institution of the suit may be proceeded against the deft living. 82 I. C. 661.

——a suit against a dead man is a nullity and cannot be cured by bringing his legal representative on record. 25 Bom. L R 7, 33 M. 86 *Ref* 71 I C. 569

——decree against a dead person or against wrong heir of a dead man is a nullity, 22 C W N 283, but it is *not so in case of bonafide act* 4 C. 342, 32 C 296. 9 C W. N 201 1 C. L. J. 584, P. C. 33 M. 6

——the Patna H. C. has held that an executing court cannot go against a decree when it is passed even against a dead man 1 Pat L. T 426 58 I. C 212

——but the Calcutta H [illegible] against dead person is a nullity 18 C [illegible]

——omission to bring on [illegible]

Jt Dr. who has died after [illegible]

sale 23 C W. N. 608: 29 C. [illegible]

45 I C 693 (c), 23 O C. 218 58 [illegible]

[illegible] the ground that the

decr[illegible] 75 I C. 321, (Pat)

32 A [illegible]

(J) *Suit against some of binds others*

——a suit against some heir of Mahamedan does not bind others, 4 C. 142 2 C L. R. 223 F. B., 7 A. 122. 5 A. W. N. 248 F. B. 19 B. 273, but it has been held that where a *decree is passed* as against the whole *property* mortgaged by a deceased Mahamedan in a suit brought against his widow or some *of his heirs*, and the whole *property is* sold in execution, then the heirs, not parties to the suit cannot be permitted to raise objection that their shares did not pass The principle is *applicable to a Hindu* family governed by the Mitakshara law as much as to a Mahamedan family. 20 B 338, 22 B. 825

——the [illegible]

[illegible] F. B. *distinguished* on the [illegible] that the principle is *different* in case of Mahamedan family.

Or. 1. General—*contd.*

——the Indian courts have properly exercised a wide discretion in allowing the estate of a deceased debtor to be represented by one member of the family so as to bind other members who are minors, but there are usually cases where the person named as deft. is *defacto* manager of Hindu family or has the assets out of which the decree is to be satisfied under his control, but where the Judge does not apply his mind as to whether the particular person does *represent* the deceased person or not the decree is not so effective. 32 C. 296 : 32 I. A 23 : 1 C L. J. 584 : 9 C W N. 201 : 7 Bom. L R. 1 P. C.

——where the plff ... nary, the minor unless by judicial in innocent third co-parceners 30

But for representative suits see "Suit relating to public matters" below.

(*K*) *Adding or substituting a party as plaintiff.*

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t

——when a suit is instituted in the name of a sole plff who is dead at the time of the institution of the suit there can be no amendment, but when a co-mortgagee suing on his mortgage adds his co-mortgagee who is dead, as a party, his heirs may be substituted 104 I. C 623. 1927 Cal 880

——substitution of the District Board in the place of the name of the Chairman of the District Board was rightly allowed by the appellate court 32 C W N 396

——when the judgment-debtor became insolvent pending an appeal by him to set aside an auction sale and the official assignee also elected not to prosecute the appeal a mortgagee from the judgment-debtor was not allowed to step in and prosecute the appeal 32 C W. N. 304 1928 Cal 215.

——when parties are added by the court subsequent to the institution of the suit s 22 L Act provides that the date when they ... suit s their N. 28 30 Bo

——It is not desirable to add or substitute a person for whom right to sue has been barred by the law of limitation though it is discretionary with the trial Court 108 I C 735 : 25 A. L J 991 : 50 A. 276 : 1928 All. 97.

Or. 1. General—contd.

(L) *Adding a party as deft on his prayer.*

——a person may be added as a deft. on his prayer. 11 C. L. J 426

——when a third person who applies to be added as a party is only a permissible party and not a necessary party then on principle he should not be added as party when it is opposed by the person with whom he intends to fight. The plff. being *dominus litas* he cannot be compelled to fight against some other litigant not of his own choice unless such a process is required by a positive rule of law. 95 I C 214 1926 Mad 836 · 1926 M W N, 575

(M) *Effect of allowing a person to be added as party who is not proper party*

——when a person who is not a proper party allows himself to be made party and an issue relating to him is raised and decided, he cannot change front. 11 C W N 84, 8 C W. N. 365

(N) *Suit by co-executor*

——co-executors cannot sue without making others party. 44 M L J 249 1923 Mad 337 72 I C 63

(O) (*Prosecution of suit on behalf of other*)

——the word "person" in Or 1 R 11 means a party to the suit, a stranger to a suit cannot be given the conduct of the suit. The Court has no discretion to allow the wife to prosecute the suit against her husband on the ground that the whereabouts of her husband were not known 46 C. L J. 530 106 I C 854; 1928 Cal. 143, 40 M L J 208 *Ref*

(2) Account Suit.

——in a suit for account all should be made parties. 18 C W N 464, including the heirs of the respondent, 22 C. W. N. 27n.

——when one agent has to account to more persons than one they must all join in the suit as he is not liable to render separate accounts 62 I. C 766

——a suit for dissolution of partnership and for accounts cannot proceed in the absence of any partner or his legal representative 34 C. L J. 405, 67 I C 10.

——joinder of suit for account against one person with a suit for recovery of loss caused by negligence against another person, is bad. 71 I. C 324 (c).

(3) Appeal.

——when the decree is joint all the heirs of deceased respondent must be brought on the record 24 C. W. N. 44 (6 C. W. N. 196, 10 C W. N. 981, 11 C. W. N. 504, 19 C W. N 290, 23 C. L. J 201, 29 C. L. J. 461, 22 B 718, 34 C 1920) *Ref.* 44 C. L. J. 557; 99 I. C. 901: 1927 Cal 238, 25 C. W. N. 249.

——Or. 1 R. 9 read with s. 102 (2) will not permit the nonjoinder of any party being condoned by the Appellate Court when such nonjoinder makes it impossible to deal equitably and sufficiently

Or. 1. Appeal—*contd.*

with the matter in controversy between the parties to the appeal. 87 I C. 904 : 1925 Oudh. 606

——joint appeal by plff. and some deft. against other deft. is not maintainable. 1923 Lah 638

——under Or. 1 r. 9 a person who is a necessary party to the suit is necessary party to the appeal 3 Pat L. T. 446 : 1922 P. 4 66 I. C. 780

——in a partition suit as well as in an appeal therefrom all persons interested must be made parties. 91 I C. 567 : 1926 Cal. 741.

——where on the death of a respondent in appeal his heirs [illegible]

I. C. 374

—— [illegible]

to Or. 4 [illegible]

——

plffs a [illegible]

withou. [illegible]

71 I C. 321 · 1923 A. 211.

——when the ground of decision is common, appeal by one of the plffs or defts will enure to the benefit of others, 19 C W. N 233, 20 C. W N 32n. 18 W R 331, 6 W. R 323, 9 W R 499, 12 W. R 211, 10 W. R. 286, 8 M. 192, 28 M 229, 13 W. R 114, 22 B. 500, 20 A. 493, 11 W R. 449, 2 W R 227, 18 C L J. 261, 13 Bur L. T. 163 63 I. C 973, 60 I C 460 (c), 63 I C. 95 (c) but when one of the defts appeals not against the whole decree but only against that portion which affects him and the defence is not common to others the whole decree cannot be reversed 18 W. R. 26, what is common ground must be determined in each case. 30 C 429, 432, 16 M. 293, 28 M 122, 124, 28 B 699, 23 W. R 166 7 W. R 49, 3 C. 738, 8 B L R 180, 12 W R. 376, 21 W. R 112.

——a person who is necessary party to the suit is a necessary party to the appeal 3 Pat L T 456 1922 P. 4 66 I C. 780, 6 C. W. N. 196, 11 C W N. 501, 31 C 489 **P. C.**, 34 C. 1020 *not fol.*

——appellate court can add party after the expiration of period of limitation, 66 I. C 365, 14 A 154, 33 C. 329 *Rel* and when through the mistake of appellant's legal advisor certain defts. interested in the result of the appeal is not made party 63 I C. 352.

——second appellate court may add parties-respondents who were not made parties in the first appeal, after the expiry of time for preferring second appeal 59 I C. 798

Or. 1. Appeal—contd.

——in exceptional circumstances the court has inherent power under s 151 C P C to implead parties. 73 I. C. 136 ; 1923 Lab 490, 3 Pat L J 409 *Dist*

14 A.
38 C 91
496 31

——the decree that can be executed is that of the original court 39 C 925, 11 A. 267, 11 B. 172, 13 C 13, 10 B. L. R. 101, P.C, 18 M. 214 F, B. 19 B. 258.

——where notice of appeal is served upon some of the respondents the appeal should be dismissed. 19 C. W. N. 290.

——in an appeal under sec 105 B T Act. all the landlords must be parties 28 C L J. 201, (6 C. W. N. 196, 10 C. W. N. 981. 19 C. W N. 290). *Fol.*

——on the death of a respondent his heirs should be made parties 24 C W N 44 (16 C W N 196, 10 C. W. N. 981, 11 C W N. 504, 19 C W N 290, 28 C. L J. 201, 29 C. L. J. 461). *Ref contra* 22 B. 718, 34 C 1020

——if one respondent in an account suit dies, all his heirs should be made parties. 22 C W. N. 27n

——an appellate court cannot modify a decree in favour of one appealing deft 23 C W N 223.

——addition of party-deft after delivery of judgment by the appellate court is of no effect. 25 C W N. 525 . 62 I. C. 464.

——when appeal abates on the death of the appellant cross-appeal cannot be heard. 44 M. 828 41 M. L J. 304 : 1921 M W. N 438, 62 I. C 757.

(4) Contribution suit.

——in a suit for contribution all co-shares must be made parties. 12 A 110.

——when a creditor obtains a decree against one partner for debt appertaining to the firm, all partners are to contribute 19 C. W. N. 68, they must contribute according to promise. 19 C. W. N. 193 P. C.

Executor, suit by

——co-executors cannot sue without making others party. 44 M L J 249 · 1923 Mad. 337 72 I C 63.

(5) Declaratory suit.

——the Secretary of State is not a proper or necessary party in every suit in which any question is raised with regard to the legality of any statute. 95 I. C. 214 . 1926 Mad. 836 : 1926 M W. N. 575.

——any declaration as regards status should be made in presence of tenants. 16 C. L. J. 383.

Or. 1,—(6) Easement suit.

—all persons interested in the servient tenements must be made parties. 25 C. W. N. 249 62 I. C. 425 14 C. W. N. 15, but it was previously held that those who have not obstructed or challenged the right of way are not necessary parties. 19 C. W. N. 1211, 69 I. C. 183, *but see below*.

—the contention that all persons interested in the right of easement were necessary parties to the suit was held to be without substance as the cause of action on the pleadings was against these persons only who were alleged to have interfered with the plff.'s right. 40 C. L. J. 74 : 1924 Cal 1050, (25 C. W. N. 249, 19 C. W. N. 1211) *Ref.*

—in a suit for the removal of an obstruction to an easement the servient owners who did not obs' whom no relief is sought are no owner" for the purpose of such objection to the plff's claim and do tenements subject to the easeme 25 C. W. N. 249 *Dist* 19 C. W. N. 1 1926 Cal 1201.

—when the suit is for declaration of right of pasturage over the land of another, i e, deft. who is in possession of the land and has obstructed the plff. the landord need not be made deft. in the suit. 104 I. C. 845 1928 Cal 23

(7) Mortgage suit

—where a first mortgagee obtained a decree for sale without making the subsequent mortgagee party and purchased the mortgage property at such sale, in a suit by the second mortgagee the first mortgagee purchaser had no greater rights than any stranger auction-purchaser paying cash for it and he was entitled to set-off only the amount of the decree made in his suit. 25 C. W. N. 397 · 32 C L. J 121 . 42 All 364 18 A L J 396 · 38 M L J. 419 1920 M W. N. 338 22 Bom L R 553 P C.

—in a mortgage suit person claiming adverse or superior right, or a right which is acquired from the mortgagor before the mortgage, should not be made party. 20 C. W N 1279 24 C L J 303, P. C., 23 C. L. J 587, 33 C 425 . 3 C. L J. 205, 5 C L. J. 95

—person not claiming un[illegible] claim the equity of redempti[illegible] neces[illegible] L. J. [illegible] A. 48[illegible] P. C [illegible] 11, *but such person in whose* presence the decree is made is bound by the decree. 35 C 701 . 12 C W. N. 657 : 7 C L J 568 . 6 M. L. T. 255, 22 C. W. N. 533 24 I. A 10 P. C. 29 C. 187 P C. 25 C. W N 192, and cannot ask for a reversal on the ground that the issue was extraneous. 33 C. 425 · 3 C. L. J. 205.

—speaking generally it may be said that a suit to enforce a mortgage in which the adverse claims of persons not privy to the

Or. 1. Mortgage Suit—*contd.*

mortgage and setting up a title paramount to that of mortgagor and the mortgagee, are sought to be investigated, is open to objection on the ground of misjoinder and inconvenience. 29 C. W. N. 784: 88 I. C. 866 · 1925 Cal 973.

——where the deft in a mortgage suit held a double capacity i.e., purchaser of equity of redemption and also settlement-holder from landlord, that is paramount title, and omitted to set up the latter defence, he will be afterwards barred by *res judicata*. A question of paramount title can be investigated in a mortgage suit in certain cases 38 C. L. J. 183

——under sec. 85 all persons interested in the mortgage property must be made party, provided the pltf has notice. 32 C. L. J. 479 P. C.

——it is competent to court to add a person interested in the equity of redemption as a party to suit on a mortgage even after the passing of the preliminary decree therein and to re-open the prior proceedings so far as he is concerned. 46 M. L. J. 333: 34 M. L. T. 114 1924 M. W. N. 364, 1924 Mad. 648

——when puisne mortgagee is not made party that part of the claim which concerns him is to be totally dismissed 34 A. 494, see also 24 I. C. 25 (redemption suit)

——where a person having a share in the equity of redemption has not been made deft there should be proportionate decree. The suit is not to be dismissed for defect of parties 29 C. W. N. 51, 25 C. W. N. 594 *Ref*

——when prior mortgagee being made party does not appear after filing written statement and the court does not make any order against him, he is not affected 18 C. W. N. 1013 24 I. C. 42.

——a prior mortgagee need not appear unless he has got subsequent mortgage also. 19 C. W. N. 942, 947, 10 C. W. N. 991, P. C. 39 C. 527 · 16 C. W. N. 505, P. C. 35 A. 111

——but when a person is both a prior and subsequent mortgagee and is made a party being described as subsequent mortgagee only, he must appear and set up his prior mortgage. 2 C. L. J. 574, 31 C. 428, 16 C. W. N. 505 · 15 C. L. J. 411 P. C., it is so also when the prior mortgage is renewed by subsequent mortgage 9 C. L. J. 78

——the provisions of Or. 1 r. 9 apply to proceeding under Or. 34 C. P. C. so a suit should not be dismissed for misjoinder of parties 29 C. W. N. 51. 82 I. C. 638.

——when a puisne mortgagee is not made party that part of the clai[illegible]
21 I. C [illegible]
within [illegible]
1923 All [illegible]
65 I. C [illegible]

——where the person who has subsequent to the mortgage in suit, acquired interest i[illegible] not impleaded as party so much only [illegible]
tionate to the interest [illegible]
1923 Nag. 234 : 72 I. C. 450, [illegible]

Or 1. Mortgage Suit—*contd.*

——in a redemption suit a sub-mortgagee is a necessary party. 44 M. L. J. 363 : 32 M L. T. 273 : 1923 Mad. 440 : 74 I C. 638

——in a redemption suit by some heirs addition of other heirs as parties-defts. after the period of limitation is not barred by s 22 L. Act. 45 B. 1009 . 23 Bom. L R 405 61 I C 590.

——a release of one of two mortgagors does not release the other. 50 Cal. 718 : 74 I C. 1021.

——when a necessary party to a suit being made party does not claim all prior rights he becomes estopped, 39 A 527 P. C , but when prior and subsequent mortgagee is made party and no relief is asked for with respect to his prior mortgage, he need not set it up 1. C. L. J. 337, 4 C W N. 297, 9 C. L J, 78 *contra*, 31 C. 428, 24 A. 429.

——misjoinder of plffs in a mortgage suit, some of whom are not entitled to any relief is a mere defect of form not fatal to the suit. 1925 Nag. 366 : 87 I C. 35.

——when prior mortgagee does not make puisne mortgagee a party and the property is purchased by third person, the puisne mortgagee may sue the prior mortgagee and the purchaser for redemption 40 M. 77 F B.

——where the legal representative of a deceased mortgagor being substituted made a hostile claim the court was right in refusing to hear the claim leaving it for the decision of a separate suit appropriately framed for the purpose. 25 C. W N. 192.

——a person not known by the plff to be interested as heir in the mortgaged property and so not made party in the mortgage suit is bound by the mortgage-decree, when the mortgagor's estate is represented by adult heir 11 C. W N 1078 6 C L. J 719, (21 A 194, 28 C. 517, 6 B 515) *Relied on*, 9 C W N 201 32 C. 296 : 32 I. A. 23 P C. *Fol.*, (4 C 142 F B. 822 F B 14 C 464) *Dist.*

——an attaching creditor is a necessary party 37 M 418, 17 C. W. N 871.

——all the persons interested as plffs also should be made parties 41 C. 727 : 19 C. L J. 437

——non-compliance with Or 34 r 1 C P C. is not fatal, Or 1 r. 9. applies to mort
the equity of redemp
proportionate to the
C W. N. 51, (25 C.
411 Diss

——where all heirs of the mortgagor are not made parties a proportionate decree may be passed although the suit would be time barred against the other heirs if they were subsequently made parties. 25 C W. N. 594

——persons interested in property relinquished by the mortgagee need not be made parties. 28 A 174 2 A L J 630 F. B.

——sub-mortgagee suing the mortgagee need not make the original mortgagor a party 12 C. L J 137, but the sub mortgagee may sue the original mortgagor or realise dues from him. 10 C., L. J. 470

Or. 1. Mortgage Suit—*contd.*

——sub-mortgagee also can sell the right of his mortgage. 29 A. 385 F. B. (18 A 113, 22 A. 511) *overruled*, 20 M. 35, 9 O. L. J. 429, 13 Bom L. R 90, 15 B 692, 20 B. 519

——where three days before the limitation period expired mortgagee brought a suit against the mortgagors and one of the many heirs of the purchasers of the mortgaged property, the suit could not be dismissed unless it was found that the plff was aware of their interest. 12 C. W N. 911

(8) Partition suit.

——the entire sixteen annas of the superior and inferior interests must actually be represented in the action. The Court can bring on record any person at any stage. 61 I. C. 378 (c).

——partion suit is not vitiated by defect of party if the parties be not prejudiced 17 C W. N. 128

——in a partion suit all co-sharers must be brought befere the court, 17 C 906, 16 B 608, 91 I C 567, 1926 Cal. 741.

——In a suit for partition all the co-shares must be represented, but a person who has no present interest but who would become entitled to a share in lieu of maintenance is not a necessary party, 49 C 1043 1923 Cal 221 · 70 I. C 687 · 36 C. L. J. 217.

——a transferee from a co sharer may bring partition suit without making his transferor a party. 1923 P. 162 : 68 I. C. 804

——there can be no compromise binding upon all the parties unless and until all the parties have joined in the compromise. 38 C L. J. 111 75 I C. 319, 27 I C. 242 *Ref.*

——question of title between the parties may be decided in a partition suit, 35 C. L. J 530 1922 Cal. 307 : 68 I. C. 482

——in a partition suit the fact that there are joint parties in which other persons are interested who are not parties to the suit is a bar to the partion of such properties, but that fact cannot debar the plff. from obtaining a decree in respect of the other properties, the persons interested in which have been made parties to the suit 85 I. C 662 : 1925 Cal 754

——a suit for partition of a portion of a joint estate is maintainable when such portion is the only property held jointly by the plff and the deft. although the deft may be interested in the other portion. 1. C. L J. 40, (7 C. 577, 24 C. 725), *Dist.* (7 C. 153, 20 C. 379, 682), *Fol.*

——in a partition suit only owners and co-sharers are necessary parties. A mortgagee has no claim to be a party. 3 Lah L. J. 337, 67 I. C. 425, 2 P. R. 1918.

——in a partition suit all the co-shares are made parties, so a residuary co-sharer cannat question the previous partition. 24 I. C. 26a 21 C. L. J. 23, P. C, 19 C. W. N. 531, P. C.

——plots belonging to some of the parties cannot be brought into hotchpot. 18 C. L. J. 556, 12 C. W. N. 640.

——to succeed in a partion suit there must me unity of title as well as possession. 68 I. C 804.

Or. 1. Partition suit—*contd.*

—in a partition suit holder of inferior right need not be made party, made p [illegible]

—[illegible] may b[illegible] superio[illegible]

—partition between holders of superior and inferior interest is a matter of consideration in each case having regard to the balance of convenience. 24 C. 575 ; 1 C W N 406. F. B., 9 C. W. N 699, 5 C L J. 307 ; 11 C. W. N 397, 1 C. L J. 40, 31 C. 214 : 8 C. W. N. 11, 12 C. W. N. 670 : 7 C. L. J. 449

—in a partition suit the position of the parties is not that of plffs and defts. as in other suits. Each deft. stands in the position of a plff with regard to the others and can demand partition himself 86 I C 765

—in a suit for partition by minor sons against their father the decree holders of the father's debt may be impleaded as defts. 1921 M. W. N. 799 ; 14 L W. 642.

—co-executors cannot sue without making others party. 44 M. L. J. 249 1923 Mad. 337 , 72 I C. 63.

(9) **Partnership suit.**

—all the partners are necessary parties. 18 C W. N. 464 7 C. L. J. 266, 14 C. 791

—when partnership business comes to an end each partner cannot sue the other for the money he has received without a suit for dissolution and account 17 C. W. N 351.

—in suits for dissolution of partnership sub-partners are not necessary parties 1916 M. W. N 18 . 34 I C. 543

—where in a suit for dissolution, various defts were impleaded as having had an interest at various stages of the business there was no multifariousness or mis-joinder 1923 Pat 276.

—one of the partners is competent to bring a suit in the name of the partnership. 1923 Nag. 137 68 I. C. 425 *contra* 16 L W 527 : 68 I C 927

—one partner can bring a suit in the name of the partnership, *1923 Nag. 137 ; 68 I C 425.*

—all the members ought to be joined as plff. only the surviving partners cannot sue. 1923 M 85 ; 68 I C. 927

—a partner cannot sue for his one item of debt. 33 M. L. T. 71.

—where in a suit for dissolution of partnership various people are impleaded *as having had an interest at various stages* of the business and accounts are demanded of various other businesses which were connected with it, there is no multifariousness or misjoinder. 1923 Pat 276

—a suit for dissolution of partnership and for accounts can not proceed in the absence of any partner or his legal representati[ve] 64 C. L J. 405 . 67 I. C 10.

Or. 1. Partition suit—*contd.*

——in a suit for dissolution of partnership and accounts a person not a member of the firm but possibly in a superior partnership of which he was one side and the whole firm as a unit was on the otherside, is not a necessary party. *1927 M. W. N* 500 · 25 A. L J. 687 : 31 C. W. N. 857 : 101 I. C. 17 : 39 M. L. T. 232 : 4 O W. N. 491 : 1927 P. C. 70.

——a person may appear as defendant under protest and whether he is a necessary party should be decided by the court. 23 Bom. L. R. 1249 64 I C. 688.

——where a suit is brought against a firm the mere fact that there is a minor member of the firm does not bring the case within Or. 32 and the court need not give assent to the reference to arbitration, 1923 Lah 103 : 68 I C 750, nor such minor member need sign the reference to arbitration. 5 Lah L. J 5 1923 Lah 212 71 I C 734, 68 I. C. 750, 25 I. C 955 : 50 I. C. 471, 16 A. 23, 19 I C 363 *Ref*

——if one of the partners returns and a stranger comes in, the new partnership cannot enforce the contract entered into by the old, nor the substitution of the name of the old partner after the period of limitation can avoid limitation. 15 S L R. 152 : 1922 Sindh 13 . 65 I C. 26.

——a suit can be brought against a firm in its firm name even if it be a dissolved firm provided the liability arose at a time when the firm was in existence. In such a suit writ should be served either upon a partner or at the principle place of business. 1922 Cal 390.

——a suit cannot be maintained by one only of the partners of a firm or by one of the joint promisees in respect of a cause of action which had accrued to all jointly 79 I C. 914

——abatement of appeal on the death of one of the partners 1925 Mad 237 · 85 I. C. 397

(10) Suit against joint wrong-doers.

——the liability of joint wrong-doers is joint and several and it [illegible]

[illegible] en

C

(11) Suit between landlord and tenant.

——a suit for rent is maintainable against some of the heirs or successors in interest of a deceased tenant without bringing all the heirs or the successors in interest on the record. 29 C. W. N. 1000 : 42 C. L J. 232 : 90 I. C 211 ; 1925 Cal 1056 F. B.

——the tenancy must be represented in the entirety before a decree can be made binding on the tenure. 25 C W. N. 525 : 62 I C 464, 12 C L. J. 643, 25 M. 26 *Ref.* 2 P. L. J. 190

——where one of serveral joint tenants is liable for the whole rent, on the death of one such joint tenants leaving several heirs no question can arise as to whether the liability is joint or several as

Or. 1. Suit between landlord and tenant—*contd.*

all the parceners constitute in law one heir. 50 C. 737 : 74 I C. 1032

——a suit for rent or cesses is maintainable against all the heirs of one original lessee without making the heirs of other original lessees parties. 27 C W. N 521 . 1923 Cal 615

——where after the death of the original tenant a suit was brought against some of his men who were in possession of the holding and against whom a previous decree had been obtained the suit was not bad for non-joinder of other heirs. 48 C. 518 : 63 I. C. 949

——the landlord may sue only the heirs of deceased tenant who are in possession. 48 C. 518 . 23 C. W N. 136n . 15 C. W N. 191 : 24 C. L. J. 371, 22 C W. N. 289 *Ref*

——the heirs of the deceased tenure holder who are not made parties in rent suit are not affected by the sale in execution of the decree. 65 I C. 592

——when rent is due to the members of joint Hindu family, it is not open to the *karta* alone to maintain a suit for rent without joining others as plffs. or dfts except when the tenant has dealt with such *karta* as sole landlord 9 C L. J 251.

——all the recorded tenants must be made parties. 2 Pat. L J. 190.

——parties should not be added in rent suit so as to transfer it into a complex title suit, though questions of title may be inci- [illegible] ...ent 28 C W N 805 :

[illegible] persons in respect of [illegible] R 458

——when the tenants of different holdings are impleaded in one ejectment suit and no objection is taken at the trial, no objection can be taken in appeal. 25 C. W N. 485.

——the landlord is not necessary party to a suit between rival claimants to an occupancy holding. 1923 A. 11 . 70 I C. 958

——an action for possession based upon forfeiture of term should for practical reasons be brought against all persons in possession (including constructive possession) not because suit is otherwise defective but because the decree will be difficult to enforce 47 C. 907 . 60 I. C. 969.

——in an ejectment suit every tenant and sub-tenant should be made parties But a decree obtained against head-lessee is binding against all sub-lessees. 50 C. 419

——in a suit by landlord based on forfeiture all persons in possession including constructive possession should be made parties to give effect to the decree 47 C. 907 60 I C. 969

——all the heirs on whom the holding devolves by succession must be made parties as they are liable jointly. 12 C. L. J. 642 · 15 C. W N. 191, 24 C. L. J. 371, 6 C W. N 111, 35 C 182 12 C. W. N. 160.

Or. I Suit between landlord and tenant—*contd.*

——where the heirs of tenure-holders do not cause their name to be registered and the landlord sues only the persons whose name are registered but who have no subsisting interest the former interest will not be affected by the sale. 32 C L. J. 77.

——the sale must be one which in future and in equity should operate as a sale of the tenure 32 C. L J 77, 10 C. 996.

——in case of tenure-holder the landlord is not bound to se who are the heirs it is the duty of the successors to notify thei succession, 3 C. W. N. 371, but the law is otherwise in case o occupancy raiyat. 27 C 546 : 4 C. W. N. 608.

——transfer of permanent tenure is complete as soon as th deed is registered and then the landlord is bound to make th transferee party. 19 C. W. N. 112, 20 C. W. N. 355, 16 C 612 19 C 17, 12 C W N. 478, 16 C W. N. 64 : 13 C. L. J. 613, 21 C. 433

——a purchaser in e [illegible] obtained by a co-sharer landlord [illegible] for entire rent by the [illegible] party 26 C W N. 639.

——co-tenants are [illegible] defect of parties if the suit is brought against some only. 11 C W. N 1026, 12 C L J. 591.

——when the holding devolves upon the successors and the suit for rent is brought against some of them it may be a money decree 22 C W N 289, 23 C W N 27n, 36 I. C. 243, 23 C W N. 136n, 38 C. 518. But if the arrears of rent was due by the deft's predecessor, the suit will be dismissed for defect of parties 36 I C 243

——a suit on a Kabulyat cannot be dismissed for defect of parties when all the executants of the Kabulyat are parties. 62 I C 619.

——suit for rent by the managing member of a joint Mitakshara family without making the infant members parties is maintainable 27 C. W N. 372 72 I C. 722.

——a co-sharer landlord has a right to claim the whole rent on behalf of the entire body of landlords, s. 148 A. being only an enabling sec. 35 C. L. J. 30. 26 C W N 639, 35 C. 331 : 12 C W. N. 429 P C.

——one co-sharer has a right to bring a suit for the entire rent of the holding making other co-sharers parties and then ask for his share of rent allotted to him. 90 I C. 673.

——a suit may be dismissed when all the co-sharers of the mahal are not parties and relief cannot be given behind their back, 1917 Pat. 1.

Suit for apportionment.

[illegible] changed into one for [illegible] of rent all the [illegible] 3 I. C. 931 . 1925

[illegible]

(12) **Suit relating to public matters**

——a person who would be represented by and bound by the decision against a party on the record is entitled to be impleaded under Or 1 r. 10 Cl. (2). 44 M. L. J. 322: 1923 M. 521: 17 L. W. 329: 72 I. C. 156.

R. 8.

——R 8 is merely an enabling rule and does not prevent a representative suit being brought in any other manner that the law permits. 38 Bom L. R 309: 94 I. C. 47. 1926 Bom 179.

——community of interest is the issue of the representative action and an order appointing a person to represent a class does not affect *one of the class who has a distinct and independent right in* another capacity. 5 Pat. 539: 94 I. C 433: 1926 Pat. 321 7 Pat. L. T. 679

——where the deft. was permitted to appear as representing the public and he was also aware that he was required to appear in his personal capacity as well and he did appear and contest the suit,

taken should be of the same opinion The true principle underlying the rule is that the suit should in form be constituted into a representative one merely to prevent the deft from being vexed and molested by similar suits by others 86 I C 1022 · 1925 Mad 985.

——a suit for declaration that a certain pathway was public one, can be maintained with the permission of the court under Or. I

obtaining of the sanction of the Advocate General and no other condition for the maintainability of a suit is to be found in the Code 925 M. W N 505 1925 Mad 1070.

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Or. 1.—R. 8—*contd*

——the disciple of a *mutt* can bring a representative suit. 41 M 124.

——where a decree for damages was passed in a suit by three persons under s 14 of the Religious Endowment Act but the plffs neglected to execute the decree, it was competent to the court under Or. 1, R 8 to [illegible] plffs to enable them to execute the [illegible] the plff in a representative capaci[illegible] 23 M. W. N. 239 17 L W 422, (24 M L J, 192, [illegible] L J. 546, 28 M. 319) *fol*

——a mutwalli can sue on behalf of a trust without sanction under this rule 63 I C. 171.

——worshippers of a mosque suing the *mutwalli*, Or 1 r 8 (some suing on behalf of all) will apply and not S. 92 (public charity) 23 C W. N 115

——when the [illegible] can add parties even after [illegible] 212 : 1923 M. W N 239 4 [illegible] 192, 33 M. 483 · 20 M L J 546, [illegible] *fol*

——suit by a worshipper for possession of properties belonging to a village temple may be brought under this rule 44 M L J 116

——when a caste is divided into two parties one party cannot bring a suit in a representative capacity as all *members* have not the same interest 40 B 151

——the secretary or any member of an association cannot alone maintain any suit even if so authorised by any resolution ; all members must join. 6 A 284, 22 B 729.

——the President of a community cannot be authorised by a resolution of the community to sue in his own name without coming under this sec 23 Bom. L R. 972

——there is a distinctio[illegible] and a place set apart for the use of [illegible] *resident* of a *mohalla* may [illegible] for the use of the people [illegible] court and without proving special damage. [illegible]

——suit to establish right to exclusive worship is a personal and individual right and is not a suit concerning property vested in trustees 23 Bur. L. T. 183 63 I C. 963.

——a member of a community may sue for the money promised to pay to the community. 44 M. L J 240 : 1923 M. W. N. 237 : 1923 M. 434 : 72 I. C. 95, 30 M. L. T. 47 : 64 I C 618

——a beneficiary of a trust in respect of a Mahammedan Wakf may sue without permission under this sec 2 Pat. 391 : 4 Pat. L T. 675 · 1923 P. 475 : 74 I. C 433

——an order for representation under R. 8. may be made by a court although it is objected to by the person who is asked to represent the public. 101 I. C. 738 : 1927 Cal. 608.

Or. 1.—R. 8—*contd.*

——when permission is granted for a representative suit and some of several representatives do not join the suit, fresh permission is necessary. 1925 Cal. 547.

——but where four persons sued on behalf of the proprietory body of villagers for an injunction for the demolition of a building erected by the defts. on a part of the common land, but one of the plffs. died during the pendency of the case no fresh sanction was necessary to continue the suit by the remaining plffs., 7 L. L J. 517 : 88 I. C. 478 : 1925 Lah 598

——Or 22 R. 3 C. P C is not rendered inapplicable by the fact that the suit is brought on behalf of the whole proprietory body of the village. 7 L L. J. 577 : 88 I C. 478 1925 Lah 598.

——permission may be granted under the rule after the institution of the suit 23 M 28, 21 B. 789, 25 M 399, 44 C. 258, 47 Bom. 809 : 25 Bur. L. R 689. 1923 Bom 305, 83 I C 856 1923 B. 305, *dissenting from* 9 C 604

——leave need not be express, it is enough if it can be gathered from the proceedings. 21 C 180, 29 C. 100, 1924 Cal 998 ; 84 I. C 79, 101 I C 738 1927 Cal. 608, *contra* 5 A. 602

——no fresh permission is necessary for the purpose of an appeal. 101 I C. 738 1927 Cal 608

——leave must be granted to definitely named persons. 17 C. 906 *contra*, 44 C. 258

——any person interested may apply to be made a party. 34 B. 420

——it is the duty of the court to cause service of notice and of the party to move the former, the suit should not be dismissed for failure of the court to do its duty. 35 C. 1021.

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is fata

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it is mandatory 83 I C. 856 1923 B 305

——the notice must contain the names of the persons permitted to represent others 101 I C 738 : 1927 Cal 608.

——if a decree is passed after the issue of a defective notice the decreee is binding as against the persons who have appeared and contested the suit irrespective of whether the decree would bind the public or the other person interested 101 I C 738 1927 Cal. 608, 101 I. C 500. 8 Pat L T 267 1927 Pat. 221, 7 Pat, 197 : 108 I C 330 1928 Pat 205 · 9 Pat L T. 113

——those who are not on the record are not personally liable. 36 M. 414 and no injunction order can be passed against them 33 M. 483, 12 M 356

——death of the person not on the record does not cause the suit to abate Punj Rec no 46 p 115

——*res judicata* applies to cases when without obtaining leave under Or 1 r 8 persons claiming a private right in common for themselves and others litigate it *bona fide* on behalf of all 1920 M W. N. 435.

(13) Suit under the Hindu Law.

——when one of the partners in a joint family business refused to join as plff. in the suit the correct procedure is to join him as a deft. in the suit and not to dismiss the suit altogether 7 Lah. L J. 280 . 26 Punj L R 699 · 1925 Lah 504.

——a reversioner can sue several alienees of a widow in a single suit 24 I. C. 95

——a creditor of a joint Hindu family advancing money to the manager of the family and suing for money after his death must join all the members as parties. 8 N. L. J. 73 : 89 I. C. 883 ; 1925 Nag 288.

Or. 2. rr. 1—7. FRAME OF SUIT.

Suit must include the whole claim arising from the same cause of action

——the relief claimable but not claimed cannot be claimed in a subsequent suit 1925 Cal 305

——a plff. who sues for a relief which the courts cannot grant him, is not debarred from subsequently bringing a suit in respect of a relief which the courts can grant him 7 Lah. L J. 236 : 87 I. C. 994 6 Lah. 384

——all matters between the parties relating to the same transaction should be disposed of in the same suit. 25 C 371, 26 M. 760, 31 M 385.

——although the rule requires that every suit shall include the whole of the claim arising from one and the same cause of action, it does not further require that every suit shall include every claim of every cause of action which the plff may have against the deft 33 C. L. J 232, 20 C. 79 19 I A 234 P. C., 8 M. 520 : 12 I. A. 116 P. C., 15 C 800 . 15 I A 106 P. C., 19 C 123 18 I. A 158 P. C., 18 C. W N 617 : 41 I A. 142 P. C.

——Or. 2, R 2 directs to exhaust the relies in respect of a cause of action and does not direct to include in one and the same action different causes of action even though they arise out of the same transaction. 30 C W N 873 97 I C 73 , 1926 Cal. 1022.

all the reliefs upon the same cause of action must be asked for. 2 C W. N. 160

——the expression " subjects in dispute " in Or 2. R 1 refers to the right which one party claims against the other and not to the cause of action alone. 49 M L J 701.

——in cases of mortgages Or. 2 r. 2 does not apply where the mortgagee bring [illegible]
bars a second su[illegible]

——Or. 2 r. [illegible]
of arrears of r[illegible]
quishments but [illegible]
35 C. L. J. 304 : [illegible]

——if the [illegible]
entitled to put forward a claim, there is nothing in Or. 2. r. 2. to prohibit him from putting forward the claim in a subsequent litigation. 1921 Pat 125 : 60 I. C. 496.

Or. 2.—Suit must include the whole claim arising from the same cause of action—*contd.*

——Or. 2. r. 2 does not apply to proceedings in execution. 15 S L. R. 11 : 62 I. C 507.

——Or. 2. R. 2 does not apply in terms to an application for executive nor does the principle apply to such application . consequently decree may be executed in parts 43 C L J. 196 · 53 C 582 . 1926 Cal. 1019 : 96 I C. 562

——a suit for partition bars a subsequent suit for account relating to a period prior to partition suit. 46 B. 823 24 Bom. L R. 302 : 1922 Bom. 9.

——a partition suit should include all questions with regard to the family estate, successive suits on the matter is not maintainable. 23 Bom. L R 1171.

——a suit for rent must include claims for all arrears. 23 Bom. L. R. 1086.

——omission to sue for instalment of annuity accruing due bars fresh suit 44 A. 663 · 20 A L. J. 590 . 1922 All. 370 . 68 I C. 970.

——a mortgage bond for a term of two years executed in 1902 provided the realisation of interest alone by suit In 1908 the mortgagee sued for the interest only due after 1905, a subsequent suit for principal and interst only was barred 27 C W. N 802 38 C L. J 126 ; 44 M L J. 123 . 32 M. L. T 41 ; 25 Bom L. R 220 · 72 I. C. 187 P. C

——redemption suit for a portion of a mortgaged property bars a subsequent suit for the remaining portion. 1923 Bom 63 : 73 I C. 862.

——when a prior suit for possession under a conveyance of immoveable property is dismissed a subsequent suit for damages against the vendor is not barred. 39 C. L. J 90 : 28 C W N 1033 . 1924 Cal 558 : 80 I C 357.

——plff's *bona fide* mistake to include a certain claim in a previous suit does not bar a subsequent suit 1923 All 230.

What are district causes of action ?

——cause of action means infringement of one's right. 6 C. W. N. 585

——the true test to determine when a cause of action has accrued is to ascertain the time when the plff. could have maintained the action to a successful result 30 C. L J 40.

——in determining the causes of action the court is to consider the allegations made in the plaint and not in defence L R 3 A. 587 . 1922 A. 510.

——cause of action dose not depend upon relief asked for but on the facts of the case 38 B. 444

——deft.'s action may give rise to fresh cause of action. 24 I. C 535, 20 C. L J. 360, P. C., 39 C 887.

——when the causes of action for two suits are different the mere fact that the relief asked for is the same will not bar the later. suit. 86 I C. 949 : 1925 M. 1172

Or. 2.—What are distinct causes of action?—*contd.*

——the rule requires only that every suit shall include the whole of the clair
34 C. L J. 485, 30 (

——it is not
joined in the suit,
out of the same cause of action 59 I. C. 517 (C)

——successive suit for different causes of action is not barred The test is, whether the cause of action in the subsequent suit is different from the cause of action in the previous suit 27 C. W. N 673 37 C L J. 545 70 I. C 187, 1923 Pat. 234 : 1923 P 575

——one test
whether the evid
a decree in bo
L J 267 71 I
been filed as one

——the dismissal of a suit for ejectment as owner against an alleged *trespasser* does not bar subsequent suit to enforce his right to redeem as mortgagor 63 I C. 684

——where an usufructuary mortgagee sued *for possession* only and the suit was dismissed he could not afterwards sue for money as he could have asked for a money decree *in the prior suit. 90 I. C.* 622 1925 P H C C 338.

——but the right to sue for possession of the mortgaged property under the covenant in a mortgage deed and the right to sue subsequently for the mortgage debt are distinct causes of action. 63 I. C 303

——a mortgagee of independent mortgages over the same property is entitled to maintain separate suits Or 2 r. 2 provides

——right to sue for ejectment and for arrears are distinct causes of action. 63 I. C. 978.

——a suit for mesne profits and a suit for possession are suits for distinct causes of action 60 I C 978

——first suit by minor's next friend by splitting up the cause of action does not bar the second suit by the *minor* on attaining majority. 45 B. 805 : 33 Bom L. R 20 : 67 I. C. 276.

——the dismissal of the first suit to set aside order *for re-delivery* under Or. 21, R. 101 does not bar a subsequent *suit for partition. 49 M. 596 : 95 I. C. 209, 1926 Mad. 683 : 50 M. L. J. 681.*

——title to the property in dispute in the two suits and the property being the same do not necessarily *show that* the causes of action are the same. 59 I. C. 517 (c)

——a suit for partition of eight annas during the pendency of appeal in another suit for establishing sixteen annas share which is withdrawn with leave to bring fresh suit, does not bar a subsequent

Or. 2.—What are distinct causes of action?—*contd.*

suit for sixteen annas share. 6 Pat. L. T. 373 : 2 Pat. L. T. 528 : 1921 Pat 209 : 62 I C. 962.

——in case of instalment bond the cause of action arises and limitation runs on the first default though the bond gives option to the creditor to sue for the whole amount or for the overdue amount. Such is the law in case of instalment-decree 24 C. 281 : 1 C. W. N. 229

——where in an instalment bond the whole amount becomes payable in default of any instalment, a suit for unpaid instalments bars a subsequent suit for the remaining instalments 25 Bom L. R 203. 1923 Bom. 201 · 72 I. C. 290, 20 Bom L. R. 773 · 37 A 400 · 43 A. 671 *fol* 39 M 981 *Dis. contra* 19 N L R 170.

——claim in the alternative as shebait and owner is maintainable 21 C w. N 160.

——separate suits for rents und cesses are maintainable. 77 I. C 364 (c)

——a prior suit for rent does not bar a subsequent suit for cess. 27 C W N 521. 1923 Cal 615.

——a prior suit for possession does not bar a subsequent suit for mesne profits for a subsequent period 71 I C 972

——a prior suit for possession and future mesne profits does not bar a subsequent suit for mesne profits previous to that 97 I C. 389. 1926 Mad. 1015. 51 M L J 252 1926 M W. N. 814, 38 M 829 *applied*

——a prior suit for possession does not bar a subsequent suit for redemption 5 Lah L J 296 4 Lah 187 75 I C 528

——when a suit is on *hatchitta*, which is found false, relief cannot be granted on original debt 1 C W N 710.

——suit for interest only bars a second suit for principal and interest on a mortgage bond 44 A 121 : 26 C. W N 297 35 C L. J. 126, 30 M L. T. 224 · 24 Bom. L R 341 : 3 Pat L T. 279 P C. but not so, where there is a postscript preventing the mortgagee to sue for the principal before two years, 107 I C. 591. 26 A L. J 57

——in the case of a single mortgage providing for the recovery of the principal and interest from the mortgaged property *as well as* from the other property and the person of the mortgagor, a previous suit for interest against the mortgagor personally does not bar a subsequent suit for recovering the balance due on the bond from the mortgaged property, the causes of action in the two suits being different. 1923 Lah 269, 1922 P. C 412 *Applied*, 1922 P. C. 23 *Dist*

——where there were separate covenants for the payment of principal and interest demand being necessary for the former, a suit

Or. 2.—What are distinct causes of action?—*contd.*

for interest alone does not bar a suit for principal. 48 M. 703: 49 M. L. J. 474 · 1925 Mad. 1120

——attachment of one's property gives one cause of action and sale gives another cause of action. 36 M. 383.

——simultaneous execution of mortgage and lease must be treated as one transaction and a subsequent suit by the mortgagee to recover principal and interest thereon is barred by Or. 2. r. 2. 63 I. C 928

——a mortgagee can sue for interest or for possession although in a previous suit he claimed interest only. 2 Lah. 13 : 59 I C. 71 F. B.

——a mortgagee holding a separate money bond against a mortgagor is under no obligation to enforce the money bond along with the mortgage or even to refer to its existence in his suit for mortgage bond. 86 I C 481 · 1925 Mad. 991.

——an usufructuary mortgage and a lease of the same property are distinct subjects giving rise to different causes of action. 5 Lah. L 205, 4 Lah 52 1923 Lah 203 · 74 I C 122.

——prior suit for redemption of a portion bars a subsequent suit for redemption of the remainder 24 Bom. L. R. 1157.

——one suit for possession by the mortgagee bars a subsequent suit unless second time dispossessed 67 I C. 281

——debtor taking possession of the creditor's estate as executor—death of debtor gives rise to a fresh cause of action against his estate. 7 C W. N. 476

——each alienation by a Hindu widow gives rise to separate causes of action 1922 Oudh 171 66 I. C. 455.

——a reversioner can in a single suit sue against several alienations of the widow 24 I C 95

——a previous title suit does not bar a subsequent partition suit as the cause of action for the latter suit continues so long as the common tenancy continues. 25 Bom. L. R. 491 : 1923 Bom. 440 : 73 I. C. 424.

——a single suit for pre-emption against the same vendee with respect to four different sales is maintainable. 73 I C. 892.

——when there is *ijaradar* for term, and he is dispossessed, cause of action for the landlord arises on the determination of the *ijara*. 1 C W N. 246, (10 W. R. 15, 9 C 367, 10 C. 577. 13 C. 100). *Dist.*

[illegible] conversion

M. L. J. 627 **P. C.**

——a suit for injunction against sale does not bar a suit for specific performance of contract. 6 Lah. 384 : 7 L L. J. 236 : 87 I C. 994 : 26 Punj L. R. 280.

——the persons entitled to maintenance can sue together. 17 C. W. N. 341.

Or. 2.—What are distinct causes of action?—*contd.*

——claim for adjustment of suit for additional land in first suit does not bar similar claim for subsequent period. 40 C L. J 538.

——dismissal of prior suit by a co-sharer for exclusive possession does not bar a subsequent suit for partition. 64 I C. 174.

——a suit for declaration of title bars a subsequent suit for possession. 1922 Nag. 129 : 65 I. C 194.

——a suit for share of inheritance only bars a subsequent suit for dower 1922 A. 510 : L. R. 3. A. 587.

——a suit for inheritance bars a subsequent suit for portion of the estate. 18 N. L. R 136.

——a suit for specific performance and a suit for recovery of earnest money are suits for different causes of action 45 A. 378 ; 1923 A 321 21 A L. J. 265 : 72 I. C 86. So also a suit for specific performance and for possession. 45 M. L. J. 431 18 L W 333.

——causes of action being identical in two suits, one being for possession and damages and the other for specific performance and completion, the second is barred under Or. 2. r. 2 (old sec 43). 6 C. W. N. 17 : 24 M. 291, P. C.

——when a single debt is split up, causes of action become different. 24 M. 960, 36 M. 151.

——independent contractors with the deft. cannot bring a joint suit against him. 27 Bom L. R 472 87 I C 435 1925 Bom 342.

——Or 2, R. 2 does not bar pleas in defence. 27 Punj. L R 463 : 96 I. C. 630 1926 Lah 494, 1926 Lah. 21 *Ref.*

When several persons can unite as plffs.

——subject to the control of the court persons can joins as plffs. though they seek for individual reliefs, in cases where the investigation would, to a great extent, be identical, the policy of the law being to avoid needless expenses where it can be done without prejudice to any one 103 I. C. 811 (c)

Date of cause of action

——admission by the deft. in the W S of the plaintiff's title does not take away cause of action. 20 C. W N 636

——plff need not specify the exact date in the plaint, it may be proved. 15 C W. N 882

——rights of the parties at the date of the suit must be looked into and in special cases subsequent circumstances may be looked to. 20 C. W. N 1099.

——relief may be granted on the subsequent event also. 24 C L. J. 140, 20 C L J 107, 20 C. W. N 1099

Objection as to causes of action.

——an objection as to joinder of causes of action if not taken in the court of first instance cannot be taken in appeal. 33 C L J 317, 63 I C. 161

——deft can obtain at the earliest possible stage declaration of the court upon the question whether there is or is not cause of action, though the objection was not taken in the W. S 3 C. W. N 220. —

Suits brought on the same day, which is earlier.

——when two suits are filed on the same day the presumption is that the suit bearing subsequent number was filed later. 2 Bur. L. J. 210.

——But the Madras H C. is of contrary opinion, which holds that it cannot be said that the suit bearing the later number was "afterwards" launched within the meaning of Or 2, R. 2 which contemplates a later proceeding in the real sense. So the pltf. may elect as to which of the two suits should be held to be by Or. 2, R. 2. 49 M. 869 : 97 I. C. 443. 1926 Mad 934 : 1926 M. W. N. 583 : 51 M L. J 351.

Or. 3. rr 1—6 RECOGNIZED AGENT AND PLEADER.

——recognized agent cannot be heard 19 C. W. N. 64

——when a suit is brought by a person professing to act as another person's agent, court has the power to enquire into the agent's authority. 19 C. 678 : 19 I A. 135 **P. C.**

——a person holding a power of-attorney is not bound to accept service of summons. 8 C 326

——in order to set aside an *exparte* decree service on pltf's pleader is not sufficient, service on party is necessary. 63 I. C. 47.

——the objection as to the validity of a power of attorney must be taken in the first court 69 I C 365.

——when a pleader cannot attend, he has no power to delegate his authority to another pleader 20 B 293

——an attorney's *retainer* can be revoked only with the leave of the court by a writing signed by the client and filed in court 36 C. 609

——if a recognised agent does not conduct a suit his presence is no appearance within Or 9, 23 B 414

——a pleader appointed by a person having power of attorney is duly appointed and an execution petition signed by such person is valid 44 M 736 : 41 M L. J 645 : 1921 M. W. N. 552 : 14 L. W. 244 : 48 I A. 534 **P C**

[illegible] ...ation of

without putting name on it, he must be deemed to have impliedly authorised the [illegible] appear for him, 6 N. [illegible] C. 436. such technical [illegible] ect the appeal. 102 I. C [illegible]

——when a plaint is returned for presentation to proper court the original *vakalatnama* continues to be in force, 6 N. L. J. 100 : 1923 Nag. 182 : 19 N. R 36 : 71 I. C. 436.

——when one person signs for another in vakalatnama with the full knowledge and acquiescence of the latter, the irregularity is formal one and may be cured by s. 99 C. P. C., 74 I. C. 1033.

Or. 3. rr. Recognized Agent and Pleader—*contd.*

——where a plaint was signed and verified by the plff's agent who was only subsequently granted leave to sign and verify the plaint, held that the omission to obtain leave beforehand was a mere irregularity not invalidating the plaint. 48 M. L. J. 721 1925 Mad. 660.

——the acceptance of a power of attorney must be in writing. 1923 Lah. 402 : 84 I. C. 518

——a pleader holding a power of attorney need not file the power in filing the appeal 7 L L. J 29 : 86 I C 207 : 1925 Lah. 331.

——the nonfiling of vakil patra does not prevent an appeal from being an appeal properly preferred under Or 3 R. 1., 28 Bom L R. 538 : *1926 Bom. 336, 95 I C 266*

——if a pleader is not competent to appear plead and act in any court under the rules governing the procedure in that court, he cannot claim the right of audience by virtue of Or. 3 R 4., 48 M 676 : 1925 Mad 1201 49 M L J. 366.

—— the leave of the court can be assumed from its attitude and other circumstances. 82 I C. 102 : 35 M. L. T, 48 47 M. 819 F B

——advocate need not present any document empowering him to act under these rules 6 Pat. L T. 380 : 1925 Pat 614 . 88 I C. 91. 4 Pat 766, 7 Pat. L T. 213 5 Pat 255 · 94 I C 841 . 1926 Pat 246

——under s. 2 (15) " pleader " includes advocate and therefore an advocate " acts " when he files a memorandum of appeal or cross-appeal or cross objections or any other document in a case other than a memorandum of appearance under Or 3, R 4 (5), 4 Rang 249 · 98 I. C. 15 · 1926 Rang 215

——there is no specified form for written withdrawal by pleader. 35 M L. T 48 · 82 I. C 102 47 M. 819 F B

——a pleader must be duly appointed before he can appear, act and plead in a case Unless and until the conditions of Or 3, r. 4 are complied with, the duties and obligations of the pleader continue, 49 C 732 : 26 C W. N 589 35 C. L J 356.

——the return of a plaint for presentation to proper court does not put an end to the authority 5 N L J. 265 1922 Nag 125

——no court can refuse a pleader to accept a *vakalatnama* containing his name 3 Pat. L T. 447 1922 P. 504 68 I C 659

——a process served on a pleader in a case is sufficient communication to his client. 9, O L J 170 : 1922 Oudh 75

OR. 4. rr. 1—5, INSTITUTION OF SUITS, *See " C P C, suits."*

Or. 5. rr. 1—30, ISSUE AND SERVICE OF SUMMONS.

Rr. 1—4

——the court cannot dismiss a suit for default without fixing a date for the deft. to appear 22 P. W R 1921 60 I. C 475.

——order made by a court for the personal appearance of a party on a particular date does not imply that the party is bound to appear on an adjourned hearing. 39 A. 476.

Or. 5. R. 17—*contd.*

——under Or. 5 r. 17 C. P. C the service if possible shoul personal unless there is an agent empowered to accept the ser and it is only if the personal service cannot be effected that t is any justification in accordance with the provisions of Or. 5 r 40 C. L J. 154 . 82 I C. 703, 1924 Cal 1004.

——where the deft took the summons and a copy of the pl from the serving peon personally but refused to grant receipt it sufficient service, although no copy was being affixed to the o door 3 Pat 326 · 2 Pat. L R. 58 : 78 I. C. 889.

R 18.

——it is not incumbent on the party to provide an identi 3 Pat L. T 498 . 65 I C 149

R 19.

——an *exparte* decree without recording that the service sufficient is liable to be set aside. 15 L W. 17.

R 20

——substituted service is allowed when summons cannot served in the ordinary way When the plff. knows all along t deft. had left a certain place two or three years before suit it can be said, he was evading service 69 I C. 467.

——service on tree near the hut is sufficient. 1923 Nag. 69 I. C. 549

——the appellate court has no jurisdiction to consider whet the order of the trial court for substituted service was on suffici or insufficient grounds. 102 I C. 243 : 1927 Mad 507 : 52 M. L J. 47

Or. 6. rr 1—10. pleadings generally
Or 7. rr. 1—18, plaint.
Or. 8. rr. 1—10, written statement & set off.
See C. P. C. "pleadings"

OR 9 rr. 1—14. APPEARANCE AND NON-APPEARANC OF PARTIES.

Applicability of Or. 9.

——execution proceeding should be excluded from those p ceeding to which provision relating to suits are extended s. 141 C. P C., 52 C. 559 42 C L J. 26 : 29 C. W. N. 886 : 87 I [illegible] C 450 : 1[illegible]

of executi [illegible] 179, 31 C. [illegible]

N. 576 *Rel. on.*

——the order does not apply to proceedings under Or. 21 90 disposed of *exparte* but in such case the court has inherent pow to give relief. 83 I. C. 749.

——it does not apply to objection made under Or 21 to t execution of a decree. 41 C. L. J. 286 ; 79 I. C. 351 : 1925 Cal 510

Applicability of Or 9—*contd.*

——where an application for setting aside a dismissal of a suit for default was itself dismissed for default a subsequent application to restore it was maintainable 47 A. 878 ; 89 I C. 350 1925 All. 773 : 23 A. L. J. 817

——where an application under Or 21 r 90 is disposed of *exparte* the provions of sec 141 or Or 9 do not apply, but the court has still an inherent jurisdiction in the matter 83 I. C 749

——Or. 9 R 9 does not apply to an order dismissing an application under Or 21, R 90 for default, 53 C. 679. 30 C W N 570 : 1926 Cal 773, 45 C. L J 60 100 I C 343 , 1927 Cal. 938, 2 Pat L T. 270 . 62 I C 113, 83 I. C. 749, 89 I C 360 *cantra.* 23 O. C 349 . 59 I. C 575 but the Court can reverse the order in the exercise of its inherent jurisdiction 53 C. 679 30 C W. N 570 1926 Cal. 773 :

——the provisions of Or. 9 do not apply to proceedings under Or 21 rr. 97 to 101 which are execution proceedings 50 M L J. 200 : 23 L W 227 . 92 I C. 533 : 1926 Mad. 412.

——Or 9 r 9 does not apply to an application under Or. 21 r 2 (2) and no appeal lies from an order dismissing an application for revival dismissed for default. 63 I C 855.

R 2.

——when process fee is timely filed suit cannot be dismissed for non service 4 Lah L J. 71 1922 Lah 63 . 67 I C 945

——when the plff failed to pay the charges for service of summons on some of the defts. under the order of the court and the suit was dismissed, the dismissal order must be deemed to have been passed under Or 9. R. 2 and not under Or. 17 R. 3. 100 I C. 691 1927 All 464.

R. 3

——the expression "neither party" in Or. 9 r. 3 would mean "not any one of the two or more parties" But the word "party" in the Code in various rules refers to the party whose case is being considered So in a case where the plff. and the two of three defts were absent but one deft was present. the dismissal of the suit for default can be said to be under Or. 9 r. 3 only so far as the two absent defts. are concerned, therefore a second suit against the two absent defts is maintainable 90 I C 2 23 A L J. 993

——a suit cannot be dismissed for plff.'s failure to appear on date which was not fixed for deft.'s appearance but only for plff's appearance with a view to his learning the date for deft's appearance. 1925 Lah 96.

——when a party has once appeared and subsequently does not appear the case is not *exparte* but *interpartes.* 1 Pat. 188 · 1922 P. 485.

——when the plff. appears and the deft. does not and the suit is dismissed for want of evidence the dismissal is on merit and not under this rule. 40 A. 590.

Or. 9. R. 3—*contd.*

——a suit cannot be dismissed for non-appearance of the parties on the day fixed for delivery of judgment. 28 Punj. L. R. 324: 100 I. C. 472. 9 Lah. L J. 178 : 1927 Lah 888.

R. 4.

——the two remedies, namely a fresh suit or an application for restoration, are not exclusive. 96 I. C. 187 : 1926 All. 678, 20 O C 66 *fol*

——notice to opposite party is unnecessary under this rule. 24 O C 347 9 O. L. J. 52. 64 I. C 267, 10 A. L J. 399, 1923 Oudh. 55

——no appeal lies against order refusing to set aside dismissal of a suit under Or. 9, r. 4, 27 C. L. J. 117

——an application to sue in *forma pauperis* being dismissed fresh application is not barred 2 Bur L. J. 217.

——when duly authorised agent with a registered power of attorney is present in court, the court cannot dismiss a suit for default of appearance. 3 Pat. L T. 447. 1922 P. 504 : 68 I. C. 659.

——although the provisions of Or 9 r. 4 do not apply to an application under Or 21 r. 90 they apply to proceedings under Or 21 r 100, 4 Pat. L T. 93. 1 Pat. L. R. 184; 2 Pat. 373 : 1923 Pat 78 · 71 I. C. 484.

——Or 9 R 4, does not [illegible]
under Or. 21, R 90 which [illegible]
30 C. W. N. 570 · 1926 Cal. [illegible]
maintainable subject to the
705 30 C. W N 570. 1926 Cal 773

——the failure of the plff to deposit the process-fee for the guardian of a minor deft. cannot be the ground for dismissing suit for default. 2 Pat L. T 256. 60 I. C. 377

——a suit should not be restored when the plff. is very careless 27 Punj L R. 264.

[illegible]

R. 5.

——Or. 9 r. 5 has no application to a case where the plff. has failed to appear and the fact that the summons has not been returned unserved is no ground to set aside the order of dismissal for default of the petitioner. 90 I. C. 675.

——this Rule applies to suit and not to appeals which are governed by the Rules contained in Or. 41. 50 B 815 : 28 Bom L R. 1446 : 1927 Bom. 68 : 100 I. C. 147.

R. 6.

——an order that the case will be heard *exparte* against a deft. who does not appear on a certain hearing date does not preclude him from appearing on a later stage, 20 A. L. J. 391, 1922 A.

Or. 9. R. 6—*contd.*

33: 64 I. C. 958, and filing written statements and examining witness 20 A. L. J 270, 1923 All 110: 66 I C 892, 1922 Bom. 345.

——in *ex-parte* case court is to take good care that plaintiff's case is at least *prima facie* proved. 15 W R 503, 39 C. L J. 279.

——the court cannot pass *ex-parte* decree without evidence. 43 C. 100 and cannot pass decree before the returnable date of the summons 32 B 534

——when decree is passed in the presence of the pleader of the deft. it cannot be regarded as *exparte* 6 Pat. 383 103 I. C 711 · 1927 Pat. 291 9 Pat. L. T. 63.

Or. 9, R. 7.

——on the hearing date the deft who had already filed his written statement *was absent* and the court declared him *ex-parte* The evidence of the plff was adduced on that date and the hearing was adjourned to another date on which the deft. appeared and wanted to put forward his evidence, held the *ex parte* order only covered the period during which the party was actually absent and did not act as bar to his resuming appearance Or 9 r 7 applies to a party who wishes to be relegated back to the position which [illegible]

91 I C 545.

R 8.

——where the plff does not appear, deft cannot adduce evidence 40 C 119

——where the plff does not appear but the deft. appears and applies for time, but the court dismisses the suit for default the order of dismissial must be deemed under R 8 and not under R. 4 7 Pat 333 1928 Pat 335

——where the plff and his pleader are both absent on the date of adjourned hearing the court cannot hear the case on merits 20 A. L. J 123 1922 All. 68 65 I C. 775

——where the pleader for plff applies for adjournment of a suit and on its being refused states that he has no further instruction, it is equivalent to absence of the party at the hearing and the subsequent dismissal of the suit is one under Or 9, r 8 90 I C 768

——Or 9 r 8 bars a second suit only when it is based on the same cause of action. When there is even a slight discrepancy arising out of the single fact amongst the many other facts common to the two causes of action that single fact alone makes them different causes of action. 87 I. C 35 · 1925 Nag 366

——a fresh suit in respect of the same cause of action against defts who were absent is not barred. 85 I C. 788 : L R 6 A. 71' 1925 All. 425

Or. 9. R. 8—*contd.*

——the Law contemplates a partial or total dismissal for default of the plff and in either case bars a fresh suit in respect of the same cause of action *above case*

——an order dismissing a suit for want of prosecution made after the passing of the preliminary decree is not appealable but is open to revision. 86 I. C 785 1925 Pat. 433 : 6 P. L. T. 152

——the "partial dismissal" under Or 9. r 8 refers to the dismissal of the *claim in part and* not to a case where a suit is dismissed partly under r 8 and partly under some other rule. 90 I. C 2: 23 A. L. J 993

——the allegations made in an application to restore a suit dismissed for default should be enquired into and then disposed of according to law L R 6 All. 14 (Rev)

——where the plff was negligent enough to start for the last train and missed it and the suit was dismissed for default it was the business of the court to decide the rights of the parties and not to deprive them of their rights by the mere exercise of discretion Negligence is human and not irreparable. It can be repaired by paying the costs of the other side and restoring parties in their original position 87 I C 119 1925 All 601 L. R 6 All 221.

——when the plff. was absent at the time of settlement of issues on account of an accident relating to the train and the suit was dismissed for default it should be restored on payment of the cost of the opponent. 27 Bom L R 685 89 I C. 225 · 1925 Bom. 423

——when the sole plff dies and the suit is dismissed for non-appearance of plff owing to the fact of death not being known to the court, the court has inherent power under sec. 151 C. P. C to rectify the mistake 25 A 331 41 I A 151 **P. C.**

——whe the plff. has been adjudged an insolvent the proper procedure for the court is not to dismiss the suit for default but to call upon the Official Assigne to state whether he intends to continue the suit 31 C W. N. 22 53 C 844.

——when the deft admits part of the plff's claim it cannot be dismissed for plff's non appearance 89 I C 614 · 3 Pat. L. R 249 1925, Pat 712, 15 S. L R 172 66 I C. 789 but part admission i pre-emption suit cannot be given effect to 60 I C. 724

——an appeal lies from an order dismissing a suit for defau but rejecting a part of the claim 45 M L. J 497 : 33 M. L T. 34 25 Bom. L. R 1248 : 75 I. C 7 **P C.**

——no appeal lies against an order of dismissal for default, b when it raises the question of excess of jurisdiction the appeal m be treated as an application for revision. 6 P. L. T. 127 : 86 I 787 . 1925 Pat. 374

——where a date is fixed for the appearance of the *guard ad litem* it cannot be dismissed for default on that date 73 I 559.

——when a date is fixed for amendment of issues and neither p appears on that date the petition for amendment may be dism but not the suit. 6 Pat. L. J 3313, 2 Pat. L. T. 760, 63 I. C. 746

Or. 9. R. 8—contd

——the order of dismissal under Rule 8 can be displaced only under Or. 9 r. 9 or on an appeal from an order under that provision 1922 M. W. N. 483 : 1922 M 416

——when the defaulter does not apply under Or. 9 r. 9 in time he cannot take recourse to sec. 151. C P. C 7 Lah L J 13 86 I. C. 256 · 26 Pun. L R. 841 . 1925 Lah 321.

——a suit dismissed for default under Or 9, R 8 can only be restored under R 9 but cannot be reviewed. 46 B. 839 : 27 Bom L R. 1150 . 90 I. C. 610 1925 Bom 521 *contra*. 26 C 598 2 C W. N 318.

——where part of the plff.'s evidence is on the record the suit cannot be dismissed for default but must be decided on merit. L. R. 4 All 390.

——when the plff. appears but leaves the court for a short time the suit should not be dismissed for default 2 Lah. L J 449

——a court has power in dismissing a suit for default to insert in the order a proviso that the dismissal shall not operate to prejudice the minor plff. 6 Pat L J. 617 63 I. C 736

——where a suit is dismissed for default under Or 9 r. 8, it has not the effect of *res judicata* on a subsequent suit as there was no adjudication on any of the issues 39 M. L J. 412 12 L W 431: 60 I. C. 201.

——where one of the two plffs did not appear in person inspite of court's order nor showed cause but the court proceeded with the trial and decreed the suit in favour of both, it was not illegal. 48 C. 57 : 62 I C. 112.

R. 9.

——on dismissal of suit under r 8, the plaintiff's remedy is (1) to apply for review under S 114 C P C. 26 C 598 2 C W N 318 *Contra*. 1 Pat. L. J 547 46 B. 839 90 I C. 610 1925 Bom 521, 86 I. C. 616 . 1925 Lah. 517 (2) to apply under r 9 within 30 days 31 C. 150 But a fresh suit is not barred in case the plff. was a minor and the first suit was brought by next friend who did not appear owing to gross want of care and diligence. 22 C. 8, 24 B. 547, 552, 19 B 571, 577.

——the mere dismissal of a redemption suit for default without [illegible] ...ps appreciating
to be an order
ral provision of
s 60 T P. Act.
; 687, 22 Bom

[illegible]

Or. 9. R. 9—*contd*

——a petition made under this rule being dismissed for default it may be restored under this rule 21 C. W. N. 30. 24 C L. J. 44 *Contra* 1923 Bom 386, 94 I. C 151 1926 Mad 654 ; 23 L. W. 538

——Or 9, r 9 does not apply to execution proceedings. 52 C. 559 42 C L. J 26 ; 29 C. W. N. 886 87 I C. 633 ; 89 I C 360, 17 A 10 P. C., 50 B. 457 · 28 Bom. L. R. 686 : 96 I. C. 411 : 1926 Bom 377.

——it does not apply to an application under Or. 21 r 2, 63 I. C 855, 41 C L. J 286, 79 I. C 351

——it does not apply to an order dismissing an application under Or 21, r. 90, for default 2 Pat L T. 270 · 62 I C. 113, 83 I. C 749 89 I C 360, 53 Cal 679 30 C W N 570 ; 1926 Cal. 773, 45 C. L J 60 100 I. C 343 1927 Cal 1938, *Contra* 23 O C 349 ; 59 I. C. 575 but the court can reverse the order in the exercise of its inherent jurisdiction 53 C 679 30 C W N. 570. 1926 Cal, 773 · 96 I. C 705

——application under Or 9 r. 9 must be disposed of on evidence 22 C W N 671 42 I C 649.

——the dismissal of a prior application for probate without trial of that question is not a decision binding for all purposes. Or 9, R. 9 does not apply to such cases 53 C 578. 1926 Cal. 1057, 14 C W. N 924 *fol*

——after a decree has once been passed in a suit the suit cannot be dismissed unless the decree is revered on appeal. 35 M. L T. 143 · 5 Pat. L T 623 40 C L J 439 P C.

——suit dismissed for default, application for restoration compromise by some of the parties, effect of. 39 C. L. J. 367 : 1924 Cal 814

——r. 9 does not empower court to set aside dismissal for default as a matter of grace. 85 I C 499 1925 Mad 209 : 48 M. L J. 152

——application for setting aside order of dismissal for default and for the removal of the guardian for negligence must be disposed of on taking evidence 87 I C 117 · 1925 Mad. 774 : 21 L. W. 325

——application for restoration—non-contesting deft.—effect of compromise by some of the parties 83 I C. 958 · 1924 Cal. 814.

——pltf. must prove his case though *exparte*. 39 C. L. J. 279 · 1924 Cal. 896 ; 81 I C 867.

——an application under Or 9. r. 9 to set aside an order of dismissal for default of an application to set aside a decree passed *ex-parte* against the applicant and *inter partes* against others, is not maintainable. 1922 Pat 5 · 1922 P 121.

——a suit cannot be restored against the exonerated defts 25 O C. 67 ; 1922 Oudh. 160 : 68 I. C. 246.

——fresh suit is barred only when it is brought for the same object and on the same cause of action as the suit which was dismissed. 45 A. 81 : 1923 A. 409 : 74 I. C 991.

——the dismissal of a suit for enhancement of rent under Or 9 R. 8 does not bar a second suit for enhancement of rent of the same tenure either under Or. 9, R 9 C. P. C. or s. 9 of the B T. Act in as much as the cause of action is different. 103 I. C. 615 · 1925 Pat, 375 ; 8 Pat. L. T. 789 : 7 Pat. 28.

Or. 9. R. 9—*contd.*

——illness of the brother was held not sufficient ground of absence. 2 Pat. 784 : 74 I. C. 847

——when the party appears a few minutes later the case should be restored. 1923. Bom. 480 : 1923 A 189 : 71 I. C. 283

——when a case is called and the party or his agent goes to bring the pleader and the case is dismissed it should be restored 96 I. C. 821 . 1926 Lah 650, 93 I C. 211 · 23 L W. 430.

——a litigant who deliberately takes the risk of not obtaining [illegible] be allowed [illegible] 3 I C 749 [illegible] use for his

Appeal

——appeal lies from an order rejecting an application but no appeal lies from order granting the application 5 C 711 *contra*, an order refusing to restore is not appealable 89 I. C. 360

——a preliminary mortgage decree having been passed *ex parte* the mortgagor applied for setting it aside under Or 9 r 13 It was dismissed for default and an application to restore it was also dismissed Appeals were filed from these two orders, but in the meantime the preliminary decree had been made final, held, that the appeals were incompetent after the decree had become final 29 C. W. N. 640 90 I C 380 . 1925 Cal 790

——where an application to set aside the dismissal of a prior application to set aside the dismissal of a suit for default, is itself dismissed there is no appeal against the order of dismissal 36 C. L. J. 184, 19 C W N 25, *Ref* 1923 Lah 302 73 I C 821.

——an order restoring a suit dismissed for default is not a judgment within the meaning of cl 15 of the Letters Patent and is not appealable 49 C 616 1922 C 407

——an order refusing to set aside the dismissal for default of an application for execution is not appealable 45 C L J. 69 100 I C. 343

For application of. s. 141 to this Chapter see **S "141"**

R. 12.

——court may order party to appear in person, if he does not, court may pass a decree *ex-parte* 41 M 256, 23 B 318 *Dist*

——where a person is added as additional plff on the objection of the deft and is ordered to appear in person, the whole suit cannot be dismissed for his non-appearance 95 I C 865 1926 Lah. 577.

R. 13, setting aside decrees exparte.

Application of this rule and Or. 17, rr. 2, 3.

——where some witnesses were examined and case was adjourned at the instance of court, Or 17, r 3 was not applicable but Or 17, r 2 and [illegible] C W. N 775, 34 C 255.

[illegible] not appearing at adjourned [illegible] Or 17, r. 2 and so this rule [illegible] 34 M. 97, *overruled*.

Or. 9 R 13. Application of this rule and Or. 17 rr 2, 3—*contd*

——where the hearing of a suit had not commenced and th plff did not appear on the adjourned date the suit should be dismissed under Or. 9 r. 8 and not under Or. 17 r 3. In case o dismissal under Or. 17 r 3 the remedy is by way of appeal or review and in case of dismissal under Or. 17 r. 2 the party can set aside th dismissal under Or 9 r 9 or r 13 The courts should exercise extrem caution when on an adjourned date the parties fail to appear. The should in the first place apply Or. 17 r. 2 rather than Or. 17 r. 3 24 Bom L R. 775 · 68 I. C. 514 . 1923 Bom. 27.

——a decree was passed after adjournment applied for on behal of the parties had been refused by the trial judge. The vaki after such refusal stated that he had no further instruction Th decree was held to be under Or. 17 r 3 82 I. C 1028 : 1925 Mad 31 *See other cases under Or 17 rr. 2 and 3.*

Scope of rule 13.—

——this Rule applies to proceedings in arbitration under Sch II para 20 C. P. C 1928 Mad 969 55 M L J. 262.

——there can be no *ex-parte* proceedings against a deft. who ha entered appearance and filed written statement. 45 A. 618 : 21 A L J 495 · 1923 A 551 . 75 I C 387

——when the party is absent but his pleader is present in cour without taking any part in the proceeding the deft is to prove tha his pleader was not instructed 25 Bom. L R 1222.

——before passing a final decree in a partition suit the cour must give notice to the deft. 20 A L J 912 : L R. 3 A. 626 Bu not so in case of passing a final decree in a mortgage suit. 192 Nag 175 67 I. C. 282.

——proceedings under Or 9 r 13 may go on *ad infinitum*, 19 Cal 552, 44 C 950 *fol.*

——the heirs of a deft against whom an *ex-parte* decree has bee passed before his death can apply under this rule 1923 A. 30, 2 A 274

——when a case [illegible] *ex-parte* decree in [illegible]

——although C [illegible] Or. 21 r 90 the [illegible] [illegible] o [illegible] being execu [illegible] not apply to them [illegible] M. L. J. 200.

——knowledge of the date of the decree must be proved by th applicant to save limitation. 4 Pat. L. T. 545 : 1924 P 36 *contra* 25 Bom. L. R 74 : 45 B. 485

——the deft's knowledge of the suit after the passing of th decree is irrelevant except for the purpose of deciding whether th application under Or. 9 r. 13 is barred by limitation 1926 Mad 31 : 90 I. C. 1042 : 49 M. L. J. 445.

Or. 9 R. 13. Scope of rule 13—*contd.*

——the applicant must have knowledge not merely that a decree has been passed, but, that a particular decree has been passed in a particular court in favour of a particular person for a particular sum. 47 B 485 : 25 Bom L. R. 74 . 72 I C. 130.

——the court cannot, acting under s 151 C. P C set aside an *ex-parte* decree when the application under this rule is made out of time. 1922 Pat. 61 - 63 I. C. 541, 43 M 94 F B., 1 Pat 277.

——application to set aside *ex-parte* decree lies in the original [illegible]

[illegible] 24 O. C 282.

——when an *ex-parte* decree is passed in a suit for enforcing a charge a puisne mortgagee who has not been made a party cannot come in and apply under Or 9 R. 13 92 I C 946 1926, Cal 1015.

——the court is restricted to the condition mentioned in Or 9 r. 13 and cannot consider any other valid reason. 15 S L. R 61 : 63 I. C 131.

——an *ex-parte* decree cannot be set aside at the instance of a party who has been expressly exempted from the decree. 3 U. P. L. R 29 : 61 I C. 484

——in setting aside an *exparte* decree notice on pleader is not sufficient as he does not represent the plff after the disposal of the case *ex-parte*. 63 I C. 47

——where the claim is divisible an *exparte* decree may be set aside as against some only. 1921 M W N 795

——an *exparte* rent decree can be set aside as regards some defts and remain good against others 32 C. W N 507 1928 Cal. 397

——an*e* [illegible] defts cannot be set aside as against al[illegible] the cause o[illegible] individual.

——court cannot set aside a decree against contesting defts. in setting it aside against absent defts. 17 C. W N 142.

——no fresh *vakalatnama* is necessary 24 Bom. L. R 744 : 1923 Bom 207.

——once the court is satisfied that the deft did try to be present in court in time and would have got there in time but for the intervention of an accident for which he was in no way responsible the court should restore the case The fact that by some human possibility the deft could have been present does not affect his right. 46 M 60 : 43 M L J 632 : 31 M L T. 257 . 1922 M W N. 600 : 68 I. C 971 · 1923 Mad 63.

——the fact that the suit decreed *ex-parte* was time-barred is no ground for setting the decree aside under this rule or under s. 151, 1 Pat 277 · 1922 P. 479.

Or 9. R. 13 Scope of rule 13—*contd.*

——a minor deft. cannot apply under this rule on the grou[nd] that he was not properly represented in the suit. 66 I. C. 460, M. L. J 399, 24 A. 383, 37 A. 179 39 A. 8. *Ref.* 18 N. L. R. 138, 97 I. 514 · 1926 All 545 24 A L J. 970 : 49 A. 123 F. B. 31 A. 572, *contr* L. R. 4 All. 137 · 1923 A. 213 71 I C. 456.

——an application to set aside an ex-parte decree which h[as] been confirmed on appeal preferred by another deft. should be ma[de] in the original court and not in the court of appeal. 42 M. L. 12 · 30 M L T 151 , 1922 Mad. 33 66 I. C. 59

——once the decree is confirmed by the appellate court origin[al] court ceases to have jurisdiction. 37 A. 208.

——when compromise petition is filed on behalf of all, petition for restoration on the ground of non-service under this ru[le] lies as it is not *ex-parte* decree. 19 C. W. N 120

——a petition under this rule may be converted to a petiti[on] under Or 47 r 1, 21 C W N 20, 24 C L. J 446

——a claim case being dismissed for default, only remedy is [a] suit 16 C W N 882

——where an *ex-parte* decree is passed the party may witho[ut] applying under this rule appeal on the ground that the refusal adjourn the case was not proper 23 Bom. L R. 769 : 63 I. C 4[?] 32 C. W. N. 101

——when appeal is preferred, application under this rule do[es] not lie. 30 M 535, *contra* 12 C W N 885, 37 A. 208. *an[d]* *below.*

——legal representative cannot apply under this rule. 29 C. [?] 38 M. 442. *contra* 21 A 274 But if the application is made b[y] the deft. his legal representative can continue it. 29 A. 574

——where an application to set aside an *ex-parte* decree [illegible] the judge [illegible] of the applic[ation] [illegible]

[illegible] ree but as som[e] [illegible] decree varie[d]

Thereafter the deft applied to the trial court to set aside the *ex parte* decree, held it should not be allowed as the decree of the tria[l] court had already been superseded by the appellate decree 9[?] I. C. 724

——an order setting aside an *ex-parte* decree conditioned on th[e] petitioner paying costs within certain time is not proper. 90 I. C 745 *contra.* it is perfectly legal, 90 I. C. 243 : L. R. 6 A. 586.

——a minor can intervene for the purpose of setting aside a[n] *ex-parte* decree provided he can show negligence on the part of hi[s]

Or. 9 R. 13. Scope of rule 13—*contd.*

guardian in the conduct of the suit. 88 I C 987 : 1925 Pat. 512 : 6 Pat. L T. 855.

——mere irregularities in the appointment of the guardian *ad-litem* who allowed the suit to be decreed *ex-parte* do not entitle the minor to reopen the suit unless he can show that he has been prejudiced thereby and has been deprived of some good defence. 97 I. C. 514 . 1926 All 545 24 A. L J 970 F. B.

——a decree based on a compromise cannot be treated as an *ex-parte* decree and consequently Or. 9 r 18 does not apply 19 C. W. N. 118 : 27 I. C. 227, 27 I. C 261.

Appearance.

——when the party and his pleader appear but the pleader asks for a pass over to consult his leader and none appears when the case is called [illegible] 68 I C 943

[illegible] is instructed only [illegible] not an appearance. [illegible] 8 C W. N 621, 6 B [illegible] 31 C 150, 22 A. 66. [illegible] L J 481, 1 Pat. 188 : 1922 (P) 485, *contra*. 4 C W N 237, 16 B 23, 26 M. 267 but when the party himself is also present in court, according to Madras H. C (30 M 274,) and Pat H C (3 Pat L J 355, 4 Pat L. J 712) it makes no difference, and according to Bom. H C, he must be deemed to have appeared 34 B. 475

——deft's pleader asks for time which is not granted, remains in court but does not adduce evidence or submit argument, it is appearance 17 C W. N. 628. *Contra* 1918 Pat 236

——but presence of party in appeal case asking for time on the ground of pleader's illness, it is not appearance. 19 C. W. N 27 n

——when pleader is instructed to make application which is made and the pleader retires, it is not appearance 8 C. W. N. 621, 21 A. L. J 500 1923 A. 549 · 74 I C 845, 23 C. 738, *Fol* 27 C. 529, *Diss*. 22 A 66.

——the test of deft's appearance is whether the requirements of the summons have or have not been complied with 19 C. L. J. 535

——*when a pleader who is not duly instructed in the suit attends*, he does not appear 23 B 414

——the term "appearance" is not defind in the Code. To constitute appearance by a pleader it must be shown that the pleader is duly instructed and able to answer all questions. 110 I C 377 1928 Mad. 831

——[illegible] the case was gone through [illegible] done except arguments [illegible] it of the unpreparedness of the pleader, who was present, to go on with the case, is a dismissal for default. *12 C* 605.

Or. 9, R. 13. Appearance—*contd.*

——when a party is personally present and applies for adjournment, it is appearance 23 B. 414, 17 W. R. 370

——plff. closes his case, deft's counsel adduces some evidence and asks for adjournment which is refused, counsel withdraws, court tries on merit, it is not an *ex-parte* decree. 35 C. 1023.

Non-appearance.

——of plff to depose though cited as a witness by the deft or called by the court, will result to dismissal of the suit. 19 C. W. N. 212 *n.*

——when suit is adjourned, fresh order is to be made for the appearance of a party 39 A 476.

——a deft. must satisfy the court either that the summons was not duly served or that he was prevented by sufficient cause from appearing when the suit was called on for hearing. 52 C. 179: 88 I. C 508 1925 Cal. 627.

——when service is effected on pardanashin lady by serving the summon on the son living in the same house it must be taken to be good service 94 I. C 228 · 1926 Cal. 845.

——an order dismissing a suit for default should not be set aside as a matter of grace, when the court finds no sufficient cause shown for non-appearance. 47 M 819 20 L W. 829.

Effect of setting aside *ex parte decree*

——when an *ex parte* decree is set aside the case remains undisposed of 21 C W. N 1087

——a third person auction-purchaser is not affected by the setting aside of the *ex parte* decree. 14 C. L. J. 300, 1925 Cal. 1074 : 85 I. C. 376.

——...ion purchaser is affec... L. J 476 *Dist.* 20 C ... t aside, 19 C. W. N.

——when *ex-parte* decree is set aside on the ground of fraud in concealing compromise, the compromise should be carried into effect without further investigation. 28 C L. J 158.

When separate suit lies.

——a regular suit does not lie on the ground of non-service ... on the ground of fraud, 21 C. ... has been unsuccessful in his ... C. 475, 29 C. 395 : 29 I. A 97 ... C. 343, but if it was tried on ... barred by *res judicata*. 29 A.

——when the applicant has become unsuccessful in appeal the trial court has no jurisdiction to entertain an application under this rule. 4 Pat. L. T. 115 : 1923 Pat 145 : 71 I. C. 583, but before the disposal of appeal such application may be entertained. 73 I. C. 900.

Or 9 R. 13. When separate suit lies—*contd*

——an application to set aside an *ex parte* decree on the ground of non-service of summons was dismissed on the finding that summons had been served In a subsequent suit to set aside the *ex-parte* decree, held that the dicision on the service of the summons was not *res judicata*. 29 C W. N. 325 : 86 I. C. 779 : 41 C. L. J 281 : 1925 Cal 663.

——a suit to set aside *ex-parte* decree is not maintainable on the ground of false claim and perjured evidence. 31 C. W. N. 258. 97 I. C. 879 : 1927 Cal 84

When appeal lies

——[illegible] decree being dismissed [illegible] dismissing an application [illegible] 519. 1922 All 337 67 I [illegible]

——application to set aside an *ex-parte* decree in a Small Cause suit was set aside by the successor of the court having no Small Cause Court power, no appeal lay. 20 A L J. 208. 1922 A 50. 65 I. C. 967.

——where an adjournment is improperly refused and an *ex-parte* [illegible] the exparte decree [illegible] g adjournment can [illegible] be set aside apart [illegible] under Or 9 r 13 as [illegible] ion appearance. 1925 [illegible] 610 F. B

——an order refusing to set aside an *exparte* decree made in a reference under the Land Acquisition act is not an award and no appeal lies against that order. 94 I C 330 : 1926 Cal. 816, 39 C. 393 *fol.*

——an appeal lies from an order rejecting the application to set aside a decree passed *ex-parte* 28 Bom L R 1245. 1927 Bom. 1 F. B, 36 A 77 *fol.* 28 Bom. L R 578 not *fol*

——an appeal lies from an order refusing to set aside an *exparte* preliminary decree in a mortgage suit even though there is [illegible] at has not been made [illegible] L. J. 28 [illegible] der refusing to set aside [illegible] 925 All. 267.

Revision.

——in revision against order setting aside an *exparte* decree passed *against all defts, all the defts must be made parties to* revision 1925 Cal. 509.

——an order setting aside an *exparte* decree can be the subject matter of revision by the H. C. 32 C W. N. 507 ; 1928 Cal. 397

R 14

——when a preliminary decree was passed *exparte* against some defts and on compromise against others and the former applied

Or. 9. R. 14—*contd.*

to have the decree set aside on the ground of non-service and it was dismissed and they appealed, but two of the defendants respondent died in the mean time and their representatives were not brought on the record for which the appeal was dismissed on the ground of abatement, held that the words "opposite party" in R. 14 meant the plffs. in the case and the appeal must be heard on merits 31 C. W. N. 906 . 103 I. C. 860 . 1927 Cal 692 : 55 Cal. 78.

Or 10. rr 1—4 EXAMINATION OF PARTIES BY THE COURT

——the proper way of clearing up pleading after they have been filed is provided by Or 10, r. 1. which is pre-emptory. 1922 Oudh. 178 66 I C 222.

——there is no o [illegible]
their pleaders when [illegible]
covers all the statem[illegible]
ment 8 Lah. L. J 67

——a statement [illegible] appears with a pleader merely to prosecute a case or look after it would not necessarily bind the party on whose behalf he appears 94 I C 1003 . 1926 A 411.

——Or 10. r. 4 is self-contained and provides for all cases where a party is ordered to attend court for the purpose of giving evidence 1921 M. W N 390 14 L W. 15 · 63 I. C. 961.

O. 11, rr. 1—23. DISCOVERY AND INSPECTION

——in a suit against a public body and in case in which the plff's claim depends on documents which are in the possession of the deft he must allow inspection 44 A 202 : 20 A. L. J. 1 : 65 I C 984.

——where in an account suit a party does not produce account books inspite of an order for discovery, presumption will be that the document is unfavourable to the party. 25 C. L. J. 581, P. C.

——where the mortgagor fails to produce the account book which would show the true nature of the debt the inference will be in favour of the mortgagee. 25 C. L. J. 589 : 21 C W. N. 761. P. C

——an order under Or. 11 R. 21 can be passed only when there is a previous order under Or. 11, R. 11 requiring a party to answer the interrogatories. 24 A. L J 589 : 96 I C 16 : 1926 All 553.

——it is only when an order under Or 11, R 18 has been made and not complied with that the court can dismiss a suit under O. 11 R 21. 96 I C. 1003 : 1926 Sind. 272.

——documents not material in the case though referred to in the plaint cannot be the subject of inspection. 23 Bom. L. R 1255

——documents produced under the direction of the court will not go in evidence without proof. 4 Lah. L. J. 395.

——rule 21 does not justify the dismissal of a suit for non-compliance with an order under r. 14 for production of documents. 46 M. L J. 350 : 34 M. L. T. 23 : 19 L. W. 355, 65 I. C. 661 *Diss.*

Or. 11, Rr. 1—13. Discovery and Inspection—*contd.*

——defence can be struck off under r. 21 for non compliance with the order of production only when the court directs discovery under r. 12, 44 A. 565 : 20 A L. J. 422 : 1922 A. 235 : 67 I C. 73.

——the penalty of striking defence should be imposed only in extreme cases and as a last resort. 65 I. C 661, 5 P at L. J. 550 9 C. 923, 14 C. 768, 58 P R. 1898, 52 P. R. 1892, 31 A 5 *Ref.*

——in order to compel the deft. to produce a document an order for production of documents under r. 14 must follow an order as to affidavit of documents under r 12., 1923 Pat 143, 1 Pat. L. R. 233 : 1923 P. 397, L. R. 5 A. 225 22 A. L. J. 299

——interrogatories cannot be administered to deft, who does not contest the suit or who is in collusion with plff 63 I. C 258

——a deft is liable to have his defence struck out only when an order of the court is not obeyed and even then the court should direct that the deft be called upon to show cause why his case should not be struck out. 27 Bom. L. O 794 : 89 I. C. 215 : 1925 Bom. 386.

——dismissal should be ordered only when court is satisfied that plff. avoids fair discovery. 1925 Cal. 166.

——the court has no statutary authority to take such disciplinary measure as to strike out the defence. 39 C L. J. 279 81 I. C. 867 : 1924 Cal. 806.

Review of order of dismissal

——when plff s suit has been dismissed under Or 11. R. 21, the court cannot review its order under s. 151, as the order is appealable, 98 I. C. 70 : 1927 Cal 158.

OR. 12, rr. 1—2. ADMISSIONS.

——the court can pass judgment as to the part of the claim admitted and allow the plff to prove the rest of his claim, 45 C. 138, the admission must be clear and unequivocal, 34 W. R. 691, and the court may not pass judgment on admission 11 C. 11, I. A. 186 P. C. 6 A 406.

——final judgment should not be passed upon the admissions in pleading or on affidavit unless the admissions are clear and unequivocal. To pass judgment on admission is discretionary and cannot be claimed as of right 27 C W. N 783

——in construing admission in a pleading a court ought to look to the plaint and the pleadings The rule is that if a party makes a qualified statement, it cannot be used against him apart from the qualification 20 N. L. R. 63 78 I. C 542 : 1924 Nag 129

——an ambiguous admission is not an admission on which the plff. is entitled to get a judgment. 97 I. C. 623 · 1927 Sind. 25.

——the object of R 6 is to get a speedy judgment, the plff. need not relinquish the rest of his claim. 92 I. C. 562 : 1923 Sind 119.

OR, 13 rr. 1—11, PRODUCTION &c. OF DOCUMENTS.

——Or. 13, r. 1 does not exclude the discretion of the court to receive any documentary evidence at any subsequent stage The appellate court should not interfere with the discretion of the court below unless it has been capriciously excercised. 40 C. L. J 280 8 Pat L. T. 255: 1927 Pat. 117, 9 Pat. L. T. 317: 106 I. C. 272. 1928 Pat 209, 110 I C. 821 1928 Pat. 537.

——the court may at its discretion receive documentary evidence at a subsequent stage of the proceedings. 45 C. 878: 45 I A. 73, 70 I C 278 1923 Oudh. 59

——when documents are accepted no inference can be drawn against the party producing them on the ground of delay in producing them, 1928 Pat 294

——documents filed at a late stage but proved in another proceeding between the parties should be accepted. 72 I. C 397.

——certified copies of public documents may be received at any time. 22 B 175, 12 C W. N 312, 2 Pat. L R. 1.

——acceptance of documents at a late stage not good ground of appeal 12 W R 32 P C, 42 C L. J. 280, nor can the appellate court reject such document 8 M 373

——when the admissibility is questionable it is better to admit 18 C 201

——question as to admissibility should be decided as they arise and should not be reserved 17 C 173, 25 C 401.

——a copy of entry in an account book filed under rr 5 and 7 does not require stamp 26 B 522

——parties should summon the documents on which they rely or file certified copies L R 3 A. 70

——proceedings for return of documents are purely ministerial 26 C. W N. 660

——Or 13, rr 1 and 2 apply only to documents in the possession of parties and not to those in the possession of third parties. In the latter case such documents need be produced only when they give evidence. 1925 Cal. 1149: 88 I C. 498

——power of court to receive account books not produced in time. 1926 Cal. 1 · 93 I C. 385.

——"first hearing' in Or. 13 R 1 C P. C. means framing of issues and documents can only be produced after that date on good cause being shown under Or 13, R. 2, 1926 M. W. N. 156 · 23 L. W. 69 1925 Mad 347: 93 I. C. 16

——rule as to endorsements on documents must be strictly followed. 38 A 627: 43 I. A 212, P. C., 8 Lah 1 · 100 I. C. 721: 1927 Lah 115 : 28 Punj L. R 455

——documents not endorsed under Or. 13, R. 4 as admitted by a trial Judge, will not be read or allowed to be used as evidence in the case 8 Lah. L. J. 492: 96 I. C 998: 27 Punj. L. R. 544, 38 A. 627 P. C. *fol.*

——*a document filed and proved out of date behind the back of* the opponents requires further proof 9 Lah L. J. 347: 104 I. C. 116 1927 Lah. 679.

Or. 13, rr. 1—11. Production &c. of Documents—*contd.*

——when a document a copy of a registered sale deed was filed and mechanically admitted in evidence, was not referred in the first court but the appellate court rested on it, in second appeal it was held that since the trial court did not consider the document the proper course was to send back the whole case for retrial. 8 Lah. L J. 537 : 1927 Lah. 45 · 99 I C. 920.

——the admittance of documents under Or 13, R 4 is not binding on the parties and unproved documents cannot be regarded as proved merely because they are thus admitted by the court. 1928 Cal 432

OR. 14, rr.1—7, SETTLEMENT OF ISSUES

——it is the duty of the court to frame proper issues and it is the duty of the litigant to adduce evidence in respect of those issues and the court cannot compel them to produce evidence with regard to points not covered by those issues. 60 I C. 75, 1925 Mad. 169.

——an issue may be framed not merely by reference to the pleadings but also by reference to other matters. 1925 Cal. 1157 87 I. C. 575.

——subordinate courts should decide all the issues in a case as piecemeal trial causes serious inconvenience or great loss to the parties 2 Pat L. T. 154 : 60 I. C 528

——an issue between co-defts is generally not allowed 2 W. R 45.

——it should be allowed when it is necessary to give appropriate relief to plff. 15 M. 264, 11 W. R, 462

——a pleader has the general power to abandon an issue. 25 M 367, 377 P. C.

——issues which do no not state the main question but various subsidiary matters of fact causing embarassment, must be avoided 35 B. 425.

——issues should be confined to those important questions of facts as would be necessary for the judge to come to a correct decision 35 B. 525 P. C

——it must give the parties opportunity to bring forward appropriate evidence. 22 C. 324 : 219 A. 4 P. C., 12 C L R. 109 14 B. L R 115 C. P.

——omission to settle issue is a great irregularity. 11 M I A. 25 P. C.

——but it is not fatal where necessary points have been raised and discussed, specially where the parties knew what the question between them was 12 M. I. A. 495, P. C , 13 M. I A. 573 ; 15 W. R. 15 P. C., 22 C 324 and when both the parties invoked the decision of the court upon a question raised by the pleadings. 11 C. W. N. 871.

——where there has been wrong issue the appellate court should remand the case after framing correct issue, 11 W. R. 20, but if there be sufficient finding on the point, it need be remanded 21 B. 325.

Or. 14, rr. 1—7, Settlement of Issues—*contd.*

——where settlement of issue is necessary the appellate court can remand the case. 11 M I. A. 25 P. C.

——in framing issues a court is not bound down to the language of the pleadings. 1925 Cal. 1157 : 87 I. C. 575 : 15 W. R. 286, 2 B 210, 11 C. 407, 12 I. A. 56 P. C., but the *plff.* should not be allowed to set up new case without raising a spesific issue and giving the [illegible]

[illegible] the parties [illegible]

[illegible] rst. 63 I C. [illegible]

——there is no reason to confine the power of the court to try certain issues of law on the date of first hearing. 1922 M. W N. 521 : 1922 Mad. 321, 15 L. W. 667 · 68 I. C. 167.

——the power to pass order on preliminary issues is *contained in* Or. 14 r 2 and Or. 15, r. 3 (1) *above case.*

——issue may be settled where the plaint discloses no cause *of* action 16 W. R. 218, and a deft. also can set up a defence which does not appear in his W. S., 21 W. R. 407, 12 I. A. 47 P. C. 24 C. 30 6 p. 309.

——but the issue should not be inconsistent with the *pleadings.* 13 M. 546, 15 I. A. 81 P. C., 11. M. P. C. I. A. 7, 8 C. 975, 5 *B* 609, 5 C 64.

——the court is under no obligation to maintain the *order of* trial of the issues. 23 W. R. 54.

——the court should frame additional issues if necessary for the determination of the matters in controversy. 16 C W. N. 1009 : 16 C L J 596 : 14 B. L R 1034 : 39 I. A. 218 P. C., 35 M. 607 : 16 I C. 250.

——an additional issue may be raised even after the close *of the* arguments in the case. 36 M. 607, 611 . 39 I. A. 218

——when an issue is amended, the trial is not in any *way* vitiated so long the parties are not prejudiced. 87 I. C. 575 : 1925 Cal 1157.

——no appeal lies from an order refusing to frame an issue 4 C. 531, 35 M. 1.

——the court has inherent power to frame issues going to the root of the matter in controversy between parties to the suit at any stage *of the case. 35 M 207 · 16 C. W. N. 1009 : 16 C. L. J. 596 :* 23 M. L J. 321 : 14 Bom L. R 1034 : 16 I C. 250 P. C.

——the practice of trying an important case piecemeal must be deprecated as tending to lead to protracted litigation and serious inconvenience and to involve the parties in heavy costs if the case is taken repeatedly on appeal to a superior tribunal. 7 Lah L. J. 611.

OR. 16, rr. 1—21, SUMMONING AND ATTENDANCE OF WITNESSES.

——party is entitled as of right to issue summons on witnesses 86 I. C. 1012 : 26 Punj. R. 181. 15 Bom. 86, it does not matter if the summons is asked *for* at a late stage. 7 C 560, 5 B. 742, 75 I. C. 656

Or. 16, rr. 1—21, Summoning and Attendance of Witness— *contd.*

——an application at a late stage to send for the chowkidari Register from the Deputy Commissioner's office should not be refused 7 Pat L. T 775 . 96 I C 448 : 1926 Pat. 545

——the court may refuse to adjourn but cannot refuse to issue summons. 1925 Lah. 67, 87 I. C. 355 (c), 16 A 218, 9 B 308, can refuse when prayer is not *bona fide* 28 M. 28, 4 U. P. L R. 93.

——there is nothing in the C P C which expressly or impliedly declares that witnesses must necessarily be summoned before the day fixed for hearing of the suit. 1923 Nag. 58, 68 I. C. 272, 5. N L. R. 181.

——when the suit is adjourned the court cannot refuse summons 68 I C 272, 87 I. C 355, 1926 Cal. 364, 28 Punj L R. 173 101 I C. 541 : 1927 Lah 281, but if the witnesses are not served for the hearing the court ca [illegible] ice, 28 Punj L. R. 173 : 9 Lah. L

——the court [illegible] summoning witnesses on the gr[illegible] ate 60 I C 656, 87 I. C. 702 192[illegible] be rejected for non-payment of [illegible] 955 : 1952 Lah. 457 : 7 Lah L. J 232

——the order of refusal is not appealable but it may form a part of the memorandum of appeal 16 A 218

——a witness is entitled to travelling expenses and other expenses of similar nature and not to any compensation for loss of time, 2 Hyde 236, he is entitled to demand such expenses after giving deposition, 4 Bom 619, even if he has not been examined by the party calling him but has been examined by the other side. 28 Bom 647

——the only remedy of witness if travelling allowance is not paid, is by an application to the court that heard the case No separate suit lies 5 W R 6 *Ref.*

——an attending witness need not be resummoned. 24 M. 200.

[illegible] ot insist [illegible] rty offers

[illegible] against [illegible] declines to produce a document. [illegible] files the document, he may

[illegible] to call one's own client as a witness in the hope of forcing opponents to call him as their witness in order to have an opportunity of cross-examining him. 32 A. 104, 108 : 37 I A. 1.

——[illegible] Muncipal or private service [illegible] part of their expenses, to the [illegible] would earn in their ordinary [illegible] spend in attending court 3[illegible]

Or. 16, rr. 1—21, Summoning and Attendance of Witnesses— *contd*

——order for payment of the expenses of the witness cannot be executed by the sale of the pltf's immoveable property. 26 C. W N. 877

——Or 16, rr. 19 and 21 apply to persons who are ordered to attend in person to give evidence, including persons who may be parties to suits but are required to give evidence as witness They do not apply where party to a suit *desires* to *give evidence*, of his *own motion* in his own favour Such a case is governed by Or 26, r 4, 35 C L J 78 : 1922 Cal 42

——when a witness appears and states that he has not the document, called for, in his possession it is an illegal exercise of his power for the judge to order an attachment. 29 M. L T 85 61 I C, 967

——it is open to a witness to produce at the hearing documents which are not referred to in the summons requiring him to give evidence and these documents are admissible in evidence on behalf of the party calling the witness, although they may not be mentioned in the summons addressed to the witness 1925 Cal. 1149 88 I C 498.

——there is no obligation on a witness to file the documents in his possession before he is put in the witness box, *above case.*

——when a court adopts the procedure laid down in para 3 of R 10 of Or. 16, it is obligatory on him to make an order for the attachment of the property of the witness. 7 Pat. 312 : 1928 Pat 356.

——the court imposes fine under R. 12 without issuing proclamation and making no attachment. 1928 Lab. 469, 1925 Mad. 1247 *Approved* (31 C. L. J. 363, 57 I C 302) *Diss. from contra* 1928 Lah 473 which has followed 31 C. L J. 563 and 57 I. C 302 and disapproved 1925 Mad. 1247 holding that "*such person*" described in *R. 12* is the person referred to throughout the two preceding *Rules* and that person cannot be fined unless and until there has been proclamation which he has disobeyd.

——rr .10 to 12 ought not to be construed as meaning that the issue of a proclamation or an order for an attachment of property are conditions precedent to the imposition of fine for non-attendance of a person who has been summoned to attend a Civil Court 48 M. 941 ; 90 I C. 991 ; 1925 M. W N. 767

——under R. 21 the pltf may examine the deft. on commission but his examination should be postponed till the pltf's evidence had been taken, 48 C. L. J. 131.

OR. 17, rr. 1—3, ADJOURNMENT.

[illegible] should ...d the

...tional ... J. 15 ; ..., and

Or. 17, rr 1—3, Adjournment—contd

——where the deft. was not aware that he was orderd to pay adjourment cost and the further hearing was not made coditional upon payment of cost, reasonable time should be allowed to deft to pay the costs and to defend the case 97 I C 172 · 1926 Cal. 1221.

——when senior pleader being ill his junior is unable to argue for not being ready, and time is asked for, it should be allowed on payment of adjournment cost. 12 C. W. N 888 35 C 799, 7 C. L. J. 426.

——r. 2 applies where the hearing has been adjourned and on the adjourned date the parties or any of them fail to appear. 45 A. 618 : 1923 A. 551 21 A L. J 496 76 I C 387 102 I C 273 : 1927 All. 507 In such a case when the caseis dismissed a fresh suit is barred. L R. 4 A. 177

——when appeals in analogous cases are pending some in inferior court and some in snperior court, the inferior court should wait for the *decision of the latter.* 11 C W. N. 112.

——when parties were ready on the previous hearing, and on the next hearing wanted time on the gound of illness supported by a certificate of a Civil Hospital Assistant, time should be granted. 14 C. W N 573

——where a plff. being directed to produce a document by a certain time fails to do it he cannot put it in evidence afterwards without the leave of the court but his plaint cannot be rejected. 76 I C. 254

——the court cannot compel the plff to furnish the deft with copies of documents in any particular language and for non-compliance of such order the court cannot dismiss a suit 75 I. C. 1.

——where the plff appeared by pleader who applied for adjournment which was refused the proper procedure for the court was not to dismiss the suit but to proceed with the case under Or. 17. r 3 1924 Mad 43 1923 M W N 802 18 L. W. 209 : 73 I. C. 982. 41 M 256 *Ref contra* 1 Pat. L. R 281 : 1923 P. 530 . 74 I. C 693

——party absent, pleader declines to proceed and leaves the [illegible] r.
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——a party who appears by pleader who after an application for adjournment has been refused reports no instruction, is to be deemed *ex-parte* although the pleader was physically present in court. 97 I C. 517 1926 Mad 971 51 M. L J. 290 . 1922 M. W. N 616.

rule 3 merely authorises the court to proceed to decide the suit forthwith and it does not authorise the dismissal summarily. 71 I. C. 862

Or. 17, rr. 1—3, Adjournment—*contd.*

——where summons on witness was not served for the negligence of the officer the court could not dismiss the suit under Or 17 r. 3 69 I. C 665, 71 I. C. 862.

——an *exparte* decree may be passed in a case in which the court acts under r 3 1923 Lah 281: 69 I. C. 368.

——when adjournments are granted the signatures of the parties or their pleaders should be taken on the order-sheet in token of information of the adjourned date being supplied to the parties 4 Pat. 440 1925 Pat 807

——where the case is transferred without notice to the deft. adjournment should be granted. 1925 Pat. 534 : 1925 P. H. C. C. 199 : 7 Pat L. T 381

——when a party failed to appear on an adjourned hearing and the court instead of making an order under Or 17 R. 2 proceeded under R 3 to decide the suit and decided the plff's claim with costs held it was not competent to the court to proceed under R 3 and to decide the suit on merits. 27 Bom. L R. 477 : 87 I. C. 716 · 1925 B. 328.

——when a court instead of deciding a case *exparte* gave a decision on the merits under Or. 17 r 3 the remedy of the aggrieved party is by way of appeal. 84 I C 521 · 1925 All 252 : L R 6 A 252

——when the plff. and his pleader are absent on the adjourned date the court cannot hear case on the merit. 20 A. L. J. 123.

——where a date is fixed for final disposal as well as for payment of fee for appointment of guardian *ad litem* the whole suit cannot be dismissed on that date. 63 I C 570

——where there are materials in the record on which the court can decide the case the matter falls properly under r. 3 and not under r 2. But where the plff adduces no evidence and his case fails on the pleadings the court has no business to record the deft's evidence so as to give it jurisdiction to act under r. 3., 3 Pat. L. T. 64 : 1922 P. 2, 34 C 235.

——R. 3 only applies where the hearing of a suit has commenced and an application for an adjournment is then made by one of the parties ; but when befc
fails to appear on an
R. 2 and not R 3 giving
dismissal set aside undei
1928 Pat. 167.

——where a party is present but fails to produce evidence and the suit is dismissed for default the suit must be decided to be dismissed under R 3 and not R 2. and an appeal lies from the dismissal. 95 I. C 798

——r. 3 does not contemplate a case of default in appearance but a case in which a party who has appeared and has been given time to do some act in further prosecution of his case, has failed to do that the decision in such case will not be *exparte*, 1 Pat. 168 · 1922 P. 485 so the only remedy of the aggrieved party is by appeal. 103 I. C. 192 : 1927 Lab 562, 3 L. W. 524.

Or 17, rr. 1—3, Adjournment—*contd.*

——the words "notwithstanding such default' in Or 17, R. 3 C. P C. clearly imply that the court is to procede with the 'ault upon such materials as

and 3 is that when there are court can decide the case the matter falls under r 3 and not under r. 2 6 Pat L J 313.

——rule 3 applies to cases where a party directed to do an act fails to perform that 45 Bom 1811 : 23 Bom. L R. 511.

——where the deft did not appear on the date to which the hearing of the case had been adjourned and judgment was pronounced on that day, held, that in the absence of any express mention that the order passed was under Or 17 r 3 it must be presumed that it was an order passed under Or 17 r. 2 and therefore in deciding the case the court must be deemed to have proceeded under Or 9. 47 A 140 : 85 I C. 470 1925 All 267

——where a party absents himself, whether on the adjourned date or not and whether he had taken time to produce any particular evidence or not, the provisions of Or. 17 r 2 becomes applicable 47 A 140 : 85 I. C 470 : 1925 All 267

——even where deft is absent on adjourned hearing, the court ought to pass an *ex-parte* decree and not a judgment on merits 47 A 181 22 A L J 1401 85 I C 27 : 1925 All 182

e deft. did not d issues, took t as the court deft's remedy 6 A. 152.

——before the evidence taken on commission can be read the court has to be satisfied that the case is such that it should dispense with the proof of those facts. From Or 26, R 8 and Or 17, R 3 it cannot be said that even in a case which is otherwise within Or 17 R. 3 the court is obliged to dispose of the case by looking at the evidence upon commission. When the deft. applicant to set aside an exparte decree examined himself on commission and the petition was adjourned to a certain date and the applicant remained absent the petition was dismissed for default, the case fell within Or. 17 R. 2 and in any case the court was not bound to consider the evidence on commission, 47 C. L J. 467 : 1928 Cal. 341.

——Or 17, r. 3 applies only after a suit has been instituted and only after it has been adjourned for giving evidence 86 I. C. 491 1925 Mad. 1045.

in a partition suit stands merely because there was 6 P. L. T 152 : 86 I. C.

For other cases, see C. P C. Or. 9 r. 13.

Or 18 rr 1—18 HEARING..

"the day fixed for the hearing of the suit", meaning of. 82 I. C. 73 · 1925 All 98.

——Or 18, rr. 5 to 12 have no application to courts constituted [illegible]

[illegible]

——in a suit for declaration of title and recovery of possession the deft pleaded *benami* The plff. began and thereafter the deft adduced evidence on the question of benami, held that the plff. was entitled to adduce evidence of rebuttal after deft had placed all their evidence before the court. 1926 P H. C. C. 24 93 I. C. 273 : 7 Pat L T. 445.

——an applicant for mesne profits taken in execution of a decree which has been reversed in appeal, must begin. 1925 Mad 145 92 I C 133

——the deposition of a witness at the appellate stage must be read over to him 51 C 236 1924 Cal 705.

——new pleadings cannot be introduced without the leave of the court at the time of stating the case : 103 I. C. 501 : 1927 Lah 615.

OR. 19, rr.1—3, AFFIDAVITS.

——every affidavit should clearly express how much of the statement is made from the knowledge of the deponent and how much from his belief and the grounds of belief must be stated Failure to distinguish between the two would be taken to mean that it is made only from knowledge entailing all its necessary consequences 73 I. C. 721.

——the court is authorised under Or. 19 to receive an affidavit from the identifier as an evidence of the fact of service of summons 6 Pat. 760 106 I C 703 : 1928 Pat. 161.

——an affidavit is ordinarily not evidence if it does not comply with the requirements of Or 19 C. P. C, 63 I C. 258.

——the ground of belief must be stated with sufficient particularity to enable the court to judge whether it would be safe to act on the deponent's belief 37 C. 259.

——an erroneous statement of routine by a person whose authority to make it was not proved could not bind a party to a proceeding. 16 C. W. N. 683.

——an affidavit must contain nothing but bare facts known to the person making the affidavit. 36 A 13.

——as human beings are liable to make mistakes in reciting facts the law requires that the contents of affidavit should be carefully read over to the deponents in the language which they understand and should be vouched by them. 36 A 13.

——source of information stated in the affidavit if not disclosed, the affidavit is bad, 11 B. L. R. 1298

Or. 19, rr. 1—3, Affidavits—*contd.*

——grounds of belief should be stated, and what portion is stated on belief and what portion on knowledge should be strictly expressed. 37 C 259, 14 C W N. 153

——facts cannot be stated on inference only 6 B L. R. 704

——where in an affidavit the declarant makes a statement of his belief on information he must give details of the person from whom he got the information. 90 I. C 703 1926 Pat 54

——an affidavit to be used in a Civil Court may be sworn before any M. by virtue of s. 139 C. P. C., 8 C W. N 40 (notes).

——a well recognised practice has grown up in all courts of accepting the statements from the Bar of practitioners with regard to matters in connection with the very litigation in which they are engaged. For that purpose they are regarded as officers of court owing a duty to the Court and it is expected that such statements would be made and would be truly made with a full realisation of the sense of responsibility It is not necessary to insist upon their making an affidavit 1928 Mad 690.

Or. 20, rr. 1—20, JUDGMENT AND DECREE.

Judgment.

——it does not matter if the judgment was written by the judge's predecessor after he had taken leave or left the judicial post. 24 C. 293 35 C 756 12 C W. N. 682. 7 C. L. J 666, 4 M L T. 38 F. B. 35 A. 368, *contra* 76 I. C. 170

[illegible] or in office 35 A. [illegible] no 80 p 248. [illegible] tion to a judge to [illegible] predecessor 33 [illegible]

——judgment delivered on a holiday is not nullity. 22 M L. J. 212.

——a case may be heard on holiday with the consent of both the parties. 25 C. W. N. 330, 9 A. 366 30 A. 136 *Ref*

——an 'act of state' is not a judgment 17 B 620.

——a judgment not pronounced in court does not operate as a judgement at all it operates only as minutes or memorandum made by the judge 9 W R 1 F. B. and limitation for appeal runs from the date when the appellant's pleader received information of the decision. 100 I C 909 28 Punj. L R. 132.

——a judgment written, signed and dated by one judge cannot be pronounced by an acting judge. 24 C W N. 719. 46 C. 978

——where a judgment is not pronounced dated, or signed in conformity with the requirements of the Code, it constitutes a mere irregularity within the meaning of sec 99 and it affords no grounds for reversal of the decree based on it 46 C. 978 24 C. W. N 791

——prononcing a judgement within the meaning of this Or does not require that the whole judgment should be read out by the court. 94 I. C. 121.

Or 18 rr 1—18 HEARING..

"the day fixed for the hearing of the suit", meaning of. 89 I. C 73 · 1925 All 98.

——Or 18, rr. 5 to 12 have no application to courts constituted under the Provincial Small Cause Courts Act or exercising jurisdiction thereunder. 89 I C. 390 1925 Nag 412.

——result of inspection cannot be the foundation of judgment it should be used to test the accuracy of other evidence and need not be recorded. 1925 Cal 170

——in a suit for declaration of title and recovery of possession the deft pleaded *benami* The plff began and thereafter the deft. adduced evidence on the question of benami, held that the plff. was entitled to adduce evidence of rebuttal after deft had placed all their evidence before the court. 1926 P H. C. C. 24 93 I. C. 273 · 7 Pat L T. 445

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——the deposition of a witness at the appellate stage must be read over to him 51 C. 236 . 1924 Cal 705.

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OR. 19, rr.1—3, AFFIDAVITS.

——every affidavit should clearly express how much of the statement is made from the knowledge of the deponent and how much from his belief and the grounds of belief must be stated Failure to distinguish between the two would be taken to mean that it is made only from knowledge entailing all its necessary consequences 73 I C 721.

——the court is authorised under Or. 19 to receive an affidavit from the identifier as an evidence of the fact of service of summons 6 Pat. 760 . 106 I C. 703 : 1928 Pat 161.

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——source of information stated in the affidavit if not disclosed, the affidavit is bad, 11 B. L. R. 1298

Or 20, R. 11—*contd.*

Jt Dr. may obtain a decree against the decree-holder may constitute "sufficient reason" for postponement, 97 I. C. 769 : 1926 Lah. 604 · 27 Punj. L. R 562.

——postponement of execution of decree or furnishing security, validety of 1927 M. W N. 202 : 100 I. C 841 38 M. L T 143 1927 Mad. 416

R. 12.

——the cases mentioned in Or. 20. rr. 12 and 18 are not exhaustive ... e basis of final decrees 27 C.

... ession after ascertainment of ... ist and future mesne profits besides directing defts to deliver possession to plff without directing an inquiry, the decree is not preliminary but final. 90 I C 789 1925 Mad 1276

——under this rule an application for the determination of mesne profits is an application in the suit. 90 I C 811

——an application for mesne profits to be ascertained under the enquiry under R 12 (1) (c) is not an application made under C ...

decree even though the claim exceeds the ordinary pecuniary jurisdiction 2 Pat L. T 648 2 Pat L T. 143 . 6 Pat L J. 54 60 I C 346

——the period of three years for payment of mesne profits should be computed from the date of ultimate decree. 34 C L J 415

——the expression mesne profits claimed may reasonably be considered to refer to the general claim for mesne profits and not only to mesne profits up to the date of suit 53 C 992 31 C. W. N 112 1927 Cal 182 99 I. C 428, 8 C 178 *fol.*

——the plff cannot get mesne profit subsequent to offer of possession by the Deft. 34 C L J 475

... f the mesne profits, it is as muc ... mesne profits themselves 34 C

... assers are liable for mesne prof ... be allowed a deduction of collection charges, but no such concession is made in favour of the *mala fide* one. 34 C L J 415

——when the possession was delivered within 3 years of the Privy Council decree, award of mesne profits from the trial court's decree does not contravene r. 12. 23 C. W. N. 55 . 84 I. C. 267 : 22 L. W 85 P C.

——an order directing that the defts are liable to account as legal representatives of deceased Jt. Dr. without determining the amount due is not appealable 47 A. 543 . 23 A. L. J. 458 ; 1925 All 588

Or. 20, R. 12—*contd.*

——when court fees are to be used in an application for ascertainment of mesne profits 7 Pat. L. T. 313 : 93 I. C 939 : 5 Pat. 361, 1926 Pat. 218 F. B

R. 13.

——administration suit in Rangoon H. C.—Practice,—change is preliminary decree. 30 C. W. N. 769 : 1925 P. C. 261 : 91 I. C 432 ; 50 M. L. J. 644 P C.

R. 14.

[illegible]

to it. 1923 Nag. 327.

——the court can extend the time for payment of pre emption money into court, 45 A. 456 : 1923 A. 519 : 74 I. C. 745, and payment to the Jt. Dr. out of court certified within time is sufficient. 19 A. L. J. 493 : 63 I C. 889.

——where the D. Hr in a pre-emption suit fails to deposit the full price in court by mistake the Jt. Dr. is entitled to ask for restitution of possession of the property if already dispossessed. 1923 Lah. 250

——a proper form of a decree for pre-emption is laid down in Or. 20 r 14 and the date by which the purchase money should be paid must be specified. It is not a compliance with this direction of the law to say that the money is to be paid within 60 days of the date on which the decree becomes final. 90 I C. 287 · L. R. 6. A 597

——ownership accrues when the pre-emption money is paid in court and not before. 85 I C 182 : 5 Lah. 486 : 1925 Lah. 202.

R. 15.

——decree in favour of the deft. in a suit for taking the account of dissolved partnership. 83 I C. 880 : 46 A. 858 : 1924 All. 854.

R. 16.

——a commissioner cannot be authorised to determine not merely the *quantum* but the *factum* of the liability of an agent, a matter which falls entirely within the province of the court. 53 C. 766 : 90 I. C. 944 : 1925 Cal 1069.

R. 18.

——where in a partition suit no preliminary decree was made but only interlocutory order was made, the plff was not precluded in his appeal from the final and only decree in the suit, from contesting its validity. 46 M. 47 : 1923 M. 147 : 74 I. C. 804. ... discharged

by t [illegible] award

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I. C. 636.

Or. 21, rr. 1—103, EXECUTION OF DECREES AND ORDERS.

Applicability.

——Or. 21 does not apply to sales by Receivers though with approval of the court appointing them. 90 I C 116 : L. R. 6 A 610.

Rr. 1—2. Payment, adjustment and certification.

——payment into court is sufficient even though the decree directs payment to the decree-holder, 35 B 35

——interest does not cease to run until the D Hr. gets notice of payment 42 M. 576.

——in case of deposit of decretal amount notice must be given [illegible] t when

[illegible] eposits [illegible] M W

——when a decree is passed conditional on the payment of money it is open to the party to deposit the amount after the re-opening of the court when the last date was closed, 87 I C 620 . 1925 All 687, even where a much larger amount was payable on default 87 I C 560 1925 M W N 566 : 48 M L J 596

——"of any kind' have been added to apply the rule not only to money-decree but to mortgage and other decrees also 28 M 473, see 49 M. 716 · 95 I. C 731 1926 Mad 749 50 M L J 547.

——a separate suit to declare that a decree has been satisfied and for injunction against execution is barred by sec. 47, 31 C. 480 : 8 C. W N 395, 21 C 437, 19 C. 683, 15 M 302, and a suit to set aside a sale on the same ground is also barred under sec 47 20 A. 254

——but a suit for refund and damages lies 10 C 351, 30 A. 464, 23 B 394, 21 M. 409, 20 M 369, 30 M 545 42 M 338, 1 Bur L. J. 207, 1923 Rang. 88 70 I. C 115, 25 Bom L R 247 1923 Bom. 253, and a suit for proving adjustment and for establishment of title to property sold in execution will lie. 25 C. 718 : 2 C W N, 247.

——payment out of court cannot be pleaded against final decree in a mortgage suit unless it is certified timely. 21 C W N. 920, 68 I. C. 443.

——payment out of court to the decree holder s attaching creditor cannot satisfy the decree 80 I. C 947 . 1925 All. 123

——*when there has been a mutual composition scheme between the Jt. Dr and the creditors it is open to a single creditor to resile therefrom* 22 L. W 853 49 M L J 730

——the words "orally adjusted" in Or 21 R. 2 (1) are wide enough to include an oral adjustment of the decree 91 I C. 705 : 1926 Cal 643

——the rule applies where the payment is made by the Jt. Dr. and not by *third person* 35 M. 659, 9 M. 230

——'certified and recorded' means that the court being satisfied of payment has recorded it in execution file 38 A. 204, 20 C L. J. 131, *Diss*

Or. 21, Rr. 1—2 Payment, adjustment and certification—contd

——"money payable under a decree" does not include the usufruct which a mortgagee is entitled to get under a decree. 39 M. 1026.

——Or 21 R 2 does not apply to all kinds of decrees whatever be the nature of the relief but only to cases where money is payable under the decree whether accompained by other reliefs or not. The words "the decree" means the decree under which any money is payable (46 B. 226 Diss from). So, where a compromise decree provided that in case the deft. paid to the decree-holder a certain sum of money within c ... of property was to be reconveyed to hi[m] ... enjoy the property with[out] ... could not recover the ... where any money is payable and adjustment of such decree, even if not certified, can be recognised by the court executing the decree 49 M 716 95 I C 731 1926 Mad. 749 50 M. L. J. 547.

——an adjustment in part with a Co-Jt Dr. comes under this rule. 31 M. 467 ... the D. Hr. will not affect law. ... C L. J. 462, 2 M. 409, 29 M. 312, ... L. J. 226; 1923 Rang. 103, 63 I. ... 1926 M. W. N. 622; 97 I. C 608.

——as executing court cannot take cognizance of uncertified amount, D Hr is not estopped to execute the decree. 34 B. 575, 19 C. L J 126, 1921 Pat. 360, 24 C. L. J. 462, 29 M. 312, 36 M. 357, 16 C. W. N. 923, 49 B 548: 27 Bom L. R. 403: 1925 Bom. 309 F. B, 32 C W. N. 434, 108 I C 105, 1928 Oudh 195 F.B.

——uncertified payment cannot be recognized by an executing court but a court trying a suit can, 43 B. 240, 15 B. 419, 13 A. 339. 95 I. C. 410 1923 Bom. 253, 16 B. 589, 25 C. 718, the Jt. Dr. can recover by suit the amount which he had paid to his creditor without its being certified. 95 I. C. 410 · 1923 Bom 253.

... Jt. Dr. can prove ... ortgage suit is not an ... ply. 39 A. 352. ... by one Jt. Dr and ... he decretal amount ... tion by the depositor ... 36: 3 Pat L. T. 754

... ecree in a mortgage ... ation of the Jt. Dr

... uncertified adjust- ... either party. 44 A.

... y be made either in ... ourt which executes

Or. 21, R. 1—2 Payment, adjustment and certification—*contd.*

it, 3 Pat. L. T. 487 : 1922 Pat. 200 : 1922 P. 276 : 68 I. C. 645 but not in the court which attacks the decree. 1922 Mad. 66 1922 M. W. N. 189 16 L. W. 290 : 65 I. C. 830.

——application to record an adjustment of a decree specially when contested is within the nature of a summary suit. 97 I. C. 321, 1923 Pat. 239 *Rel on*

——a compromise made after decree affecting any immoveable property of the value of over Rs 100 and embodied in a petition under R. 2 and recorded by the court is exempt from registration. 97 I. C 321, 43 M. 688 F B. *fol*

——a surety cannot set up the adjustment which the Jt. Dr. cannot. 67 I C. 885, 1923 Cal. 313

——a surety of a judgment-debtor cannot plead satisfaction of the decree by any adjustment or discharge of the decree which has not been certified by the court as required by Or 21 R 2 49 M. 325 . 1926 Mad. 674 . 50 M. L. J. 584 . 94 I. C. 528.

——but the court proceeding against the surety does not execute the decree in the real sense of the expression, but enforces the bond under s. 145 C P C in the manner provided for execution of the decree and is therefore, not "the court executing the decree" 96 I. C. 234 : 1926 Sind 105 According to this case the surety is not barred from relying on an uncertified adjustment in discharge of his liability.

——deposit by the Jt Dr without notice of the assignment of the decree amounts to complete discharge. 2 Pat 754.

——the dismissal of an application by a Jt Dr. to have satisfaction recorded does not operate as *res judicata* and bar an application by the decree-holder for the same purpose. 89 I C 195 1925 Pat. 822. 7 Pat. L. T 95.

——one of several joint decree-holders can enter satisfaction in regard to his own share of the decree but cannot bind the other decree-holders 89 I. C 195 1925 Pat. 622, 7 Pat L. T. 95.

——one of the partners of a firm can receive the money under the decree and certify payment 92 I. C. 387 : 1926 Sind 167

——agreement by the Jt Dr to pay increased rate of interest in consideration of the latter giving an extension of time for payment, is enforcible in execution proceeding. 86 I. C. 723 1925 M. W N. 86 : 48 M. L J. 121 1925 Mad 457

——when an application is made by the assignee or transferee of a decree under Or. 21 r 16 (for execution) the application is made to the court as a court which passed the decree and it is open to the Jt. Dr. to plead that the decree has been satisfied even though the formalities under Or 21 r. 1 and 2 have not been satisfied, 47 Bom. 643 : 1913 Bom. 404 25 Bom. L. R. 474, 45 M. 659, 40 M. 296 *Ref. contra, below*

——Or. 21, R. 2 is not restricted to original decree holders but extends to an assignee decree-holder, but an uncertified adjustment between the assignee and the judgment-debtor before the former

Or. 21, Rr. 1—2 Payment, adjustment and certification—*contd*

applies under Or. 21, R 16, can be validly pleaded as a bar to the execution of the decree. 31 C. W. N. 921 : 104 I. C. 4 : 1927 Cal 694

... original decree bar of execution T. 401 · 1923 M.

——an agreement which if raised in the suit itself would negative wholly or partially the pltf's claim, cannot be placed as a defence to execution. 1921 M W. N 382 14 L. W. 317.

——it is open to the judgment-debtor to plead in bar of execution of a decree against him a pre-decree arrangement between him and the decree-holder that the decree will not be executed, 49 M. 513 1926 M W. N 368 1926 Mad. 582 · 50 M L. J. 364 *contra* an agreement not to execute a decree cannot be taken cognizance of by an executing court the remedy of the Jt Dr being to institute a separate suit to restrain the decree-holder from executing the decree, 32 C W N. 434

——where the payment is made to third person under the terms of a compromise decree and is not certified the executing court cannot recognise it. 45 A. 304 1923 A. 271 : 21 A. L. J. 97 · 71 I C. 457

——an application by Jt Dr to certify a payment falls under s. 47 and is appealable. 3 P L. T 487 1922 Pat. 200 : 1922 P 276. 1 Pat 644 68 I C 645. Or. 21 r 2 does not limit the scope of sec. 47 under which the court can make an inquiry if fraud is proved. 1 Bur. L. J •3 : 1922 L B R 31 11 L. B. R 363 : 68 I. C. 914

——where an adjustment of a suit is arrived at between the parties out of court and the pltf without informing the court obtains a decree and the decree is time-barred the plaintiff cannot sue on the orginal adjustment. 3 Lah L. J. 10 : 1 Lab. 443 : 57 I C. 153.

——Or. 21 r. 2 does not confine itself to a money decree 23 Bom. L. R. 981

——a mortgage decree is not excluded from the operation of Or. 21 r 2. 5 P. L. J 672 · 1 Pat L T 416 · 57 I. C. 743 : 16 C. L J. 179

——the court to which an application is made for a decree absolute is not a court executing the decree and so r. 2 does not prevent a court to recognise an adjustment. *above case* and 2 P L. J. 585, 16 C. L J. 169 *Ref.*

Limitation.

——to certify adjustment or to make objection, by the Jt. Dr limitation is 90 days, Art 174, L. Act applies. 19 C. W. N. 650, but the D. Hr may apply at any time. 21 B. 122, 4 P. L. J. 159.

——the D. Hr. may either apply to certify payment before execution or may do so in his application, 26 C. W. N. 534 · 35 C. L. J. 566. 26 C. W. N. 529 : 35 C. L J. 71 : 68 I. C. 760, 33 C. L. J. 390 : 20 C. W. N. 272 : 43 C. 207. 41 M. 258, *contra.* 38 A. 204 Such application of D. Hr. is a step in aid of execution under Art.

Or. 21. Limitation—*contd*

182 L. Act. 20 C. W. N 615, and when payment is for interest it will save limitation. 23 C. L. J. 390, 20 C. W. N. 272 But where there is no order for interest in the decree the payment will not save limitation 22 C. W. N 325. The D Hr is not bound to certify in writing a payment or adjustment of his decree, the word certify in this rule means primarily, to assure, to vouch, to make certain. 23 C. L. J 423

——a statement in an execution petition that payments were made out of court does not amount to an application for certification 1922 Cal. 200 : 64 I. C. 32, 45 C. 630, 23 C W. N 320 *fol.*

——no application is absolutely necessary for certification of

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——part payments and the certification must be made before the application for execution is barred by limitation. The provision of s 20 L Act, cannot be avoided 26 C. W. N 534 . 35 C L J 566 . 64 I. C 72.

——an uncertified payment towards a decretal amount is not a step in aid of execution and does not save limitation under Art 182 (5) L. Act 44 C. L. J 248 1927 Cal 29, (43 C 207 and 46 C. 22) *Doubted.*

——art. 174 L Act. (90 days) applies to a case where the Jt. Dr. applies under Or 21, r 2 but it does not govern an application by the D Hr himself. 26 C. W N 529: 55 C. L J 71 · 1921 Cal. 30.

——the application by the D Hr to certify a payment need not be distinct from an application for execution, *above case.*

——the decree-holder is not bound to certify payment within any fixed time 45 Bom. 91 22 Bom L R. 1121 59 I. C 399, 6 Pat. L. J. 337 : 2 Pat L. T 765 63 I C 535

——where a payment has been made within 3 years of the last starting point of limitation for an execution petition but is certified under Or. 21 r 2 after the expiry of the 3 years the certification makes the payment entitled to recognition as a payment made on the date on which it was actually made and not as if made on the date it was certified 47 A 873 89 I C. 415 · 1925 All 802

Adjustment by guardian.

——an adjustment of a decree made by a guardian without obtaining the permission of the court as required by Or. 32, r. 7, cannot be certified under this rule 29 M 309.

Or. 21. R. 6—*contd.*

due under the decree or the relief to which the decree holder is entitled. The decree will be the guide for itself for the executing court, which is entitled to construe the decree for itself If the transferring court puts a wrong construction on the decree in the certificate the Jt. Dr cannot be ordered to approach that Court for getting it amended 4 Pat. 440 : 1925 Pat. 807.

RR. 10—14, Application for Execution.

——application for execution, particulars to be stated 2 Pat. 809 · 4 Pat. L. T 513 · 1 Pat L. R. 453 : 1924 P. 23 · 71 I. C. 174

——in considering whether an application is an execution application or not the substance and the form of the application should be looked to 107 I. C 298 · 1928 Mad 129.

——an execution application filed on the last day of limitation without giving the particulars required under RR. 11 and 17 is merely a scrap of paper, 7 Pat L. T. 350 : 1926 Pat. 533 : 93 I. C. 761.

——the omission to mention the existence of cross decrees may be material defect vitiating the execution petition. 71 I. C. 1054.

——omission to specify all the previous applications with their dates and their results is not a material irregularity such as would render an execution proceeding illegal. When an omission is or is not material depends on the particular facts of the case. 96 I C 554 ; 1926 Cal 1146.

——concurrent execution is not barred 4 Pat L. T. 99 : 1923 Pat. 61 : 2 Pat 318 ; 71 I C 74.

——execution petition may be amended by the addition of other properties, 4 Pat L T 99 · 1923 Pat, 61 : 2 Pat. 328 : 71 I. C. 741, 22 C W. N. 540 : 27 C L J 398, 55 I C. 16, 34 B. 142, but see under Rule 17.

——no amendment of an execution petition should be allowed after it has been registered 85 I. C 742 : 1925 Cal. 1048

——in case of joint D Hrs verification by some is sufficient 4 Pat, L. T. 513 : 2 Pat. 809 . 1923 Pat. 229 74 I. C 174.

——an execution application filed at the last day of limitation which was flagrantly defective with regard to the particulars required to be given under Or. 21 r 11 and which was not rectified till much later, is barred by time. 90 I. C. 761 : 7 Pat. L. T. 350 : 1926 Pat. 533.

——where a decree-holder disappears but his death cannot be [illegible] (2), file an application [illegible] y have been ordered [illegible] legally be substituted [illegible] . 378 : 3 Pat L. R. 43 :

——execution ought to be stayed where to do so is not detrimental to decree holder's interest. 48 M. 494 : 84 I. C. 134 : 1925 Mad. 42.

——pleaders who are authorised by their vakalatnama filed in the suit to take out execution are authorised to present the

Or 21, RR. 10—14, Application for Execution—contd.

N. 736, *Fol.*

——an execution application filed by a pleader on behalf of the decree holder and verified by his son can be entertained, *above case.*

——Or. 40, R 1 has nothing to do with the appoinment of receiver in execution of a decree which is dealt with under R. 11. S. 47 applies to such a case and no second appeal lies 1928 M. W. N. 390.

——any method suggested by the decree holder for the satisfaction of the decree, not actually prohibited by law falls within R. 11 (2) (j) (v) 1928 Lah 7, (41 M 265, 5 P R 1919) *Dist*, 1926 Oudh 616, *Rel on*

——decree holder has the right to choose the property against which he will proceed 1928 Mad 713 · 27 L W 544 F. B

For other cases see, " C P. C *execution* "

R. 15, execution by joint D. Hr.

——when the decree determines the shares of the D Hr. it may be executed for one's own share only 9 C. 482. 10 I. A. 4, P. C.

——a joint decree cannot be executed for one's individual share which the applicant considers to be his own 4 A 78, 5 A. 27, 35, I A. 231, 15 B 142, 18 M. 464, 97 I C 896 1926 Oudh 605. 3 O W. N. 160

——under R. 15 any one of the joint decree holders can execute the whole decree, so the judgment-debtor is entitled to look for a valid ... the

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court Any amount received by the executing creditor in court or out of court during the pendency of the execution proceeding enures to the benefit of all 1928 Mad. 800

——when one of the joint D Hrs. applies for execution of the whole decree it is discretionary with the court to grant it, 7 C L. R. 537, or to give notice to other D Hrs before making an order for execution 33 C. 306, the court may make orders for protecting the interest of the other D. Hrs and of the Jt Dr 1 B L. R. A. C. 8.

228 : 7 Pat. L. T. 27.

Or 21, R. 15. execution by joint D. Hr —*contd.*

——non-mention of the names of other decree-holders and their interests does not invalidate the proceeding. The court is not bound to issue notice to other decree-holders before ordering execution. If the latter subsequently come to give consent to the execution their interests are properly safeguarded. 30 C. W. N. 562 : 96 I. C 692 : 1926 Cal. 811

——this sec does not apply where the decree attaches condition for joint execution by all the D Hrs. 6 A 69.

——when payment of the whole joint decree is made to one D. Hr the other may execute the decree for his share, 26 A. 31, 318, 28 A 452, 17 C L J 372, 13 C. L. J. 3. 3 C. L. J. 383 1917 Pat 258, or may proceed against the joint D. Hr. who has appropriated his share of the money 29 M. 183

——when the payment is made in part the other D. Hr cannot execute the decree for that part, 9 C 831, even if that has not been certified but admitted 15 M 343

——application must state that the decree is executed on behalf of all, it cannot be amended 4 Pat. C J. 575.

——if no objection is raised by the Jt Dr. to the execution of a joint decree by some of the decree-holder in the executing court, he cannot take the objection in appeal 97 I C 375 : 1926 Mad. 1198. 24 L. W 711

——the decree in a partition suit is a joint decree and is not time barred when the plff applies for execution within three years from an application for execution filed by a deft. though after three years from the date of the decree. 43 M L. J. 379 : 1922 M W. N. 518 . 31 M. L T 311 1922 Mad 356 . 42 M. L. J. 94 : 30 M. L T. 312 1922 M 327 65 I. C 990

——in a partition suit decree for cost may be executed by all the joint D Hrs. or by some subject to the provisions of this rule. 45 A. 401 21 A L J. 308 1923 A. 494 · 74 I. C. 687.

——one of several D Hrs cannot grant full discharge of the decree out of court or certify to the court complete satisfaction. *above case*

——this rule gives wide discretion to the court to adjust the rights of the D Hrs: *inter se. above case.*

R. 16. Application for execution by transferee.

——an assignee of an award can apply for the execution of the decree. 27 C. W. N. 606.

——a mortgage decree is not a decree for payment of money within this Rule. 49 M. 508 : 93 I. C 58 : 1926 Mad. 623 ; 51 M. L. J 139.

——the question whether, when a portion of the consideration [illegible] depends

Or 21, R. 16, Application for execution by transferee—*contd.*

provided the assignment is not a sham transaction 1928 Mad. 458, 1928 M W. N. 507 *fol*

——*benamdar* of one of the Jt Drs cannot execute the decree. 19 N. L. R. 151, but see 44 M. 334 · 39 M. L T 692 . 1920 M. W. N. 776

——the court should adjudicate upon the objection by the Jt. Dr. that ostensible transferee is really a benamdar on his behalf. 1926 Lah. 666.

——the decree obtained by a trustee can be executed by the owner when the trust is declared to be invalid. 4 Pat L. T. 731 · 2 Pat L R 27

——transfer of portion of the decree is valid, 44 M 919 41 M L. J. 316 F. B and this Rule applies to the assignment of even a fractional interest in a decree 48 A 432 . 1926 All 346 24 A. L. J. 430, 107 I. C. 603 1928 Lah 70, (33 M 80 17 Cal 341) *fol*

——a purchaser of property included in a decree does not thereby become the assignee of the decree and cannot execute the decree. 98 I C 856 . 1927 Mad 240

——where the Dr. Hr transfers a portion of a decree with a condition that the transferor alone will have the right to execute the decree, he becomes an agent of the transferee with respect to the portion transferred and if the transferor acts *mala fide* the transferee will be entitled to execute the decree, the condition being void under S. 28 of the Contract Act 44 M 919 41 M L J 316 : 1921 M. W N 649 F. B.

——a mortgagee-auction purchaser of properties with all rents and profits thereof can execute rent decree obtained by the mortgagor subsequent to the mortgage suit 25 C. W N 863 · 57 I C. 874, 7 A 1107, 17 I C 512 *Discussed*, 11 B 506 *fol*

——a Jt. Dr becoming co-sharer by purchase cannot avoid the effect of an ejectment suit 63 I C 894

——when during the execution case a joint D Hr assigns his interest and the assignee applies to be brought on the record it is

——a pending execution proceeding does not abate by reason of death or devolution of interest of any of the joint Dr Hrs *above case.*

——provisions of Or 21 r 16 must be complied with. 3 Lah L. J. 434 ; 2 Lah 230 63 I. C. 884

——R 16 contemplates the occasion when for the first time the assignee comes before the court to apply for execution. Notice is not to be issued each time the assignee comes to execute the decree. 31 C. W N 921 : 104 I. C 4 1927 Cal 694

——execution of a decree without service of notice on the assignor is not merely irregular but is unlawful and the execution sale under those circumstances is a nullity. 54 C. 624 : 105 I C. 193 : 1927 Cal. 781, 36 B 58. fol.

Or. 21, R. 16 Application for execution by transferee—*contd.*

——contest by Jt. Dr 39 C L J. 590: 28 C. W. N. 963: 1925 Cal. 23.

——objections to the *executability of the decree* cannot be entertained when a transferee decree-holder seeks to execute the order. The proper stage at which such an objection should be taken is when notice goes to him under R. 16 87 I. C. 436: 1925 All 662 L R 6 All 295.

—— the omission of the judgment-debtor to take objection to the substitution and to the transmission of the decree does not preclude him from raising in the executing court the question that the decree is not executable. 8 Pat L T. 163. 101 I. C. 616 1927 Pat 170 73 I C. 213

——when the assignor on getting notice does not object the Jt. Dr is protected in payment of the decretal amount. 83 I. C. 142: 1925 A 206.

——the petitioner whose allegation is that he purchased the decree in the *benami* of another person is not entitled to execute the decree because Or 21 R. 16 C P. C is a bar to his contention that the transferee was *benamdar*. 48 M. 553: 88 I. C. 409: 48 M. L. J. 419 1925 Mad. 701, 48 M 553, 100 I. C. 545: 28 Punj. L. R. 239: 1927 Lah 110

——an assignment of a decree not by operation of law to be valid must be in writing and a transferee under an oral assignment has no *locus standi* to execute the decree. 51 C. 703: 28 C. W. N. 626: 39 C. L J. 373: 1924 Cal 661 80 I. C. 881.

——the assignment of a personal decree does not require registration. 106 I C. 485 1928 Mad. 142.

——the assignee must have the decree that has been passed assigned to him before the filing of the execution petition as it is a condition precedent 28 Bom L R. 761. 96 I C. 833: 1926 Bom. 406.

——when the decree-holder succeds as heir of the deceased judgment debtor to part of the property attached in execution, he can proceed against the property for the whole debt. 103 I. C. 911: 1927 Mad. 937.

——a decree-holder of a decree-holder is not, by operation of law a "transferee" of the decree-holder. 5 Pat. 511: 96 I. C. 446: 1926 Pat. 320: 7 Pat L. T 793.

——a preliminary decree in a partition suit is not an executable [illegible] transferred under Or. 21, R. [illegible] W. 392.

[illegible] decree-holder and some of the [illegible] at the latter will pay the [illegible] and that he must execute [illegible] ent-debtors and realise the [illegible] ll under this Rule and is not [illegible] he execution of a decree by [illegible] r 99 I. C. 902: 1927 Mad.

Or. 21, R. 15. Application for execution by transferee—*contd.*

——there is no express provision of law under which a transferee of a decree can be certified as such by the court. 1926 Lah. 666, 38 A. 289 *Dist.*

Proviso 2.

——transfer of personal decree brought about by death is not excluded from the operation of Proviso 2, *i e.*, by such transfer the *decree ceases to be executable, 1926 Mad 1141* 99 I. C 26 51 M. L. J. 443.

R. 17. Procedure in receiving application for execution of decree.

——the decree-holder is not bound to proceed against the property of the judgment-debtor in the first instance 93 I C 54 · 1926 Lah 110 · 6 Lah 548.

——where the execution petition was filed within 12 years but it was amended after 12 years S. 48 did not bar the application. 45 M. L. J. 651 : 33 M. L T. 125 · 18 L. W. 739

——where an execution petition was filed asking for a relief against immovable properties, but description of the properties was ' ' furnished later and decree held that the eject the application defect to be cured the court made no plication was time- · 92 I C 109 : 1926 Mad 260

——the rejection of an execution application under Or 21 r. 17 (1) implies that the application is not "in accordance with law" within the meaning of Art. 182 (5) L Act. 8 N. L J 91 . 1923 Nag. 236.

R. 18 Execution in case of cross decrees

——the court has inherent power to allow Jt Dr to set-off decree for larger sums obtained by himself against the original holder of the decree for mesne profits. 28 C W N 988 · 84 I. C. 747 · 1925 Cal. 102

——a cross decree against one of the partners of a firm may be set-off against a decree in favour of the partners in their individual capacity 29 Bom L. R 396 104 I. C 319 1927 Bom. 255.

R. 21.

——the decree holder should be encouraged to proceed against both the property and the person of the judgment-debtor simultaneously, refusal to it should be the exception and not the rule. 93 I. C 54 1926 Lah 110. 6 Lah 548.

R. 22, notice before execution.

——if notice is not served, the purchase in execution of the decree is void. 20 C. 370, 42 C. 72 : 41 I. A. 251. **P. C.** *contra* where

Or 21, R. 22, notice before execution—*contd.*

it was held to be voidable only, 40 C. 45, 26 O. C. 288 : 73 I. C 211, 5 Lah. L J 67.

——omission of notice vitiates execution, 46 C. L. J 579 · 105 I. C. 65 , 55 C. 96 . 1928 C 60 24 C. L J. 337, 523, 21 C. W. N. 776, 22 C L J 327, *and sale*. 27 *C L. J 528, 44 C. 954*. 42 C. 72 · 41 I A 251 P C , 42 M L. J. 422 1922 Mad. 93 ; 1922 M. W. N. 173, 91 I C 711 1926 Cal 539.

——non service of notice where necessary makes the sale void. 25 C W N. 972, 1921 M. W N. 394 · 14 L. W. 638 : 63 I. C 903, 2 Pat L T 401 6 Pat L. J 319, 21 C W N. 776 : 22 C. W. N. 391 46 M L. J 104 : 19 L W 179 F B , 45 M. 875, 45 M. L. J. 413 *overruled*, 42 C. 72, 44 C 954 *Fol* 25 B 337, 14 C. 18 *Dist.* But the D. Hr. may prove that the Jt Dr's interests were to his knowledge *fully represented by another person who was a party* to the execution proceedings, 1921 M W. N. 394 . 14 L. W. 638 : 63 I. C 903, and where the judgment debtor appeared before the executing court and showed cause against execution the objection regarding the non- [illegible] 40 C. 59

e jurisdiction proceedings 1 539.

——where the notice is given to a wrong person, the sale in execution of the decree is not void but voidable as it constitutes a serious irregularity 27 I A 216 25 B 337, P. C., 32 C. 216 ; 9 C. W. N. 231 · 1 C. L J 584 32 I A 13 P C., 40 C. 45

——minor living with the adult, notice on such adult member is sufficient. 35 C. L J 9 64 I C 25

——where after attachment but before sale the Jt Dr. died and his legal representative was not brought on the record the sale was not null and void. 33 M. L T 25 45 M. L J. 413 · 1923 M. W. N. 817 ; 18 L. W. 577 . 75. I C. 46.

——when after decree but prior to execution one of the Jt. Drs dies and his *legal* representatives are on the record, no notice to them is necessary under Or. 21 r. 22. Even if there are other legal representatives who are not on the record absence of notice to them is nothing more than a mere irregularity and does not vitiate the proceedings. 86 I. C. 745 1925 Cal. 1257.

——once a notice is served the rule does not contemplate that a fresh notice should be served for every execution application made more than one year after the last order against the Jt. Dr. 2 Pat 916 ; 4 Pat. L. T. 721 ; 1923 Pat. 283 . 74 I. C. 838, 5 Pat 1 ; 1925 Pat. 474

——notice is required only in cases where the application is made more than one year after the date of the decree. 74 I. C. 202.

——but if no notice is issued at all the mere order for issuing a notice will not give a fresh start. 23 B. 35 The notice need not be actually served. 27 B. 622.

Or. 21, R. 22, notice before execution—*contd.*

——where the proceedings are in fact proceedings in continuation of the prior execution cases no notice is necessary under the rule. 1928 Cal. 241

——notice served not on the true legal representative of the deceased Jt. Dr. but on a third person is bad and former can take objection at a late stage. 23 Bom L. R. 514 · 45 B 1186 63 I C. 248.

——mere service of notice under Or. 21 R 22 is not sufficient to revive the decree 41 C L J. 159 87 I C 61 1925 Cal 668

——a Jt. Dr. who has no subsisting interest in the property against which execution is brought has no right to question the execution on the ground that no notice was served on him 88 I. C 1039 1926 Cal 86.

——an order setting aside an auction sale on the ground of non-service of notice under Rule 22 is an order falling under s 47 and an appeal and second appeal lies against it, 91 I. C 711 1926 Cal. 539.

Limitation,—Arts 182 and 183 L. Act.

——"date of issue" means the date when the notice is actually issued and not the date when court passes the order for issuing the notice. 6 C W N 656, 18 C. W N 1288, 20 C L J 15 10 C W N. 303 4 C L. J. 530 *Contra*, 23 B 416, 27 B 623, 1917 Pat. 52 39 A 536

——the provisions of Or 21 R. 22 clearly indicate that the mere issue of process under the rule cannot be sufficient to declare a decree capable of execution so as to constitute revivor under Art. 183 L Act. 41 C. L. J 159 : 87 I C 61 : 1925 Cal 668

——the issue of a notice under Or 21 R. 22 C P. C. where it is necessary, comes within Art. 182 (6) of the L Act 6 Pat L T 290 : 87 I. C 531 1925 P H. C C 121, 1925 Pat 474 F B

Appeal.

——an order of setting aside an auction sale on the ground of non-service of notice under Or. 21 R. 22 is an order falling under s. 47 and hence there is an appeal and second appeal against it. 91 I C. 711.

R. 24, Process for execution

——the officer to whom warrant is delivered for execution may delegate his power to his subordinate. 22 C. 696, 759, 6 A 385, but a warrant addressed to a peon cannot be executed by a nazir 1 Pat. L. J. 550.

——where an officer of a court arrests a Jt Dr. without warrant with him, the arrest is illegal, 5 A 318

——a warrant cannot be executed after the expiration of the date specified therein for its execution. 31 C 424, 10 C. 18, Date must be specified 1 Pat. L J 550, it must be sealed : 3 Pat. L J. 636.

Or. 21, R. 24, Process for execution—*contd.*

——if a warrant is extended, the extended date must be specified in the warrant otherwise a resistance to its execution after the original date does not amount to an offence under sec. 186 I. P. C. 37 C 122

——the provisions of Or 31 r. 24 (2) are mandatory and an attachment made under a writ which does not bear the seal of the court as required by the rule is an illegal and invalid attachment. 7 Pat. L. T. 30 . 93 I. C. 146 1926 Pat. 237 . 5 Pat. 216

R. 26 when court may stay execution.

——the judgment-debtor is not obliged to furnish security but he may or may not furnish it as he pleases, the court may make the stay order conditional on his giving security. 7 Lah. L. J. 313: 1925 Lah 552 28 Punj. L R 634 91 I C 772.

R 29 Stay of execution pending suit.

——the words "until the pending suit has been decided" mean after all rights of appeal have been exhausted and not merely until a *decree* has been *passed* by the *court* 55 C. 512 : 32 C. W. N. 181 · 107 I. C. 79 1928 *Cal* 222.

R 30 Decree for payment of money.

——the decree holder is to decide whether he shall execute the decree against the person or property of the Jt Dr. or against both simultaneously, and though the court has the discretion under Or 21, R. 21 to refuse execution against person and property simultaneously it cannot decline to make an order of committal to prison on the ground that the decree-holder should proceed against the property at first. 6 Lah 548 93 I C. 541. 1926 Lah 110.

——no attachment is necessary where by consent decree certain property is charged with payment of the decretal amount and liberty is given to the decree-holder to sell the property in case of default of payments 2 Pat 768, 73 I. C. 598 . 1924 Pat. 258.

R. 31. Decree for specific moveable property.

——in the case of a decree following Or 20. R 10 execution cannot be taken out by the decree-holder so far as the money portion of it is concerned, without adopting the procedure prescribed by this Rule. 31 C. W N 850 · 103 I. C. 740 : 1927 Cal 652, 13 M L. J. 444 *fol.*

——this rule does not apply when the property sought to be attached is not in the possession of the judgment-debtor. 1 C W. N 170.

R. 34. Decree for execution of document.

——a *solenama* which provides that one of the parties shall execute a patta in favour of another and which has been embodied in a decree can be given effect to by the execution of the decree under Or. 21 R. 34, 95 I. C. 179 . 1926 Cal. 975, 34 C. 456 *Dist.*

Or. 21, R. 35. decree for immovable property.

——symbolical possession gives fresh cause of action in a suit for khas possession by the decree-holder against the judgment debtor and when the suit is against a third person the latter is to show that his right by adverse possession has been perfected as against the plff. under Art. 144 of the L. Act 96 I C 481 · 1926 Cal 1172, 1922 Cal. 176, 5 C 584 P. C *Rel on*, 1926 Lah 35.

——but it has been held in a case by the Madras H. C. that when a plff is entitled to actual possession under the law, he is not entitled to get what is called symbolical possession When the Jt Dr is in actual possession the decree holder is also entitled to take the delivery of actual possession but if in such a case the decree holder takes symbolical possession he cannot rely on it when limitation is pleaded against him 86 I C 439 1925 Mad. 1140 . 49 M. L. J. 303

R. 36. Decree for delivery of immovable property

——this Rule applies only to a case when the property is in exclusive possession of a person not bound by the decree and entitled to remain in possession It does not apply to a case of joint holding which is covered by R 35 97 I. C. 170 1926 Lah 668 27 Punj L R. 617

——where delivery of possession was duly proclaimed by beat of drum but no copy of warrant was affixed as required by law. there was no proper delivery. 84 I C. 733 . 6 Lah L. J 522 : 1925 Lah 264 . 6 L L J. 822

——where the decree-holder asked for delivery of the immovable property with standing crops but was allowed delivery of possession of the land only his remedy was to apply again for effective possession of the whole and not delivery of the crops only. 97 I. C. 567 : 1927 Mad. 71.

R. 39. Subsistance allowance

——the whole amount is to be deposited within 30 days. 1925 Nag. 30.

R. 40. Proceedings on appearance of Judgment-debtor after notice or arrest

——the court cannot refuse arrest of judgment-debtor unless it finds that the Jt Dr cannot pay the debts owing to poverty or some other sufficient cause, or because the decree-holder refuses to take a farm of the judgment debtors' land 94 I C 279 · 27 Punj. L. R. 229

——the finding as to the inability of the judgment-debtor to pay a decretal amount "for other sufficient cause" must be based on evidence and should not rest on a mere statement at the bar and the security must be sufficient and not illusory, so a judgement debtor ought not to be released on his personal security The provisions of s 55 are mandatory 54 C 782 106 I C. 66 1928 Cal. 62.

Or. 21, R. 24, Process for execution—*contd.*

——if a warrant is extended, the extended date must be specified in the warrant otherwise a resistance to its execution after *the original date does not amount to an offence under sec 186 I P. C.* 37 C 122

——the provisions of Or 31 r 24 (2) are mandatory and an attachment made under a writ which does not bear the seal of the court as required by the rule is an illegal and invalid attachment. 7 Pat. L T 30 · 93 I. C 146 1926 Pat. 237 : 5 Pat. 216

R. 26 when court may stay execution.

——the judgment-debtor is not obliged to furnish security but he may or may not furnish it as he pleases, the court may make the stay order conditional on his giving security. 7 Lah L. J. 341 · 1925 Lah 552 28 Punj L. R 631 91 I C 772.

R 29 Stay of execution pending suit.

——the words "until the pending suit has been decided" mean after all rights of appeal have been exhausted and not merely until a decree has been passed by the court 55 C. 512 · 32 C. W. N 181, 107 I C 79 . 1928 Cal 222

R. 30 Decree for payment of money.

——the decree holder is to decide whether he shall execute the decree against the person or property of the Jt Dr. or against both simultaneously, and though the court has the discretion under Or 21, R. 21 to refuse execution against person and property simultaneously it cannot decline to make an order of committal to prison on the ground that the decree-holder should proceed against the property at first 6 Lah 548 93 I C 541, 1926 Lah. 110.

——no attachment is necessary where by consent decree certain property is charged with payment of the decretal amount and liberty is given to the decree-holder to sell the property in case of default of payments. 2 Pat 768, 73 I C 598 1924 Pat. 258.

R. 31. Decree for specific moveable property.

——in the case of a decree following Or 20, R. 10 execution cannot be taken out by the decree-holder so far as the money portion of it is concerned, without adopting the procedure prescribed by this Rule. 31 C. W. N 850 . 103 I. C. 740 ; 1927 Cal 652, 13 M L J. 444 *fol.*

——this rule does not apply when the property sought to be attached is not in the possession of the judgment-debtor. I C W. N 170.

R. 34. Decree for execution of document.

——a *solenama* which provides that one of the parties shall execute a patta *in favour* of another and which has been embodied in a decree can be given effect to by the execution of the decree under Or. 21 R. 34, 95 I. C. 179 : 1926 Cal. 975, 34 C. 456 *Dist.*

Or. 21, R. 50, Execution of decree against firm—*contd*

——execution against firm property does not preclude the *eventual execution of the decree against the individual partners* as soon as any or all the conditions set forth in Or. 21 R 50 are fulfilled. 92 I. C. 896 , 1926 Lah 236.

——a decree obtained against a firm cannot be enforced except as to partnership property against a person alleged to be a partner *and against whom an application has been made under Cl (2) unless* he has been served with summons to appear and answer to application specified in Cl. (2) and he has had an opportunity of disputing his liability as a partner. 30 C W. N. 11 : 53 C. 214 91 I. C 824 : 1926 Cal 271

——*in order to entitle a person with benefit of this Rule it must* be shown that a decree has been passed against a firm, passing of award is not sufficient 29 Bom. L R. 660 104 I. C 91 · 1927 Bom 428.

——a decree against a firm obtained after death of one of the partners *may be executed against his legal representative though* he was not impleaded as a party in the suit. 100 I C. 204 . 1927 Sind. 130, F. B

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29 Bom. L. R. 921

——the liability of the person appearing under protest may subsequently be decided under Or 21, R 50 54 C 1057 : 31 C. W. N. 1004 : 105 I C. 356 : 1927 Cal 758

R. 52. Attachment of property in custody of court or public officer.

——Or 21 r. 52 C P C. provides for attachment of property in the custody of any court or any Public officer. 49 B 638 : 27 Bom. L. R. *545 : 87 I C 1011*

——an order under R. 52 is judicial and not administrative. 1925 Cal. 354.

——in order to attach money of the judgment debtor deposited in court execution application is to be put in and notice is to be given to the *judgment* debtor. 97 I C. 1020 · 1926 Mad. 1104 : 1926 M. W. N 683 · 51 M. L. J 436.

R. 53 Attachment of decrees

——attachment of decree before it is drawn up is good, 34 C. L. J. 494.

——where a decree is attached without notice to the Jt. Dr. and he satisfies the decree, he has the right to have satisfaction entered up 61 I. C. 815.

——a notice under R 53 (6) to the judgement debtor of the attached decree is not necessary before the attachment of the *decree under Rule 53 comes into force* 50 M. 677 . *103 I. C. 502* : 1927 Mad. 728 F. B 24 M L. T 495 *Ref*, 13 L W. 34 *Dist.*

Or. 21, R. 53. Attachment of decree—*contd.*

——an attached decree should be executed and sold. 45 B 343 22 Bom. L. R 1304 · 59 I. C. 541

[illegible]

payment of money under this Rule. 95 I. C 1033 : 1926 All. 379 : 24 A L J. 385

R. 54 Attachment of immovable property.

——when immovable property is charged with the payment of decretal amount it need not be attached, the proper procedure is to treat the decree as preliminary decree for sale and to file an application for the passing of an order in the nature of decree absolute for sale. 99 I C. 656 . 1927 Mad 190, (41 M 327 : 6 L. W. 701) Ref.

——this Rule does not require that a separate proclamation of sale is to be served in every *mauza* comprising the state or tenure. 6 Pat 588 105 I C. 689, 40 C 635 Ref.

——where the prohibitory order contemplated by this rule is not published, there is no legal attachment. 55 C. 545 : 104 I. C. 340 · 1927 Cal 885.

R 55 Removal of attachment after satisfaction of decree.

——in case of instalment decree the instalment which has become due and in respect of which attachment has been made, is the amount decreed in this Rule. 105 I. C 799 . 1928 Nag 65.

R. 57 Determination of attachment

[illegible] attachment ceases, 1923 Bom.

[illegible] attachment to subsist even [illegible] struck off on account of a default on the part of the decree-holder is an improper order but is not a nullity. 87 I. C. 349 : 1925 All. 456

——though an order dismissing an execution case but maintaining the attachment is not a proper order yet when once passed it is binding on the parties 44 A. 274 : 20 A. L. J. 113 : 1922 A. 62 : 65 I. C. 91.

——where an execution petition is dismissed for default, an [illegible] 1925 [illegible] 887

[illegible]

I. C. 543.

Or. 21, R 57. Determination of attachment—*contd*

——this rule does not apply to a case where there is no default of the decree-holder i e., when the court strikes off an execution proceeding or consigns the record to the record room to suit its own convenience, or to reduce its pending file When out of the two properties attached the court after the sale of one property strikes off the proceeding without any default of the decree-holder the dismissal is not one under this rule. 97 I. C 102 : 1926 A. 734 : 24 A. L J 901 : 48 A 698, 107 I C. 574

——the effect of an application to revive an execution thus suspended is that the proceeding is continued from the stage at which it was left (32 I A. 102 P C. and 34 A 409) *fol.* 41 A. 157 *Dist.*, and an order thus restoring an attachment relates back to the date when the attachment was first made and its effect is to invalidate any private sale made during the subsistence of that attachment *above case.*

——when the execution proceeding is transferred to the Collector he has the power to dismiss an application under r. 57. 1923 Nag. 18, 68 I C 643.

——when an execution petition dismissed for default is restored, the previous attachment is revived 18 N. L R 152 64 I C 420.

——the word "default" is not restricted to default of appearance but applies also to a failure to do what the D. Hr. is bound to do. 75 I. C 824

——this rule applies to attachment before judgment which becomes converted into attachment in execution when application is made to execute the decree 46 M. L. J 415 34 M L. T 118 F. B. 46 A. 894

——damage for wrongful attachment before judgment 49 B. 629 ; 27 Bom. L R 525 . 87 I C. 1026.

RR. 58 to 63, claims.

Application of the rules.

——these rules do not apply where the property is directed to be sold under a mortgage-decree, as there is no attachment, 26 C. W. N 50, 4 B. 515, 520, 2 M 108, 412, 18 B 98, 1 C. W N 701, 14 C 631, 19 A. 480, 55 I C. 895, or under a rent decree. 28 C 382 : 5 C. W. N. 474, F. B., 4 C. W N 732, 3 C W N 386, but are applicable to executions *under rent decree obtained by co-sharer landlords.* 17 C. 390, F B. 14 C 201. *Ref* and to mortgage decree, when there [illegible] aid to be wholly [illegible] B 17 M. 17) *Rel* [illegible] ched. 27 M. 67, 38 B. 631

——objection of limitation cannot be taken under rule 58. 2 Pat. L. T. 275 : 60 I. C 375

——claim petitions should be disposed of before sale. 16 C. W. N. 1029. 1 . C. W N. 817, after sale the court has no jurisdiction to try the claim case. 4 Pat L. T. 544 : 74 I. C. 87.

Or. 21. Rr. 58 to 63. Application of the rules—*contd.*

——after a property which had been attached in execution of a decree has been sold the court has no jurisdiction to hear an application putting forward a claim. 87 I. C. 168 : 1926 Cal 468

——a claim case cannot be restored. 16 C. W. N. 882

——a court of small causes has no power to attach an immoveable property before *judgment or to adjudicate on claim* proceedings resulting out of it. 28 C. W. N 16 *contra.* 20 C. W. N 178, 43 I C 123

——an usufructuary mortgagee cannot come under rule 58, he should come under r. 100, 1 Pat. 159 : 1922 P. 408 *contra* 10 O. & A. L. R 185 97 I. C. 255 ; 1927 Pat. 51.

——a mortgage not being a claim under Or. 21 r. 58, an order rejecting a mortgage-claim does not become conclusive if no suit is filed within a year. 97 I. C 178 · 22 N L. R 94 : 1926 Nag 423, *contra* The fact that the claimant is a mortgagee and has obtained a preliminary decree for sale does not make any difference in his rights and when his claim is disallowed and the order is not challenged by suit within one year it becomes conclusive 93 I. C. 335 : 1926 Mad 593, 49 A 903 · 25 A. L. J 689 · 102 I. C. 792 · 1927 All. 593 But if it can be inferred that the intention of the decree-holder was not to attach the property itself but the equity of redemption the attachment may be allowed to continue upon the equity of redemption 97 I C. 255 1927 Pat 51.

——an attachment of equity of redemption in usufructuary mortgage continues despite mortgagor's applications for its release. 1925 Cal. 296.

——where a deft puts in a petition under r. 58 and the petition is dismissed he is entitled to appeal against the order as the petition is really one under s. 47 though not in form. 75 I. C. 747.

——*it is obligatory upon the court to withdraw an* attachment before judgment upon the dismissal of the suit and reversal of the dismissal on appeal does not revive the attachment which has been cancelled. So when a fresh attachment is effected the objector has a right to prefer a fresh claim and the period of one year should be counted from the date when the fresh claim as rejected 87 I. C. 756 : 1925 Cal. 1147, 1925 Mad. 1113 : 87 I. C. 637 · 43 M L. J. 616.

——when on the death of a tenant of certain homestead land leaving three sons, two of them only executed a kabulyat on which the landlord sued them for rent and obtained a decree and [illegible] he had one [illegible] claim was [illegible] 45 C. L. J.

——under s 47 parties to the suit include the parties against whom the suit has been dismissed and therefore an objection by such a party that the property attached in execution is not liable to be attached is one under s. 47 and not under Or. 21 R. 58, and

Or. 21, Rr. 58 to 63. Application of the rules—*contd.*

the decision thereon is a decree 3 Pat. L. R. 90 : 6 P. L. T 725 : 87 I C 743

As to the point whether an objection is tenable under this Rule or s. 47, See, *Notes under s. 47.*

Points to be decided.

——the court is to consider whether the property at the time of attachment was in the possession of the judgment debtor as his own property, if such property was in the possession of some other person, whether it was in his possession in trust for the judgment debtor or in the claimant's occupation as the tenant of the judgment debtor. Title to the property is beyond the scope of investigation in a claim case. 108 I. C. 67 . 1928 Mad 163 . 54 M L. J. 321

——question of possession only is to be seen , question of title is required to be gone into only to determine whether the person in possession holds for himself or for another 1 C W. N 617, 13 Bur. L. T 214, 103 I C 12 1927 Nag. 286

——the court is bound to decide the question of possession. 87 I. C 189 · 1925 M W N 590 48 M. L J 603 1925 Mad 588

——under this rule the court cannot go into title. 14 C 617, 18 C. 290, and cannot act on suspicion only 29 C. 543, 11 M I A. 28, 551, **P. C.** *Ref.*

——in case of attachment before judgement claim is to be preferred at the time of attachment, but objection under sec 47 (in this case as to transferability of occupancy holding) is to be preferred at the time of execution 38 C 498.

——claimant proving interest or possession, the court is to see for whom 24 I C 62

——property standing in the name of the claimant should be released the court is not to see whether it is benami for the J Dr. or not. 29 C. 543, 14 C 617, 18 C 290.

——when the court dissallowed a claim merely remarking that the claimant had some sort of interest the order was liable to be set aside in revision 60 I C. 616

——direction to proceed with sale after simply notifying claim amounts to adverse order. 1925 Mad 368

——where the objector admits the property to be that of the Jt Dr and liable for the decree the court can release it from attachment only if the conditions laid down in R. 60 are found 91 I. C. 414 ; 1926 Mad 355

——costs of claim case 35 M. L T. 106 83 I C 89 . 1924 M. W N. 757.

Release

——the order of release is only provisional, subject to the result of the regular suit and it does not put an end to the attachment so as to leave the claimant free to deal with the property. But a different rule has been adopted with regard to attachment before

Or. 21, Rr. 58 to 63 Release—*contd.*

judgment. 33 C L J 201 : 25 C. W. N. 544 : 62 I. C. 348, 14 C. W. N 371, 2 Bur. L. J. 113 : 1923 Rang 237.

——the order of removal of attachment is conclusive though *ex-parte*. 2 Bur. L J. 60 75 I C. 323 : 1923 Rang. 156

——when an order is made for the removal of an attachment a fresh application for attachment is not maintainable. 75 I C 322 (Bom.)

——when the objector admits the property to be that of the judgment-debtor and liable for the decree, the court can release it from attachment only if the conditions laid down in R 60 are found 91 I. C 414 1926 Mad 355.

——when the judgment-debtor raised an objection under R 58 on the ground that the property was in his possession in his capacity of a trustee and the same was allowed and thereupon the decree-holder preferreda no appeal, held that no appeal lay as the order of the lower court was made under R 60 and not under s 47. 26 A. L. J. 477 · 1928 All. 392

Effect of Dismissal of claim under R. 58.

——when a claim under R 58 is dismissed subsequent petition by a transferee of the claimant under R. 100 is not barred 98 I C 541 ; 1927 Cal 339

——when the claim is rejected the claimant is barred to raise his claim to the property even by way of defence. 26 A. L. J 794 : 1918 All 328

R. 63, Saving of suits to establish right to attached property

——the dismissal of a claim petition followed by the dismissal of regular suit has the effect of conclusively setting the question 44 M 268 . 40 M L J. 7 28 M. L T. 420 · 60 I. C 780.

——suit under s. 63 is simply a form of appeal from a summary order under r. 58, 90 I C 196.

——it is not open to the decree-holder to withdraw an attachment and then bring a suit under Or. 2I R. 63, as this Rule contemplates an objector's claim accepted or disallowed, 93 I. C 997 : 1926 Lah. 348 27 Punj L. R. 408 : 7 Lah. 235 : 8 Lal. L. J, 350

——where a property is sold subject to a mortgage upholding [illegible] t question the [illegible] and was not [illegible] upheld and one [illegible] the lessee in ejectment contending that the lease being *pendente lite* is not valid against him, the suit is not barred by the earlier proceeding. 104 I C 292 : 1927 All. 657 : 50 A. 202 : 25 A. L. J. 1025.

——where debt is attached and the garnishee objects to the [illegible] by him [illegible] between [illegible] 3 Mad 45.

Or. 21, R. 63, Saving of suits to establish right to attached property—*contd.*

——the D. Hr's. case under r. 63 is a personal case and he is not to take the general ground that as against all other creditors and all other persons a mortgage or sale is void. 71 I C 20, 42 M. 143.

——an order in favour of a D. Hr. made under this rule does not ensure to the benefit of the other D. Hrs. who are not parties. 18 A. 413.

—— bad under sec. 42 Sp. R or consequential relief. Lah 167.

—— resh suit is not maintainable against the same party in respect of execution of another decree.. 1921 M W. N. 33, 41 M. 846 F B. relied on 38 M. L J. 397, 8 C. 279 *Fol.*

——an order disallowing a claim under these rules is not a nullity merely because the court erroneously does not go into the question of possession but disallows the claim on some other ground 34 A. 365.

——Or 21 R. 63 applies to orders on the claims preferred to property attached before judgment 41 M. 849 F. B , 1921 M W. N. 33

——where a claim is disallowed but the execution petition in pursuance of which the attachment was made, was subsequently dismissed because the decree-holder was unwilling to proceed with

——when after the rejection of claim case the execution petition itself is dismissed the objector need bring a suit under R. 63 and if fresh attachment is made and fresh objection thereto is rejected the objector may file a suit. 94 I. C 120 (C)

——an order under Or 21 r 63 dismissing a claim for default is subject to the result of the suit instituted by the unsuccessful party, conclusive no less than an order dismissing a claim on merits. 26 Punj L. R. 151.

——the D Hr also can sue to establish the title of the J Dr. and in such suit Jt Dr. is not a necessary party 12 A. 150 P C

——but in case of a suit by claimant the J r is a necessary party. 28 A. 41, 43 claimant can also ask for consequential relief, 10 B. 608, 17 C. 436 17 I A 17 P. C. limitation runs from the date of appeal 39 M 1196, 25 M 555

——unless Jt Dr. is made party he is not bound by the decision of the claim case 37 M. L J. 547: 54 I. C. 530, 37 M L. J. 624, 54 I. C. 536.

—— the D. Hr. is not a necess 58; 70 I. C. 168, 1922 M. 1927 Lah. 631, 105 I. C. 799

Or. 21, R 63, Saving of suits to establish right to attached property—*contd.*

——when the claim is defeated in a suit by the claimant under R 63 the auction purchaser can be included as a party. 103 I. C 763 1927 Lah 631

— — ... int can also

ind to bring
30 M 335,

31 M. 163, 15 C 674, 11 B 114

——a transferee of property is a necessary party in a suit under r 63, 33 C L. J. 201 25 C. W. N 544

——the claimant is not bound to take action to set aside the attachment, he may pay the decretal amount under protest and then sue. 40 C 598 40 I A 56 **P C**

——Art 11 of the L. Act applies to suits arising out of claim petition regarding property attached before judgment if the claim petition was put in the passing of an order for sale. 44 M. 902 1921 M W N 569 41 M L J 252 · 14 L. W. 645 **F. B.**

——in a suit under r 63 burden is on plff. 2 Lah L J. 198, 1923 Nag. 334, 67 I C 876 but where the claim case is not decided on merits the burden is not on plff 60 I C. 751. *See P. C. case below*

——the plff is to give *prima facie* evidence of the genuineness of the documents and once he has shown a *prima fasie* title, the onus shifts to the D Hr to prove that the transfer was fraudulent and unreal, 89 I C 953. *See P C* case below.

— ...

——but it has been recently held by the P. C. that when the claim case preferred by a person under a registered sale deed from the Jt Dr is rejected, in a suit to establish his right the onus is on the contesting deft. i e. the attaching creditor, to show that the sale to the plff, was fraudulent one; but utter inadequacy of price may raise the legitimate inference of fraud. 32 C. W. N. 28 : 46 C. L. J. 349 · 29 Bom L R 1481 : 53 M. L. J. 388; 4 O W. N 926 ; 105 I C. 788 1927 P C 237

— ... m a successful claimant
· under r. 63. is not an
," and as such the suit
party within one year

——when the sale is stayed for further orders it is not an adjournment and a sale without fresh proclamation is bad, 75 I. C 343 (Burma)

——adverse decision in a claim case prevents the unsuccessful party from asserting his right either as a plff. or as a deft. except in a suit under r. 63, 1922 Cal. 164.

——a defeated claimant cannot avail of a suit by successful party to re-agitate his title. 1925 M. 368.

Or. 21, R. 63, Saving of suits to establish right to attached property—*contd*

—but he can do so when the execution case is dismissed after the rejection of the claim. 1925 M. W. N. 406 87 I C. 635: 1925 Mad, 1113.

—a regular suit is continuation of claim proceedings. 1925 Nag 82

Limitation of title suit.

—when claim case is not tried on merits but is rejected on ... ig title suit is ... 8 Mad. 525.
... in an order of ... (64 I C. 209,

—an order dismissing a claim for default is an order under r 63. 26 C. W N. 126, 356, 202, 45 C 785 23 C. W. N 375, 24 O C. 213, *contra* below under the Old code.

— ... 'c) is dismissed ... Art II L Act ... 5: 1 M. L. ... L. J. 296, 32 C. 537). *dist*

— ... an investigation on the ... to the regular suit 45 ... M 985. 1 Rang. 481: ... I C. 178 22 N L R ... 327, 45 C 785. 1927 Lah. ... against such order 2

—where the execution petition was struck off for part of the decretal amount being realised pending a claim case but subsequently on the representation of the objector that the decree had been adjusted, the objection was allowed *exparte*, held that the latter order was quite unnecessary and without jurisdiction and the D. Hr. was not barred to bring his suit within one year, 3 Lah. 7. 1922 Lah. 108 67 I C 543

—to apply Art. 11 of the L. Act the property to which the claim is preferred must have been *defacto* attached, merely the ... Where after an order ... ut in and rejected, ... order of rejection: ... ear as the order is a nullity. 51 M 349 32 C W N. 821. 48 C L J 11 26 A L. J. 616 55 I A. 256 1928 P C 139 P C

—claim disallowed but attachment withdrawn, title suit need not be brought within one year. 45 B 56 22 Bom. L. R 1446 59 I C. 774

—upon dismissal of the suit attachment before judgment is cancelled and reversal of the dismissal does not revive the attach-

Or. 21, R. 63 Limitation of title suit—*contd.*

[illegible] prefer [illegible] . 756 : [illegible] court [illegible] 921 M.

——merely because the claimant does adduce evidence or is absent it does not follow that there are no materials before the court to enable it to enquire into the matter. If the court does not enquire and dismiss the application rule 63 applies. 6 C L J. 362, 14 A 325, 20 I C 349, 19 A. 253, 32 C. 577, *doubted.*

——where the claim by a mortgagee on the date of sale to have the sale proceeds kept in deposit to satisfy his mortgage was dismissed on the ground that as the sale had taken place the court had no jurisdiction to hear the petition, subsequent suit on the mortage was not barred by Art 11 and 62 L. Act, 70 I. C. 648 1923 M 76 . 43 M. L. J 467 : 16 L W 485, 41 M. 985 F. B *Dist* 41 C 654 P. C. *Ref*

——where in a claim case the court's order was "whatever right the defendant has will pass by the sale, &c. the claim will be noted in the sale proclamation," Art 11L Act (one year) did not apply to a regular suit 44 M. L. J 141 1923 M. 295 : 72 I. C. 857.

——a suit by the vendee claimant against the vendor Jt. Dr for return of consideration money after his claim has been dismissed need not be brought within one year. 21 A. L. J. 770 : L R 5 A. 28.

——when a claim petition is withdrawn and the court endorses as "not pressed, dismissed," the order is not under the rule and the claimant is not bound to bring suit within one year. 1926 Mad 265

Court fee

——the plaint is chargeable with a court-fee of Rs. 10, though the plff. may also claim possession of the property or an injunction restraining deft. from executing the decree. 35 C. 202 : 35 I. A. 22. 12 C. W. N. 169 : 7 C L. J. 36 P C, 9 B. 20.

Valuation.

——the valuation in such a declaratory suit is the value of the decree and not of the property. 38 A. 72.

R. 66. Sale proclamation.

——when J Dr. objects to the value to be stated, the court may mention both the prices as stated by D Hr and J. Dr. 20 C W. N 44 n 28 C. W. N 552, 91 I. C. 819 (c) *Contra.* value of the property must be settled by the court and mentioned in the proclamation. 1917 Pat. 105 F. B.

——where the values given by the D. Hr. and Jt. Dr. differ considerably both values can be inserted in the sale proclamation. 91 I. C. 819 : (c) 1926 Cal. 610.

——the approximate value should be stated in the proclamation but its omission is an irregularity which does not vitiate the sale

Or 21, R. 66. Sale proclamation—*contd.*

unless it had a material effect upon the number of bidders and upon the price. 1922 Cal. 93 : 70 I. C 308.

——the court is under no obligation to fix its own valuation in the proclamation of sale. 1928 Mad. 503 : 27 L. W. 577, 1927 Mad. 1009, *Approved* 8 C. W. N 257 *Dist.* 2 P. L. J 13 and 4 Pat L. J. 37 *Diss* 20 A 412 **P. C.** *Expl* and *Dist.*

——the value fixed by the court need not be true value but as far as possible fair estimate. 1 Pat. 214 · 1922 P 550.

——valuation must be fixed by the court otherwise the sale will be vitiated. 1923 Pat. 208 : 1923 P. 445 73 I. C. 317.

——the court cannot sell more than what law allows, 37 B 931, if there is any ambiguity in the sale proclamation the decree may be examined to see what was sold 96 I C 771 . 1926 All 730

——J Dr. not objecting under this rule is estopped to object afterwards. 16 C. L. J. 557, 32 C W. N 309 : 1928 Cal 328.

——where inspite of the notice the Jt Dr does not attend at the settlement of the sale proclamation he is not estopped by the principle of *res judicata* from contending thereafter that the property was not liable to attachment. 46 M 768 : 1924 Mad 1, 45 M. L. J. 346 74 I C 155 : **F. B.** But he is afterwards estopped from objecting to the valuation 4 Pat L. T. 721: 1923 Pat. 283: 2 Pat 916. 74 I C 838, 32 C W. N. 309 1928 Cal 328

——it is no duty of the judgment-debtor to attend and assist the court as regards the correctness or otherwise of the particulars included in the proclamation 105 I. C 335

——it is not incumbent on the decree-holder to specify the income of the properties in the sale proclamation 106 I. C 138. 1928 Mad 398

——D. Hr cannot enforce any incumbrance which he has not stated in the sale proclamation 17 C W N 137.

——sale proclamation may be issued before disposal of objection by the Jt Dr 43 I. C. 450 (C)

——an auction purchaser under certain circumstances may impugn a notified incumbrance 24 C W N 269 55 I. C. 189 3 O L. J 422 : 36 I C 732.

——where the sale is not effected subject to mortgage but the mortgage is only notified at the time of sale the auction purchaser is not estopped from questioning the validity of the mortgage 44 A 714 20 A L. J. 722 1922 All. 443 : 68 I C. 790 33 C L J 333, 63 I C. 395.

——where the D. Hr omits to notify his own prior mortgage in the sale [illegible] estopped from setting up the mort- [illegible] U B. R. (1921)

[illegible] mortgage deed and insert in the proclamation the special contract entered in the mortgage deed 13 L. W. 444 : 62 I. C 735, 36 Cal. 323 *Dist*

——effect of notification of mortgage in sale proclamation 66 I C. 694

Or. 21, R. 66. Sale proclamation—*contd.*

[illegible] the purcha- [illegible] cannot claim [illegible] the purchaser [illegible] ortgage. 34 C. L J 333.

——the issue of notice under R. 66 (2) relates to a case where a proclamation is drawn up, when the proclamation is drawn up originally after notice to the Jt. Dr. no notice is necessary before preparing the proclamation a second time when the sale is adjourned. 90 I C 351

——an application under r. 66 may be verified by the Karpardar and want of signature of the D. Hr may be amended. 1 Pat. L. T. 647 59 I. C 282

——settling sale proclamation is purely a ministerial act. 46 M L. J 71 1923 M W. N 894 18 L W 615, 27 M 259 F B.

——but it has been held by the same H. C. that to settle the proclamation is the duty of the court and if it does not do it and deputes a commissioner to do it the sale becomes invalid. 49 M. 333; 1926 M. W. N 936, 51 M L J. 165: 94 I. C 8: 1926 Mad. 755.

——sale proclamation should contain statement as to revenue assessed upon the estate, omission of which may vitiate sale if other conditions are present. 45 M L J 423 18 L W 137: 75 I. C. 546 P C.

——failure to serve the sale proclamation does not vitiate the sale when the Jt Dr knows of it 1922 Cal. 93: 70 I. C. 308.

——the executing court can consider the question of order in which the properties should be sold although an application relating to the same question was not granted by the trial court. 96 I C. 492 1926 Mad 834, 1926 M W N 566 51 M. L. J. 135, 23 L W. 765.

Appeal

——all orders under R 66 are not appealable; only such orders [illegible] 1926 M W N 566: 51 M. L. J. [illegible] rule is one [illegible] 30 C. 617. [illegible] ion and directing its issue is not appealable [illegible] I. C. 547, 16 C W N 124, 970 *Ref* 59 I C 282

——there is no appeal against an order determining a question under Or. 21 R. 66, 96 I. C. 567: 1926 Cal. 1184, (16 C. W. N. 124 and 970) *fol.*

——an order as to whether an incumbrance should be notified does not relate to the settlement of terms of the sale proclamation but relates to execution of the decree and is appealable. 1 Pat. L. R. 53: 1923 Pat 76: 1923 P. 139: 75 I. C. 860.

——but where the court at the instance of a stranger notifies an incumbrance in his favour with a view to its being shown in the sale-proclamation and the court without expressing an opinion as

Or. 21, R. 66. Appeal—*contd.*

[illegible] be notified the order is not [illegible]rs as determine the rights [illegible] 92 I. C. 644 1926 All. 268 [illegible] as to the order in which [illegible] 45 M. L. J 478 : 1923 M [illegible]

——[illegible] in the sale proclamation is [illegible] W. N. 297 ; 32 M L J [illegible] C. 836, 91 I. C. 819 1926 [illegible]

——the failure to issue notice amounts to irregularity within [illegible] 311, 1899 A. W. N 84. [illegible] clamation at the village [illegible] 8. 1922 M. W N. 490

——an order of an executing court refusing to notify incumbrances in the sale proclamation is really an order under R 66 and not under s 47 and is therefore not appealable, 3 Pat. L R 118. 4 Pat. 731 · 6 Pat, L T. 843 88 I C. 332 1925 Pat 500

——though petition by a judgment-debtor is filed as one under Or. 21 r 90 when the objections are that the petitioner had no notice of the proclamation of sale and that there was no under-valuation of the property, they fall under Or. 21 r 66 and second appeal is competent 1925 M W. N. 701. 1925 Mad. 1142.

——no appeal lies against an order declining to re-open the valuation fixed in the sale proclamation, 1925 P. H C C 160. 6 P. L. T. 507. 90 I. C. 276 1925 Pat. 588

R. 69. Adjournment or stoppage of sale.

——in case of adjournment, day and hour must be specified, omission of this is material irregularity 24 C 291, 31 C 815, 8 C. W. N, 686, 6 C W. N. 44, 48 I 689, 14 C L J. 541, 49 A. 402 : 99 I. C. 926 1927 All. 241 : 25 A L J 302.

——when there is series of short postponements less than seven days, which, taken together amount to more than 7 days, a fresh proclamation of sale is necessary. 6 C. W N 44. But as under the rules of the High Court each property is taken up in its turn an adjournment of the sale of a property in consequence of such procedure is not an adjournment within the meaning of this sec. 17 C. 152 Effect of postponement for more than 7 days, 39 C 26 P. C.

——where the sale is kept open for some days to get higher bids without adjourning the sale, there is a continuous sale and no fresh proclamation was necessary. 8 Pat L. T. 796 104 I. C. 215 1927 Pat. 312 ; 6 Pat 432.

——where an execution sale is not conducted within the precincts of the court house, the officer, conducting the sale may adjourn the sale to the next day 107 I C. 274 : 1928 Lah 249

—— when a sale is adjourned by the order "until further orders" and no fresh proclamation is made the sale should be set aside · 2 Bur L. 54 · 1923 Rang. 154 . 75 I. C. 343

Or. 21, R. 69. Adjournment or stoppage of sale—*contd.*

——an application by a Jt Dr. for adjournment of the sale without issue of fresh proclamation and beat of drum *does* not amount to waiver of irregularities nor of any fraud practised upon him 6 C W N 42, 16 C W. N. 704 14 C. L J. 346

——bidding at auction is a mere offer which may be retracted before the hammer is knocked down. 14 M. 235. But see. 19 C. W. N. 633 below.

——where an execution sale is postponed on the ground that the decree has been satisfied r 69 has no application. 4 Pat L. T. 495 · 1923 P 572 · 75 I C. 676.

——a sale is invalid if 25 p c of the purchase money is not immediately paid. 28 A 238, 2 O L. J. 216; 30 I. C. 230, *contra.* 15 C. W. N 350, 16 C 33

——a bidder cannot withdraw his bid but Nazir or Court can decline to accept it 19 C. W N 633 · 21 C L J. 174.

——moveable property in which the Jt. Dr has a share may be sold in execution of decree and proportionate sale proceeds will be taken towards the Jt debt. 32 C L J. 64.

——it is discretionary with the court to refund the purchase money deposited by the defaulting auction-purchaser. 59 I. C. 705 (N)

R. 71 Defaulter answerable for loss

[illegible] is a decree and is [illegible] J. 105: 65 I. C. [illegible] 329 *fol.* 14 A. 201. *overruled.* also 23 N. L R 14 100 I C. 691 : 1927 Nag. 112.

——whether there is default in depositing 25 p c. or the balance the property may be resold and the deficiency recovered from the defaulting purchaser *above case*

[illegible] has the [illegible] ount [illegible], L.

[illegible] the court that he bids [illegible] for the *default.* 45 [illegible]

[illegible] alutory one intended to minimise the hardship *resulting* from the purchaser's default and courts should give effect to it unless the defaulting purchaser would be substantially *prejudiced,* 87 I C. 1 : 1925 Mad. 631 : 21 L. W. 232.

——the *only* persons who can proceed against the original bidder for recovering the deficiency are the decree holder at whose instance the sale took place and the judgment debtor and [illegible] same judgment debtor, [illegible] this *Rule* and attaches [illegible] of all decree holders and [illegible] M. 570 : 97 I. C. 66 : 1926 Mad. [illegible]

R. 72. decree-holder auction-purchaser

——purchase by decree-holder without leave is not *ipso facto* void, it is valid until it is set aside. 27 C W N 208 · 37 C. L. J. 403 : 1923 Cal 302 · 75 I. C. 196, 27 C. W N 294 3 Pat L. T 529 : 31 M. L. T. 209 : 45 M. L J. 718 25 Bom L R. 630 · 37 C. L. J 430, 21 A L. J 23 : 67 I C 914 P. C., 41 B. 357 11 B. 588, Jt Dr. is to take objection under sec. 47 and nct by regular suit 22 B. 271, 23 A. 478, 16 M. 287; he may take objection by way of defence when D Hr sues for possession 32 M. 242 it has also been held that a suit may be brought to set aside the sale within one year from the confirmation or sale under Art 12 A. of the Limitation Act. 101 I C 89, 1927 Mad. 1135

——when permission is given on certain condition and the D Hr. [illegible]

——in case of purchase by the D. Hr without leave the Jt. Dr. can set aside the sale without proving that he has sustained substantial loss by such sale. 13 L. W. 616 1921 M W N. 535 · 62 I. C. 854

——where the decree holder files a petition asking for permission to bid and no order is made on it but the decree-holder is allowed to bid permission will be presumed. 104 I. C 215. 6 Pat 432 : 1927 Pat. 312 : 8 Pat L T 796.

——D. Hr. bidder cannot withdraw from bid, nazir or court can decline to accept bid 19 C. W. N. 633 21 C. L. J. 174.

[illegible] le on the [illegible] consider [illegible] 11 C 731. [illegible]

——a decree-holder or a stranger is not bound to bid up to the valuation fixed by the court 22 I C 2. 1926 Pat 146

——no appeal lies from an order refusing permission. 13 C. 174, 33 C. 717.

R. 73. Restriction on bidding or purchase by officer

——the clerk of a pleader is not a person who has duties to perform in connection with the sale under this rule 49 A. 292 : 99 I. C. 443 : 1927 All. 76 : 25 A. L. J. 173.

R. 80. Transfer of negotiable instruments and shares.

——a sale cannot be set aside when the irregularity does not lead to loss. 93 I C. 935. 1926 Pat 202 7 Pat. L T 468.

——it is a Rule which prescribes the procedure when what is required or when what is decreed and ordered is the transfer of the share. 1928 M. W. N. 442 : 1928 Mad 571. (41 B. 76, 1923 Mad. 241) *Dist.*

R. 83. Postponement to raise money.

——the rule does not apply to mortgage decree. 5 Lah. L. J. 67, 46 M. L. J. 71 1923 M. W. N. 894 : 18 L. W. 615.

Or. 21, R. 89. Scope of the rule—*contd.*

——the rule is to be strictly complied with, the Jt. Dr. cannot take advantage of any deposit by the co-Jt. Dr. independently made. 14 L W 631

——deposit can be made in case of sale based on award. 27 C. W N 466 · 1923 Cal 582.

——r 89 is more comprehensive than s. 310 A. At any rate the scope of this rule is not narrower where the provision of the Eastern B. and A Tenancy Act applies A permanent under-tenure-holder has *locus standi* to apply under r 89, 23 C. W. N. 597, 32 C. 10, 19 C W. N 826 *Ref*

——an application under this Rule is a proceeding in execution, consequently the provisions of Or. 9, do not apply to it. 28 Bom. L R 686 50 B 457 96 I C 411 1926 Bom. 377.

——the word 'Court" in R. 89 means a Civil Court and not the court of the Collector or the sale officer when sale proceedings take place 100 I C 726 1927 All. 754.

Who can apply under this Rule ?

——J Dr selling property privately after the court-sale may apply under this rule 40 B 557 1921 Pat 364 25 B 631, 44 M. 554: 29 M L T 269 40 M. L J 497, F B (34 A. 186, 38 M. 775). *not fol. contra* 41 C 305 · 17 C W N 1207, 22 I. C 192, but the said purchaser cannot 26 C. W N 149 68 I. C. 289 : 49 C. 454 · 1922 Cal 291, 44 M. 554 F B, 24 L W 759, 23 B 450 ; 1923 Lah. 302 *contra* 21 M 416 : 6 C L J 117, but such purchaser can no doubt employ the judgment-debtor to make the deposit but he cannot insist on the court to compel the judgment-debtor to present the application against his will. 24 L. W 759 98 I C. 739 : 1927 Mad. 151.

——where the judgment-debtor sold certain properties to a stranger after auction sale but in pursuance of a contract of sale entered into with him prior to the execution sale the vendor had no right to a [illegible] had such right, 48 [illegible] B

——a prev [illegible] not affected by th [illegible] en the subject considered, the sec. interpreted).

——nor a purchaser from the Jt. Dr. subsequent to the auction sale but before its confirmation can deposit. 49 C 454 : 1922 Cal 271 · 68 I. C. 289 : 26 C W N 149 . 24 M. L J. 201 : 34 All. 187 40 B. 557 . 4 P L. J. 340 *Ref* 44 M 554 · 29 M L T 269 : 40 M L J 497 13 L W, 499 F B , 1923 Lah 302, 98 I C 739 · 1927 Mad. 151: 24 L. W. 759

——a transferee from Jt. Dr. after attachment can deposit 26 C L J. 127 . 36 I. C 510, so also a mortgagee. 100 I C. 82 · 1927 Mad 445 : 52 M. L. J. 157.

—— [illegible] holding cannot deposit [illegible] 38 : 15 C W. N. 1358 [illegible] W N. 163· 18 C. W [illegible] 27 Cal. 817.

(according to the view of one of two Judges)

Or. 21. R. 89. Who can apply under this rule ?—*contd*

——purchaser of a portion of non-transferable occupancy holding cannot deposit 1917 Pat 167 F. B, 19 C. W. N 176 n, *contra.* 18 C. W. N 971 F. B, 31 C W. N 1050 : 1927 Cal 817 : 55 C. 108 . 106 I C. 143.

——a reversionary heir-apparent can deposit. 18 C. W. N 778

——it is not quite clear what the effect of the amendment is. 24 M. L J. 205

——a person whose title cannot be affected by sale sought to be set aside cannot make deposit 16 C W N 904 · 15 C L J. 83.

——the expression "owning such property by virtue of a title acquired before such sale " applies as well to a longstanding title as to one recently acquired from the judgment-debtor. A person whose claim under Rule 58 has been rejected may apply under this Rule 1927 M. W. N. 53 38 M. L T. 30 : 99 I. C. 893 · 1927 Mad 327

——an interim receiver appointed under s. 20 of the Provincial Insolvency Act of 1920 after the sale of the insolvent's property cannot be said to be a person "owning such property" and has no power to apply under Or. 21, R 89, unless he is expressly authorised to do so. 1926 M W. N. 159 : 93 I C. 271 : 59 M L J 239 . 1926 Mad 357

——when the share of a brother in the joint family property is sold in execution another brother can deposit as a person holding an interest in the property sold. 51 M. 246 1928 M W. N. 101 · 1928 Mad 399 : 54 M L J 455

——a mortgagee with possession can apply 9 O L J 50 · 25 O C. 78 : 1923 Oudh 146 . 68 I C 929 20 A. L J 42.

——a permanent under-tenure-holder has *locus standi* to apply. 23 C W. N 597 52 I C. 237, a lessee can apply 109 I C 168 . 1928 M. W. N. 159 . 54 M L J 445

——a person in whose favour there has been merely an agreement to sell the property sold cannot apply under this rule, nor a person who has purchased the property pending the attachment. 1923 M. 659 17 L. W. 680

——a mortgagee who has purchased equity of redemption in one portion of the mortgaged property can apply. 2 Pat 715 1923 Pat. 430 : 74 I. C. 102.

——a mortgagee after sale from the judgment debtor deposited certain amount and the judgment debtor deposited the rest held, it was a good deposit 49 A. 839 102 I C. 471 1927 All 561. 25 A. L J 576.

——an erroneous decision on the right to deposit may be interfered in revision by the H C, 1921 Pat. 364 25 B 557 P C 22 C. W. N 50 P. C. *Ref.* 44 M. 554 29 M L T 269 40 M L J 497 13 L W 499 F. B

——there is [illegible]

Or. 21, R. 89 Who can apply under this rule?—contd.

prior to the execution sale. Both the Jt. Dr. and the purchaser made a joint petition under r 89, held that the vendee had no right but the Jt. Dr was entitled to make the application. 24 A. L. J. 69.

——no application under r 89 can be prosecuted until prior application filed under r. 90 has been withdrawn, but there is no provision in the Code for the converse case. 17 C. W N. 478 11 I. C 196

——where after the sale and within 30 days judgment-debtor applies under R 90 to set aside the sale and the application having been dismissed he moves the court under R. 89, within the period of limitation, for the cancellation of the sale on deposit, the application is maintainable 26 A L J. 79 : 1928 All 196.

——the (... of the property has ... Or 21, R. 89, ... that the dec... 1928 Pat 40

Deposit, validity of

——conditional deposit is not valid. But it becomes valid when the condition is withdrawn. 16 C. W N. 904 : 15 C L. J. 83, 4 B. 735, 4 Pat. L T 295 · 1923 Pat 159 71 I C 332, 68 I. C. 629

——deposit under objection is bad. 2 A. L. J. 340 : L R 4 A 195 · 1923 A. 503, 74 I. C. 557.

——deposit made one day after, owing to the Presiding Officer rising earlier, is valid. 16 C W. N 904 : 15 C. L. J. 83, 23 C. L. J 467 but if the full amount is not paid within 30 days owing to mistake of the Officer of court in calculating the amount the sale cannot be set aside unless the officer was charged by the court to make calculation 26 C 449, 26 C 609, *Dist*

——when the judgment-debtor was told on the last day of limitation that the Judge was busy and that the amount should be deposited next day, he was entitled to extension of time under s 4 L Act. 96 I C., 376 . 9 N. L. J. 57 *1926 Nag. 331.*

——deposit being made after the expiry of 30 days and all persons concerned being agreeable the court may set aside the sale under S. 151 C. P. C, 9 O and A. L R. 983, the court cannot extend the period. 96 I. C. 377 · 1926 Lah. 639, 111 I. C 895 : 24 N. L. R. 127 1928 Nag. 265 *F. B.*

——*Jt Dr, cannot apply under this rule to set-aside the sale of some of the lots 1 C. W. N. 703*

——'date of sale' means the date on which the property is knocked down to the highest bidder, 29 C. 626, 631, if for any reason the final bid remains unaccepted for some days by the sale officer, the period of 30 days does not begin to run until such bid is accepted. 35 A. 65.

——"the date of the sale" is the date on which the sale takes place and the highest bid is accepted and the deposit paid and not the date on which the court confirms the sale and orders the

Or. 21, R 89. Deposit, validity of—*contd.*

balance to be collected 28 Bom. L. R. 510 : 95 I C. 549 · 1926 Bom. 335.

——a mere presentation of an application without deposit of money within the 30 days is not sufficient 13 C L. J. 467.

——where the deposit is made after 30 days the court must reject the application and confirm the sale when the purchaser is a person other than the decree-holder, though the decree is satisfied in the meantime 1928 Nag 136, 1922 Pat 525 *Dist.* (2 B 540, 10 A. 83) *not approved* 10 A. 166 P. C *Expl.* 106 I C. 568.

——but a sale can be set aside without going through the form of filing an application under Or 21 R. 89 when the auction-purchaser is the decree-holder himself and he certifies to the court that the decree has been settled out of court 104 I C 753 1928 Pat. 40.

——on deposit no rateable distribution is allowed. 40 C 619, 37 B. 387, 31 B. 207

——the auction-purchaser need not be formally added as a party in the petition of deposit, notice may be issued on him as one of the parties affected by the sale 1923 Cal. 394

——but formal application to set aside sale must be made within 30 days. 1922 M W N. 171 1923 Mad 83 15 L. W 450 . 66 I C. 44, *contra.* 4 P L T 491

——sale cannot be set aside under this rule without giving notice to the auction purchaser 3 Lah L J 463

——part payment with an undertaking to pay the balance is not good deposit The rule must be strictly complied with 23 Bom. L. R 847 . 46 B 171 1922 Bom. 193.

——application to deposit is sufficient, no separate application to set aside a sale is necessary 63 I C. 140.

——deposit and oral application is sufficient, 86 I C 498 1925 Mad 909, no petition is necessary 87 I C 437 1925 M W N. 175 : 1925 Mad. 639.

——the expression "any amount" which may have been received by the D. Hr in r 89 (b) means money actually received by the D Hr. and does not include sale proceeds into court. 25 Bom. L. R. 446 1923 Bom 299 73 I. C 454, 23 B 723 *fol* or any deposit made by any Co-Jt Dr. independently. 43 M. L J 71 1922 Mad. 54 : 65 I C. 983

——*a Jt. Dr is not entitled to take advantage of any deposit* made by Co-Jt. Dr not conjointly with him 42 M L. J 71 1922 Mad. 54 : 65 I C 983

——the payment under this rule is voluntary, so no suit lies for refund when the sale has already been set aside 45 B 1094 : 23 Bom. L R 455 : 62 I R 105.

——it is the duty of the applicant to see that notice is served on all persons interested but it need not be issued within 30 days. 4 Pat L T. 491 1 Pat. L R 361 · 2 Pat 800 1924 P 37 75 I. C. 430, *contra* 1924 M. W N 171 · 1922 Mad 83 66 I. C 44.

——a deposit may be made by the pleader's clerk. 46 M. L J 119 : 1924 M W. N. 37.

Or. 21, R. 90. Scope of the rule—*contd*

——objection which might have been taken at an earlier stage cannot be taken under this rule 46 M. 736 : 1921 M. W. N. 463 : 45 M. L J. 263 : 15 I C 369

——where in execution of a decree obtained against some members of the joint Hindu family, property of the family is sold the other members can institute a suit to set aside the sale without applying under this rule 2 Pat. 386 · 1923 P 451

——when the Jt Dr does not apply under R. 90 he cannot after confirmation of sale plead any irregularity by way of defence to a suit by the purchaser for possession 28 C. W N 821 78 I C 126 : 1925 Cal. 81.

——application to set aside sale of a decree in execution of another decree is not maintainable under r 90, 64 I. C. 383

——this rule not only covers a case of material irregularity but also a case of fraud in publishing or conducting the sale. 66 I. C 220

——an execution sale cannot be set aside merely for suspicious circumstances about sale and low price in the absence of proof of fraud or material irregularity in conducting sale and of resultant substantial injury to party seeking to set aside sale. 85 I. C. 342, 1925 Mad 202 · 20 L W. 736

Who can apply under this Rule ?

——Or 21, R 90 is very wide, a mortgagee-auction-purchaser can apply to set aside a sale for rent-decree 22 C W N 143

——purchaser of a non-transferable occupancy holding can apply under this rule 18 C. W N. 72n , 19 C W N 326.

——the purchaser of a portion of a non-transferable holding has an inherent right in the holding sufficient to entitle him to make an application to set aside a sale in execution of a rent decree. Section 170 Cl (3) B T Act will have no application, 6 Pat. L. T 295 : 87 I C. 881 . 1925 Pat 461, 2 P L J 459 *Dist*

——in case of unfair bargain the purchaser himself can apply under the rule. 1920 M. W N 152, 5 N. L. J. 146 ; 1922 Nag. 113 : 18 N. L R. 96 : 65 I. C 875

——an auction-purchaser cannot apply under r. 90, 68 I. C. 429, 20 C 8, 19 C W. N 1291 *Ref* 74 I. C 760.

[illegible] ...sts are [illegible] be pro- [illegible] under [illegible] 28 *Dist.*

But see the next case contra

——'any person whose interests are affected by the sale" is wide enough to include an auction-purchaser. 47 A 479 . 23 A L. J. 233 · 87 I. C 278 . 1925 All 459, 105 I C. 465 . 1927 Rang. 301

——when sale takes place at the instance of Co-D Hr. the other Dr. Hr. can apply. 24 I C 83, 18 C. W N 1311

——Co-Jt Dr , after others have failed, can apply. 16 C. L J. 98, 93 I C. 870 1926 Cal 829.

Or. 21, R. 90 Who can apply under this rule—contd.

——a person who has attached before judgment is not entitle to apply 17 C W N 80

——where the Jt Dr sold his properties to another before th date of the execution sale but the properties were still sold in auction as belonging to the Jt Dr, he was the person whose interests were affected by the sale under Rule 90 92 I. C. 597 1926 Mad. 217 24 L W 872

——Jt Dr under Court of Wards cannot apply, 20 C. W. N 852

——when property has been sold in execution of decree against ostensible owner, the real owner cannot set aside the sale under this rule 36 A 358, 22 I C 839, *contra* 20 C. 118 19 M. 167.

——a person entitled to share in a rateable distribution is entitled to apply under this rule but where the application for execution is not made until after the receipt of the sale proceeds by the court the application cannot come under this rule. 27 M. L J 302

——a presumptive reversioner can apply under this Rule when the sale takes place in execution of a decree against a Hindu widow representing the estate of the last male owner. 97 I. C. 571 : 1926 M W N 631 1926 Mad 959

——a reversionary heir apparent can apply 4 Pat L. J. 360

——where stranger is auction purchaser, sale cannot be set aside on the ground that the decree was already satisfied 20 C W N 84 n

——when r 90 is applicable S 47 need not be considered. 25 C L J 399

——a person claiming the property adversely to the title of the Jt Dr cannot apply under this rule 1 Bor L J 231.

——when a person applies first under R 90 and then under R 89 the court ought to call upon him to make decision either to withdraw his application under R 90 or not If he does not do so he will not be allowed to press his application under Or 21 r 89 From the fact that he was not called upon to make his claim it could not be presumed that he withdrew his application under R. 90 The converse proposition that an application under Or. 21 R. 89 having been made and disposed of, an application under Or. 21 R 90 is not maintainable does not necessarily follow from sub clause 2 of Rule 89 88 I C. 500 47 A 850 1925 All 778 23 A. L. J 760.

——but it has also been held by the same H. C that an application under R 90 can ordinarily be made after the sale has been concluded, so when it has been made before the sale is concluded its existence is no bar to an application under R 89 93 I. C. 953 ; 1926 All 754

——a third person cannot raise the question of irregularities in the sale, only the decree holder or a person whose interest is affected by the sale can raise. 97 I. C. 757 1927 Cal 82.

——the words "affected by the sale" should not be construed as if the words were "having an interest in the property." 103 I. C. 499 : 1927 Mad. 783 : 53 M. L. J. 229 : 39 M. L. T. 110.

Or. 21, R. 90. Who can apply under this rule—*contd.*

——it is open to an attaching creditor to apply under Or 21 R. 90 to set aside an execution sale of the property attached by him at the instance of another creditor Meaning of the expression "person whose interests are affected by the sale" 51 C. 495, 28 C. W. N. 899 : 1924 Cal 786 84 I C 119.

——an attaching creditor cannot apply under this rule. 42 C. L. J. 37 : 89 I. C 688 1925 Cal 1103.

——where a holding governed by the B. T Act is sold in execution sale, the heir presumptive of a transferee of the holding cannot apply to set aside the sale 86 I C. 576 : 1925 Pat 556

——a person who possessed an interest in the property sold at the time of sale can apply to have it set aside under Or. 21 R. 90 though subsequent to the sale and at the time of applying to have it set aside his interest had been transferred to another. 87 I C 94, 22 L W. 872

——a judgment debtor who has been duly served cannot apply under this rule 1925 Cal 552

——a mortgagee purchaser of an occupancy holding in execution of his mortgage decree can apply under Or 21 r 90 to set aside a sale of the holding in execution of a rent decree 86 I. C. 612 1925 Cal. 92

——an *interim* receiver appointed under s 90 of the Provincial Insolvency Act can apply under R. 90 1928 M W N 216. 109 I. C. 148 1928 Mad 454

——an application under R 90 which was not signed by the Jt. Dr but was signed by his vakil is valid if the latter had authority to make the application 27 Punj L R. 355 1926 Lah 514. 98 I. C. 165.

Form of application

——it is no part of the duty of the judgment-debtor to name in his application all the auction purchasers 49 A 788 102 I. C. 126 : 1927 All 513 : 25 A L. J. 524.

Material Irregularities

What are material irregularities ?

—— [illegible] value is material irregularity, if [illegible] J 98, 2 C W N 550 20 A C. W. N 577, 14 C L. J. 541.

——when the decree-holder and the judgment debtor differ hopelessly as to the value of the property a statement by the court as to the value is at least a guess, so the court may consider it better to abstain from such guess 1927 Mad 1009 106 I C. 201, 20 All. 412, P. C. *Dist*

——the court itself is under no obligation whatever to fix in the proclamation its own valuation 1928 Mad. 503, 1927 Mad 1009, *approved* 8 C W N 257, *Dist.* 2 Pat L J. 130 and 4 P. L. J. 37 *Diss.*, 20 A. 412 P. C. *Expl.* and *Dist.*

Or. 21, R. 90 What are material irregularities ?—*contd.*

——to set aside the sale the inadequacy of price must b occasioned by some irregularity 83 I C. 228; 1925 Mad 729; L W 521, 9 C 656 P C. *Rel*

——non-publication or improper publication of the sale proclam ation is material irregularity 9 C 556, 40 I A 140; 17 C. L. 573 P C

——failure to publish the sale proclamation is not an illegalit vitiating the sale but only an irregularity which can be waived b the Jt Dr But a waiver can be valid only if the person was full aware of all the facts 91 I C 407 1926 Cal 577

——sale subsequent to insanity of the J Dr. is. 19 M 219

——sale held neither on the day originally advertised nor on th day to which it was adjourned should be set aside for material irre gularity in conducting it 35 C L J 140 65 I C 746.

——omission to state or misstatement of Govt revenue in sal proclamation is, 23 M 628, 3 I A 230 26 W R 44 P C., 10 I A 9 C 656 P C

——selling before 30 days have expired after service of sal proclamation is 21 C 66, 12 M 227 *contra* 29 M. L. T. 304, 2 Pa 207 1923 P 45

——sale of property within 30 days of the proclamation is a irregularity but it does not render the sale void without proof substantial injury 3 Pat L T 765 1922 Pat 321 68 I. C. 363.

——a court has jurisdiction to sell property without attachmen An attachment is only for the benefit of the D Hr., so want of it doe not affect the sale, *above case*. It is a mere irregularity. 63 I. C 643, 18 M. 437 30 M. 255, 64 I C 420 *Ref* 1225 M W N 187

——selling without previous attachment 21 A 311 *contra* Pat 2073 1922, Nag. 81, 30 M 255, 18 M 437, 64 I C 420

——where paucity of bidders is due to the omission of proclama tion by beat of drum, sale must be set aside 67 I C. 752, 21 C 291 *Ref*

——the omission to state the estimated price is not materia irregularity if the property was visible to all the purchasers. 4 Lal L J 441 1922 Lab 35 67 I C 885

——sale proclamation not being affixed on the property. 6 C. W N 44 7 C 460

——sale without fresh sale proclamation, where successive shor adjournments amounting to more than 7 days have been allowe 6 C W. N 44 or where portion of the property has been release 3 C 544 2 C L R. 260

——advertising property of two persons but selling of one with out fresh sale proclamation 6 C L R 237

——selling of debt, secured by a mortgage of immovable pro perty under the provisions applicable to moveable property. 9 C 511, 10 M 169 *Dist.*

——selling upon a notification so vague in its description as t be misleading. 22 A. 168, 170.

Or. 21, R. 90. What are material irregularities?—*contd.*

——non-specification of the adjourned date and hour of sale. 6 C. W. N. 48, 24 C 291, 31 C 815 8 C. W. N 686.

——absence of specification of incumbrance and statements of value of property. 6 C. W. N 836

——selling on a day previous to that fixed in the order of postponement. 25 W R 328.

——an execution sale cannot be challenged on the ground that in the proceedings against the Jt Dr. who was a minor, he was not represented by the grantor, the defect amounts only to an irregularity. 30 C W N 86 · 89 I C. 765.

——selling properties in one lump advertised to be sold in lots. 18 W R. 342 : 12 W R 492

——refusal by the court to issue fresh proclamation if applied for by the D. Hr. when the J Dr waives it 24 M. 311

——omission to bring on the record the legal representative of [illegible] nt and before sale, 18 C L. J. [illegible] 925 Pat. 384, 49 A 830 102 I C [illegible] 828 it makes the sale voidable [illegible] nt, but the right *may be waived* [illegible] annot object in defence after the [illegible]

——where notice under or 21, r 22 is given to a wrong person. 27 I. A. 216 · 25 B 337, P C, 32 C 296 32 I A 23 P. C. But when no notice is served the sale is a nullity 24 C L. J 337, 523, 21 C W. N. 776 · 22 C L J 337, 20 C 373, 42 C 72 : 41 I A. 251 : 1921 Pat 181 : 3 U. P L. R Pat 33 61 I C 822 *contra*, where it was held to be voidable only. 40 C. 45

——purchase by decree-holder without leave of the court, 11 B. 588

——sale proclamation not served according to the order of the court. 40 C 635 17 C L J 573 : 17 C. W N 637, P C

——sale of property in contravention of the terms of the decree 16 C. L J 559

——sale of property at a place and by an officer different from that advertised makes it a nullity 44 M 35 39 M L J 188 : 1920 M. W N. 490 12 L W 132 59 I C 167 F B.

——an application to set aside a sale on the ground that there was no guardian *ad litem* of a minor in the execution proceedings comes under r 9 and the defect is an irregularity 35 C L J 9. 64 I. C. 25

——vague or false description of property 34 M 143, but not misdescription when it can be identified 2 P. L J 623 41 I. C 282, or when decretal amount is found to be incorrect 25 C W N 585.

——a mistake in the dimensions of the property is a material irregularity but it is not itself sufficient unless there has been substantial injury. 96 I C 196 1926 Lab 587.

——representatives not brought on the record 29 C. L J 411 : 23 C W N. 608 45 I C 699 (c). 18 C L. J 628

Or 21, R. 90 What are material irregularities ?—contd.

——failure to issue notice under r 66 for drawing up the proclamation of sale is an irregularity in conducting or publishing the sale, 4 Lah 243 1923 Lah 592 : 75 I. C 103 contra 1 Mys. L J 105

——omission of land revenue in the sale proclamation is material irregularity 45 M L J 408 18 L W 137 1923 P C. 93 : 75 I. C. 546 P C

What are not material irregularities

——R 90 is confined to material irregularity or fraud in publishing or conducting a sale and antecedent fraud or irregularity does not properly come within the purviews of the rule, except for collateral purposes 93 I C 870 1929 Cal 829

——proclamation served fixing sale date on the 13th and sale taking place on the 20th, owing to court's absence, no irregularity 16 C W N 1 P C, 39 C 26 14 C L J 334 8 C. L J 1173

——issuing notices of attachment and sale together. 4 W. R. Misc. 12

——publication of sale proclamation on a day less than thirty days before sale 29 M L T 304 contra 21 C 66, 14 M 217.

——omission to deposit 25 p c of purchase-money at the date of sale 28 A 238

——entering wrong parganah in the proclamation but served in the right village and the estate identified 25 W. R 326

——omission to state the rent of the tenure. 7 C. 723.

——selling at an inadequate price 8 B 424

——sub-dividing one of the lots advertised for sale. 21 M. 417.

——sale of property consisting of numerous plots of land situated in various villages in one lot 107 I C 295 1925 Mad. 684

——sale of immoveable property on a closed holiday. 3 A 335.

——selling portion of estate within jurisdiction, although the greater part falls within another district 23 W R 154

——the irregularity must be in conducting the sale and the responsibility of conducting the sale is on the court : an agreement between parties not to bid, dissuading others from bidding is not an irregularity within the rule 4 C W N 228, 23 M 237. Nor the disparaging remarks of bystanders are irregularities, 17 C. 152, but of D Hr are 5 C 308

——non-statement of place of sale in the proclamation, if parties be not prejudiced 41 M L. J. 465 1921 M W. N. 735 : 14 L W 515.

——when publication of a sale proclamation is only an irregularity which may be waived by the judgment-debtor who was fully aware of all the facts. 91 I C 407. 1926 Cal. 577.

Fraud

——particular allegations of fraud must be made. 24 C. L. J. 335 ; 17 C W. N 524. 1921 Pat. 181. 3 L. P L. R. (Pat) 33 : 61 I. C. 823.

——fraud may be proved by theorem and inference from facts proved. 18 C. W. N. 185.

Or. 21, R. 90. Fraud—*contd.*

——fraud must be established by proof 18 C. W. N. 681.

——where the application to set aside sale is filed after 30 days fraud in conducting sale and fraud in concealing the fact of sale must be proved 87 I. C. 555 (c), 16 C. W N 894, 17 C W. N 478, 1021 Pat. 181 : 3 U P. L. R (Pat) 33 : 61 I. C 822, 46 C. 975, 38 M. 1076 P. 1085, 1922 p 422 (1 C W N. 67, 36 C 654). *Dist. contra.* fraud in sale only is sufficient. 24 I C 249, 19 C W. N 553

——in case of fraud and suppressions of process &c. the starting point of limitation is the date when the applicant had knowledge not merely of the factum of the sale, but a clear and definite knowledge of the facts which constitute the fraud and it is for the opposite party to show that the applicant had such knowledge at a time from which taken as starting point the application was barred 48 Cal. 119 60 I. C 801

——when fraud is committed by any party it lies upon him to show that the opposite party had a clear knowledge of the facts constituting the fraud at a date beyond the statutory period. 32 C. W N 519 · 47 C L J 351 168 I C. 33 · 1928 Cal 349

——in case of fraudulent concealment of proceedings up to the date of sale the effect of fraud continues. 88 I C 500 . 4 A. 850 23 A L J 760 · 1925 All. 778

——the Rlue contemplates material irregularity or fraud in publishing or conducting a sale and antecedent fraud or irregularity does not properly come within its purview except for collateral purposes 93 I C 870 1926 Cal 829

——fraud is essentially different from irregularity in the conduct of sale. Where there was gross under-valuation of the property sought to be sold and the processes were not served on the Jt Dr held that these facts alone did not by themselves constitute fraud. 6 P. L. T 567 85 I C 622 1925 Pat 521, 16 C W. N 894

——the mere fact that at an auction sale a property fetches a smaller price than it is worth, raises no presumption of fraud. 89 I. C. 107

——a sale under a fraudulent decree is not void but voidable 19 C. W. N 115 n

——when original decree cannot be set aside on the ground of fraud as being time barred, sale in execution thereof cannot be set aside. 20 C. W N 659, 27 C. 197 *Dist*

——violation of undertaking not to sell is fraud 3 Pat. L. J. 645

——an execution sale which has been brought about by fraud of the D Hr is liable to be set aside even though it is not established that the auction-purchaser has participated in or has been cognisant of the fraud 27 C W. N 537, 6 C. W. N 253, 2 C W. N. 691, *Discussed*

——wilful mis-statement of value of the property in the sale proclamation justifies an inference of fraud. 3 Pat L. T. 501 1922 Pat 269 1922 P 507.

——a sale in execution of a decree is not rendered void merely because the decree in execution whereof the sale took place was

Or 21, R. 90 Fraud—*contd*

fraudulently obtained unless the auction-purchaser was a party to the fraud in the execution proceedings which vitiated the sale itself 62 I C 594

——absence of proclamation, question gone into at a prior stage does not bar application under this rule 46 M. 736 : 1923 M W N 463 45 M L J 263 75 I C. 369.

——the addition of the word "fraud" in this rule takes it out of sec 17 C P C, 4 Lah 243 1923 Lah 592 : 75 I C 103

——in setting aside a sale the third person auction purchaser need not participate in the fraud and the case of *bonafide purchaser* for value is not excluded 37 C L J 145 27 C W. N 587 : 74 I C 975 1923 Cal 538, 4 Pat L T 306 1923 p 435 · 72 I. C 625

——fraud in publishing or conducting the sale must be the fraud of the decree holder or any other person concerned with the conduct of the sale so it is not necessary to allege or prove fraud on the part of the auction purchaser 44 C L J 565 99 I. C. 946.

Substantial injury

N B

——under the old law there was conflict as to how substantial injury was to be connected with the material irregularity But the present rule, following the decision of the Privy Council reported in 21 C 66 20 I A 176 which lays down that evidence to connect these two materials must be direct, has been altered. (*Other cases under the old law*, 9 C 656 10 I A 25 P C. 32 C 502, 31 C 815 : 8 C W. N 686, 6 C W N 48 30 C I 6 C W N 688

——it means loss which is wrongful. 7 C W N 439

——when the property is sold at an inadequate price owing to irregularities in the conduct and publication of the sale, there is substantial injury 16 C W N 1022

——in order that a plea of under valuation should be upheld it must not only be shown that their was under-valuation in fact but also that it prejudiced the judgment-debtor 32 C W N. 309 : 1928 Cal 328

——but the statement of idequate price in the sale-proclamation itself proves substantial injury 16 C W N 240 n and fraud. 3 Pat L T. 501 1922 Pat 269 1922 P 507

——when the inadequacy of price resulted from undervaluation in the sale proclamation the sale should be set aside 1921 Pat. 75 : 1 Pat L T 441 3 L P L R (Pat) 12 57 I C 640

——the judgment-debtor should prove that the properties were under valued in the sale proclamation and also that by such under valuation he has sustained injury 32 C W N 309 : 1928 Cal. 328

——a sale should not be set aside long after it has taken place on a mere estimate as to what price the property sold ought to have fetched. 75 I C. 46

——where the value in the sale proclamation was fixed by mutual consent the fact of the price fetched at the sale was considerably less is not enough to set aside the sale. 1 Pat. 214 : 1922 P. 550.

Or. 21. R 90. Substantial Injury—*contd.*

——the judgment debtor is not precluded from raising the question of valuation merely because the question had already been decreed when the sale proclamation was settled 105 I. C. 689 : 6 Pat. 588 : 9 Pat. L. T 387 · 1928 Pat 25.

——the circumstance that the decree-holder offered to return the properties to the judgment debtor at the prices for which they bought them but the offer was not accepted, may be taken into consideration in determining whether the Jt Dr has really suffered any injury 32 C. W. N 309 1928 Cal 328

——where the alleged irregularity does not produce any serious loss there is no ground for setting aside the sale. 5 Lah. L. J 30. 1923 Lah 213 71 I C 730

——in order to succeed in application the court has to find not only material irregularity but also substantial injury. 22 A. L. J. 413, 75 I C 784.

Procedure.

——no order for dismissal in default should be passed till the end of the day because there could be no default until the court rose for the day. 26 A L. J 382 . 1928 All 301 108 I C 576

——when it was found that there was fraudulent suppression of the process in connection with the sale and there was a substantial injury as the property was sold at a low price the sale should be set aside in *toto* and not to the extent of the applicant's interest in the property. 32 C W N 5.9 47 C L J 351 1928 Cal. 349 108 I C. 33

Effect of setting aside sale or decree

——the Jt Dr and D H must refund the money, otherwise the auction-purchaser will not vacate the property, but auction-purchaser will not get refund of any mortgage debt he has paid 1917 Pat 153.

——when decree is set aside the sale is also set aside, if the auction-purchaser be not a stranger 20 C W N 665, 667, 20 C L. J. 469 19 C W N 537, 27 C 734, 31 C. 499, 37 C 107, 27 C. 810: 4 C. W. N 492, 6 C L. J 92, 102

——where a sale is set aside under r 90 or r 91 the court has power to order interest on the purchase-money being paid to the purchaser under r 93, 25 C W N 366 33 C L J 176 40 M. L. J. 141 . 1921 M W N 26 13 L W 217 23 Bom L R 727 . 19 A. L. J. 101 : 6 P L J 129 2 Pat. L. T 115 P C

——no second appeal lies from an order under *this rule*, 6 Pat. L J. 319 · 2 Pat. L. T 401, 1921 Pat 181 61 I C 822 but if the application is a combined application under this rule and Or. 21,

Or. 21, R. 90. Effect of setting aside sale or decree—contd

r. 22 it virtually comes under s. 47 and a second appeal lies 1921 Pat. 181 3 U P. L R (Pat) 33 61 I. C. 822.

Appeal. Application of sec. 47 C. P. C

——the addition of the word "fraud" in this rule takes it out of s 47 C. P C, 4 Lah 243 1923 Lah. 592 : 75 I. C. 105

——where in an application to set aside a sale under this rule on the ground that no notice under Or. 21 r. 22 was served, court finds that no notice was necessary the order does not come under s 47 and hence there is no second appeal. 2 Pat 916 : 1923 Pat 283 4 Pat L. T. 721 74 I C 838

——when a sale is set aside under Or 21, R. 90 and under s. 173 B T Act, the order under B T. Act not being appealable, order under R 90 is also not entertainable 46 C L J. 172 : 104 I. C. 825 : 1927 Cal 833

——an appeal is expressly provided by Or. 43 r (1) against an order under r 90, 4 Pat L T 735, but no second appeal lies. 1923 Lah.287 72 I C 788

——there is no second appeal provided against an order under Or 21 r 90, 87 I C 555, 30 C. W N 586 96 I. C. 669 : 1926 Cal. 790

——where the sale is sought to be set aside on the ground that no notice of the sale proclamation was served and also there was an undervaluation the objections fall under s 47 and Or. 21 R. 66 and there is a right of second appeal. 1925 M W N. 701, 87 I C. 413 1925 Mad 1142

——there is no right of second appeal in the case of orders on application under R 90, 78 I C 315 5 Pat L T 443 · 1924 Pat. 803

——the H C cannot revise the order dismissing an application under R. 90 even for default as it is to confirm the sale under R. 92 and is appealable 41 C L J 286 ; 79 I. C 351 : 1925 Cal. 510, 79 I C 351 (c).

Partial setting aside

——the court can set aside a sale with respect to some properties and not to others 24 I C 64, 18 C W. N. 647, 32 C. 296, 47 M. 288 F B., 44 C L. J 167 96 I C 206 1926 Cal 1219.

——a sale cannot be set aside against the auction-purchaser unless it is set aside against the decree-holder as well. 105 I. C. 716 : 5 Rang. 606.

Party

——a person alleged by the auction-purchaser as real owner is not necessary party. 24 I. C 44.

——auction-purchaser must be made party and notice must be given to him before the application becomes time-barred 2 Pat L T. 336 : 62 I. C. 61, 2 Pat. L T. 270, 62 I. C 113, 62 I C 336, 50 I. C. 5 (c) Fol 37 B. 357 Diss. contra under the Old Code. 16 C. W. N. 570 : 39 C 687, and also under the new Code 107 I C. 492 : 1928 Lah. 413, 1928 Lah. 418, 1927 Lah. 661, 1928 Lah. 414, 50 I. C. 5 62 I. C. 61, 8 L. R. 199 (Rev). and an obiter in 47 C. L. J. 62 : 107 I. C. 733 : 1928 Cal. 189.

Or. 21, R. 90. Party—*contd.*

——art. 166 L Act. provides a period of 30 days for an application to set aside a sale in execution of decree But there is no time under the Limitation Act for serving notices upon the persons affected by an order under Or. 21 R. 92. 7 Pat L T 532 : 94 I. C 31 : 1926 Pat 266 : 1926 P. H. C. C 83.

——in one sense all the decree-holders are already parties to the proceeding, for an application under this Rule is an application in the suit itself and therefore they are all parties to the proceeding. *above case.*

——ostensible purchaser made party, real purchaser not known, the latter may be added after 30 days 1923 All. 462.

Compensation

——the court can award compensation to Jt. Dr. 18 C. W N 1299, 15 C. L J. 187.

Limitation.

——when the application to set aside sale is filed after 30 days fraud in conducting sale and fraud in concealing the fact of sale must be proved 87 I. C. 555 1926 Cal 577, 16 C W N. 894 : 17 C. W. N. 488, 1921 Pat 181 · 3 U P. L R. (Pat) 33 · 61 I C. 822, 46 C 975, 38 M. 1076 p. 1085, 1922 Pat 422 (1 C W. N 67, 36 c. 654) *Dist. contra* Fraud in sale only is sufficient 24 I C. 249, 19 C W. N. 553.

——in case of fraudulent concealment of proceedings up to the date of sale the effect of fraud continues 88 I C. 500 47 A 850. 23 A. L J. 760 1925 All 778

——in case of fraud and suppressions of process & c. the starting point of limitation is the date when the applicant had knowledge not merely of the factum of the sale but a clear and definite knowledge of the facts which constitute the fraud and it is for the opposite party to show that the applicants had such knowledge at a time from which taken as starting point the application is barred. 48 C. 119 : 60 I. C 801, 32 C W. N 519 41 C. L J. 351 108 I. C. 33 : 1928 Cal 349.

——when the ap[illegible]
of fraud under s 15 [illegible]
right to set aside t[illegible]
ledge by the fraud [illegible]
for the other party to prove that the complainant had knowledge of the facts at a time which is too remote for the application to be filed 87 I. C. 555 . 1926 Cal 577, 32 C W N 519 47 C. L J 351 · 108 I. C 33 1928 Cal. 349, 20 I A 1 P C. *Rel on*

——where an application to set aside sale on the ground of irregularities was filed with 30 days but the particulars of the irregularities were filed more than 30 days after, the court should not reject them 47 A 256 : 92 I C. 567 1926 All 305. 24 A. L. J. 256.

Or. 21, R. 91. Setting aside sale by auction-purchaser.

——apart from this statutory provision there is no principle of law or equity which would entitle an auction-purchaser for refund of purchase money. 86 I C. 622 1925 Lah. 467 : 6 Lah. 283

——auction-sale can be set aside by the decree-holder only on the ground that the Jt Dr. has no saleable interest. After the sale is over any adjustment between the parties is no ground for setting aside the sale 88 I. C 537 · 1925 Pat 702 : 7 Pat L. T. 25 : 1925 Pat 702

——auction-purchaser cannot set aside sale on the ground of deficiency in area, 27 C 264 4 C. W. N. 13 or on the ground of mis-representation or concealment in the sale-proclamation inducing purchase at a price more than the property is really worth, 10 C 368 (remedy might be by suit) or if the purchaser knew that the debtor had no saleable interest, 3 A. 527 or if the title be defective, 1 Pat. L R 73 74 I. C 134.

——this rule does not apply where the Jt. Dr. has no saleable interest in a portion only of the property, 9 C 636, 27 A 537, or on the ground that the property is subject to a mortgage, 9 C 506, 9 A 167, or on the ground that one of two Jt Drs has no interest, if the other debtor has the entire interest. 22 C. 565, 573, or on the ground that revenue was in arrear for which it was subsequently sold in auction 2 C. L. J 508.

[illegible] le does not apply, [illegible] gular suit lies ca [illegible] 19 A. L. J 147 [illegible] a. 28 C. W. N 20

——where a third person brings a suit against the D Hr auction-purchaser making the Jt. Dr a party and obtains a decree nullifying the sale, the D Hr. is entitled to proceed with execution case which is revived 2 Pat 829 : 1923 Pat. 342 : 1 Pat. L. R. 338

——rr. 91-93 are not exhaustive, the auction-purchaser has a remedy by way of suit to recover his money. 4 Lah. 354 contra 28 C. W. N. 20. *and other cases below*

——an auction purchaser cannot maintain a suit for refund of purchase money [illegible] of the Jt Dr. 28 C. W [illegible] 83 · 70 I C. 606 3[illegible] 1925 Lah. 199, 78 I. C [illegible] 224 104 I. C. 614 : 192[illegible] 219.

——want of [illegible]

6 P. L. T. 769 : 19[illegible]

——the saleable interest is the interest at the time of sale. 7 I. C. 279

——it is not obligatory on the applicant to pay the process fee or to serve notice according to the mode of service prescribed, in every case, upon all persons affected. 67 I. C. 286 (C)

R. 92. Sale when to become absolute.

——the provisions of r. 92 are imperative and the court cannot refuse to confirm the sale unless the requirements of RR. 89 and 90

Or. 21, R. 92. Sale when to become absolute—*contd.*

are strictly complied with 111 I. C. 895 ; 24 N. L. R. 127 · 1928 Nag. 265 F. B.

——an executing court cannot refuse to confirm a sale except with reference to action taken under Or. 21 r. 89-91. The fact that by accident or by act of God the property has since been destroyed by fire is no ground for refusing to confirm the sale. 88 I. C. 693.

——a sale is not affected by a subsequent amendment of the decree. 85 I. C, 660 1925 All 264.

[illegible] merely [illegible] egarded [illegible] 70 · 1926 [illegible]

——unless a sale is confirmed no change of ownership takes place. 1921 M. W. N. 519

——the effect of the issue of the sale certificate is to cure the irregularities 97 I. C 757. (C)

——the fact that by accident or by act of God the property has [illegible] the [illegible] of [illegible] 'act [illegible]

——when one Jt. Dr is exonerated from the decree in appeal the sale [illegible] 61 I. C 571 [illegible] to [illegible] 881, [illegible] 75 [illegible] -dings brought by [illegible] 6 Pat L. J 16 : [illegible] C 393 *Dist* [illegible] is actual notice [illegible] J. 161 108 I C 391 : 1928 Lah 414,

——when no petition is made under r. 90 in time no suit is maintainable to set aside the sale on the ground of fraud and irregularity. 1921 M. W. N 9, 16 C 33, 26 B. 40, 29 A 196 **P. C**

——no plea of bar of limitation of decree after the confirmation of sale is maintainable 2 Pat L J 157

——when the sale is set aside under r 90 or 91 the court can award interest to the purchaser under rule 93. 1921 M W. N. 26, 25 C. W N. 36 **P C.**

——the court may refuse interest. 19 C L J 358

——an injunction against sale but without proper notice cannot restrain the confirmation of sale 1922 All 282 ; 69 I C 745

——a suit to set aside an auction-sale on the ground of fraud does not lie after the sale is confirmed 89 I C 107

——an order confirming or setting aside sale is appealable under Or. 43 r 1 (1), no second appeal lies. 4 Lab. 243 1923 Lah 592 :

Or. 21, R. 92. Sale when to become absolute—*contd*

75 I. C. 103 : 5 Lah. L. J. 9 1923 Lah. 224 : 73 I. C. 367, 25 O. C. 78 : 66 I. C. 929, 42 C. L. J. 176 90 I. C. 228, 91 I. C. 213, 40 A. 425, 1926 Cal. 400, 91 I. C. 213 . 1926 Lah. 204.

——there is no appeal from an order refusing to confirm a sale because the court does not purport to act under Or. 21. R. 92, 95 I. C. 866 1927 Lah. 71.

——an order setting aside an execution sale cannot be passed on the ground that no notice was given of the application to the other party, but so long as that order stands it cannot be treated as nullity 107 I. C. 476 . 1928 Cal. 267

——the auction-purchaser is a necessary party to a suit to set aside sale brought by a minor deft after his attaining majority 1924 Bom. 130.

——a suit for possession by a Jt. Dr. after sale of his property in execution would not lie as long as the sale was not set aside and the period of limitation within which such a sale could be set aside is one year from the date of confirmation of the sale But this rule of limitation does not apply when the property to be recovered was not sold but was wrongly taken possession of by the auction purchaser 86 I. C. 648 6 P. L. T. 473 . 1925 Pat. 376.

——an auction purchaser is entitled to be heard against an application made to set aside the sale because no sale can be set aside without giving him the [illegible] and therefore he is entitled to appeal if [illegible] 1927 Lah. 681, (40 A. 425, 15 C. W. [illegible]

——an appeal lies against a [illegible] under rule 92, but no second [illegible] Lah. 414 : 108 I. C. 391.

—— judgment debtor who has been adjudicated an insolvent cannot appeal from order confirming sale of his property. 111 I. C. 432 : 1928 Lah. 675, (47 I. C. 152, 35 I. C. 531, 41 A. 243, 1926 Mad. 556 F. B.) *fol.*

R. 93. Return of purchase money.

——purchaser's remedy lies in regular suit also for the recovery of the money when the sale is set aside. 36 C. L. J. 205, 37 C. 6?, 36 A. 529, 7 C. W. N. 105, 5 C. W. N. 240, 13 C. W. N. 1080, 1 C. W. N. 140, 23 A. 355, 35 B. 29, 1920 M. W. N. 736 : 12 L. W. 639 6? [illegible] I. C. 6? [illegible] Art. 1?? [illegible] to other [illegible] that order stands it cannot be treated as a nullity nor can it be impeached in an appeal against a subsequent order directing refund of the purchase money. 107 I. C. 476 : 1928 Cal. 267.

——commencement of limitation in a suit by auction-purchaser for portion of purchase money drawn out by another decree-holder

O. 21, R. 93. Return of purchase money—*contd.*

in rateable distribution on the ground of absence of saleable interest of the Jt. Dr 30 C. W. N. 79 91 I C 768 1926 Cal. 297.

——new Code has changed the law and no separate suit for refund lies. 36 C L J 132, but this Rule does not repeal any right which prior to the enactment of the Code of 1908 a purchaser at auction sale may have possessed under the law, to recover the purchase money when he discovered that the Jt Dr. had no saleable interest 53 C 758 43 C. L J 418 96 I. C. 64 1926 Cal 971.

——a purchaser seeking to
as a condition precedent have
He can however sue the Jt Dr
sentation. 24 Bom. L. R. 308 19.

——where a sale is set aside the court has power to order interest
to the purchaser. 25 C W N. 141 · 1921 M W N 26 · 13 L. W. J. 101 6 P. L. J. 129 2 P L. T

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bene

the
J. 1216, 46 B 838, 67 I C. 360

——the purchaser can execute the order setting aside the sale as if it was a decree. 47 I C. 630 23 M. L. T 355

——under the general law apart from statute there is no warrant of title of a court-sale, 22 C. W. N. 760 : 46 I C 783, (3 C. 806 P. C. *fol.*), 1918 M W. N. 655 · 49 I. C 359, 29 I C. 392 : 2 L. W. 517, 42 I. C 440, 23 M. L J. 487, 33 A 419.

——an auction purchaser purchases with his eyes open and if the title to the purchased property does not turn out to be as perfect as he expected, the fault is his own. 39 I C. 763 . 2 P. L. J. 361 : 2 P. L W. 551.

R. 94 Certificate to purchaser.

——all interests of the Jt. Dr. pass to the auction-purchaser. 21 C. W. N. 854 : 26 C. L. J. 250 : 41 I. C. 511.

——but the sale cannot pass anything more than that indicated by proclamation and attachment. 7 Pat L. T. 280 1925 Pat. 615

——auction-purchaser may sue for possession without getting any sale certificate 19 C. W. N. 835 : 20 C. W. N. 673.

——an auction-purchaser becomes the owner of the property purchased on the date of auction sale 16 C. W N. P. C , 33 A. 45, 63.

——sale certificate does not create title and auction-purchaser may prove his title independently of the sale certificate. 7 C L. J 381, 9 C. L. J. 346 : 19 C 63, 47 C. 1108 : 24 C. W. N. 1011 : 31 C. L. J. 463.

O. 21. R. 94. Certificate to purchaser—*contd.*

——certificates of sale are documents of title which ought not to be lightly regarded or loosely construed and the mortgagor Jt. Dr cannot bring a suit to refer back to the original mortgage-deed to show that the property in question was not sold. 44 M. 483 : 1921 M. W. N. 374 63 I C 708.

——if there is an error in the sale certificate the court has ample authority as a court of justice, equity and good conscience to rectify it and mould the relief accordingly. 28 C. W. N. 403 : 39 C. L. J. 222: 82 I C 297 : 1924 Cal. 881.

——boundaries prevail over areas mentioned therein 18 C. L. J 541 : 22 I. C. 26.

——the court has inherent jurisdiction to amend a sale certificate in which property has been wrongly described. 19 C L. J 209 : 23 I C 811, 12 C. W. N. 1027 or to grant a fresh certificate 7 C. W. N. 388 But new matter cannot be inserted in sale-certificate. 18 C W. N. 313, 41 C 590 : 19 C. L J. 161 : 15 M L T. 137 12 A. L J. 156 · 21 I C 936 16 Bom. L. R. 150, P. C. and a court should not make ... amending a certificate, 23 W. R ... an amending order as the matter ... nder sec. 244 (old), 47 (new), 3 C. ... n order rejecting amendment, 23 A.

——wrong *tauzi* number may be corrected. 20 I. C. 588.

——where there is an error in the sale certificate the court has ample authority as a court of justice and good conscience to rectify it. 28 C. W. N. 403

——share cannot be entered by way of amendment 18 I C. 725 (c).

——sale certificate is conclusive proof of title. 44 M. 483.

——if in a certificate issued by the revenue authorities on the sale of an estate, the boundaries of the estate are not mentioned, the estate being described by its name only the purchaser takes all that comprised the estate as it stood at the date of the sale 32 C. L J. 402.

——there is nothing in the Code which makes a certificate of sale conclusive as to the property sold. Its action in granting the certificate is ministerial and not judicial. 4 Pat. 760 : 90 I. C 571 : 1925 Pat. 615.

——sale certificate is to be granted to the bidder and not to his proposed vendee. 24 C W. N 27 : 54 I. C. 726.

Evidence

——no evidence can be given to contradict the terms of a sale certificate but evidence may be given to interpret its terms, when they are ambiguous. 19 C. L. J. 182 : 22 I. C. 280.

——a statement by a land-lord that the tenant held under him 20 bighas of land was not a statement in his favour but one against

Or. 21, R. 94 Evidence—*contd.*

Act and covered by sub-clause (1) of s. 21 of that Act; so the entry in the sale-certificate might be used as evidence in favour of the landlord 24 I C. 283, *distinguished from* 31 C. 380 *where the question* was whether the rent payable was Rs 30-6 as alleged by the landlord or Rs 13-8 as asserted by the tenant and the landlord sought to use in his favour the statement in a sale certificate supporting his contention, and it was held that the entry being based on an admission in his own favour could not be used in his favour

R. 95 Delivery of Property in Occupancy of Jt. Dr.

——when delivery of possession is given under this rule, a forcible entry by sub-tenants claiming under lease of antecedent date from Jt Dr. constitutes criminal trespass 1 C L J 104, 16 C 206, *Fol.*

——when a plff. is entitled to actual possession under the law, he is not entited to get what is called symbolical possession. When the Jt. Dr is actually in possession but the Dr Hr takes symbolical possession he cannot rely on it when limitation is pleaded 86 I. C 439 1925 Mad 1140 . 49 M L J. 303

——a purchaser cannot get summary possession under this rule from the lessee *pendente lite* but must bring a suit for possession. 3 C. W. N. 12 n.

——J Dr may oppose the application on the ground of non-transferability of occupancy holding although the sale has been confirmed. 26 C 727, 18 C L J. 564

——Jt. Dr cannot take the objection of non-payment of landlord's fee. 7 C. W. N. 591

——the purchaser may take possession by regular suit without taking possession under this rule. 14 C 466, 31 M 177, 1926 All 120 · 891. C 134 *Contra* 12 C. 169

——auction-purchaser may sue for possession within 12 years from the date of purchase without getting any sale-certificate 19 C W. N 835 20 C L J 433, 20 C. W. N 675, 14 C. 466, 89 I. C. 134 · 1926 All 120, and if within period of 12 years he somehow or other obtains possession he cannot be ousted by a person who in the eye of law has no title 89 I C 134 . 1926 All 120

——symbolical possession instead of actual possession is not sufficient to save limitation where the Jt Dr remains in actual possession 43 A 520 · 19 A. L J. 469 · 63 I C. 312.

——delivery of symbolical possession gives rise to fresh cause of action, 1923 Cal 138, 27 C W N 24, and puts a stop to adverse possession prior to that, specially where the deft was a party, 46 B 710 : 24 Bom L R. 232 1922 Bom. 28 66 I. C 320, and since then the Jt Dr. becomes a trespasser, 3 Pat L. J 335 · 1923 P. 197 · 66 I C 817, this principle avails also persons claiming under the certified purchaser 27 C W. N 24

——the purchaser can obtain khas possession under this rule, although at first he took symbolical possession under r. 96, 17 W. R. 80 and the suit is to be brought within 12 years from the date of symbolical possession. 19 C. L J. 209, 24 C. 715, 16 C. 530

Or. 21, R. 95. Delivery of property in Occupancy of Jt. Dr.—*contd.*

——symbolical possession against the grantor of a perpetual lease will not be effective against the lessee so as to save limitation in a suit for possession 19 C. L J. 209, 18 C. 520.

——s 47 does not bar regular suit for possession. 29 A 63, 31 A. 82 F. B, 1 C. W N. 658, 6 C L J 749, 18 A. 36 *contra* 3 A L. J. 234

——the purchaser of an undivided share cannot apply under this rule. 29 M 294.

——when the auction-purchaser has purchased a share in a property sold the only way of his getting a valid and effective delivery of possession sufficient to give him a new start for limitation is by getting delivery under this Rule, 5 O. W. N. 372 - 110 I C. 70 1928 Oudh 251 F B.

——where the delivery of possession was duly proclaimed by beat of drum but a copy of warrant was not affixed as required by law there was no proper delivery 6

——the period of limitat

possession is 3 years from the

and an application being rejected as time-barred is no bar to a suit for possession 29 A 463

——an *ex parte* order in execution proceedings directing delivery of possession can be cancelled by the court and if it is done the delivery of possession is of no effect 41 C. L. J. 349 : 85 I. C. 921 : 192 Cal 1023

Appeal.

——an order passed on application for delivery of possession is appealable. 53 C. 781 : 43 C L. J 345 30 C W. N. 649 : 1926 Cal 795 F B, 20 C W N 829 *Diss*

by the decree.

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95 for delivery

925 Mad. 119 :

R. 96. Delivery of Property in Occupancy of Tenant.

——the purchaser may obtain possession without the intervention of court. 22 W R. 406

——the delivery of possession of auction purchaser under this rule does not cause dispossession to a person, not the J Dr, found in possession by receipt of rent from tenants so as to entitle him to complain under Or. 21 r. 99 1 C. W. N. 343.

——formal possession under this rule saves limitation giving a

25 B. 275, 3.9,

and 359

applies for

applies for

of a Receiver

5.

Or. 21, R. 96. Delivery of property in Occupancy of Tenant— *contd.*

——an application by the auction-purchaser more than three years after the sale is confirmed, is not barred by the law of limitation as such order can be made by the court of its own motion and no period is fixed. 40 I. C. 605 (c)

RR. 97-99 Resistance to delivery of possession.

——a decree-holder being resisted may either apply under Or. 97 or may bring regular suit. 8 B 602.

——the court cannot proceed with an inquiry which results in *an order under R 98, without giving notice to the obstructor,* 106 I. C 491 ; 1928 Lah 215 10 Lah L. J. 68

being once obstruc- of possession, 13 M ?, *contra* only remedy

——proceedings can be instituted under r. 80 against a purchaser from the J Dr after attachment. 34 M. 450

R 98 and an possession

any suit rty claims 29 Bom.

y be actual or constructive 25 B 478

——a co deft against whom no decree is passed is a person other than the Jt. Dr 30 M 72

——the words "on his own account" in r 99 can only refer to a person who claims to be in possession on his own title, a sub- -rty "on his own int and Jt Dr he other than the

sion without making under r. 97 when he

elivery of possession after removal of the d by Art. 167 L. Act

——under the above circumstances a subsequent suit is barred by s. 47 C P C., 1 Pat 157 1922 P. 407.

——where delivery of possession in the first application is accepted by the Dr Hr as complete, second application by him is, in the absence *of any allegation of fraud in the proceeding on the* first application, incompetent 1923 Mad. 25 70 I. C 755. 43 M. L. J. 179 : 31 M L T 356.

Or. 21, Rr. 97-99. Resistance to delivery of possession—*contd.*

——the provision of r. 97 comes into operation only when either the delivery of possession has been ordered by the court or at any rate, an attempt has been made to obtain possession out of court. 46 A. 693 : 1924 All. 495 : 22 A. L. J. 626

——a decree passed under s. 9 of the Specific Relief Act is a *decree* for possession within the meaning of Or 21, r. 97 C. P. C. and there is nothing in r 97 which prevents its being applicable to such a decree 1926 M. W. N 163 : 23 L. W. 157 : 92 I. C. 61 : 1926 Mad 553

——the person obstructing need not be physically present. 1926 M. W N. 163 23 L W 157 . 1926 Mad. 353 : 92 I. C. 61.

——when the decree-holder is the auction-purchaser and is resisted by the Jt. Dr. an order made under r. 98 is appealable as a *decree* 4 Pat. 726 ; 6 P L T 351 : 1925 Pat. 478. *contra.* an order passed against a decree-holder auction-purchaser under R. 98 is not appealable, even when questions relating to execution are decided therein. 92 I C 544 . 1926 Cal. 985.

RR 100-103 Claim Against Possession

——delivery of symbolical possession does not amount to dispossession within the meaning of these rules, 30 C. 710, 1 C. W. N. 343, but a person in possession through his tenant will be said to be dispossessed within the meaning of the rule if actual possession is delivered. 33 C. 487.

——an application under R. 100 should be registered and disposed of according to law. 79 I. C. 598 ; 5 Pat. L. T. 567 : 1924 P. 698.

——the court should first examine the applicant to determine *whether* proceeding under this rule lies. 16 W. R. 288 Onus is on the applicant 8 W R. 8, 12 W. R. 16, 14 W. R. 358, 20 W. R. 114, 19 C L. J. 209, 16 C 473 P C.

——a mortgagee from tenant is in possession on his own account 19 C L. J. 13, 1 Pat 159

——a member of a joint Hindu family cannot say that he is in *possession* of any particular portion of the joint family property on his own account, his possession being that of the family. 14 C. W N 298, 18 C. L. J. 138, 33, 17 B. 718.

——a person who is in joint possession along with another can be said to be in possession on his own account and can maintain an application under r. 100, but the court cannot go into the question of benami. 75 I. C. 856 : 5 Pat L T. 107 : 1924 Pat. 5??, 83 I. C. 599 : 1924 Pat. 506.

——purchaser of a portion of a non-transferable occupancy holding being in the position of a sub-tenant is liable to be ejected

Or. 21, Rr. 100-103 Claim against possession—*contd.*

718 : 1927 Cal 156 42 C. 172 F B *expld*, 3 Pat. L. J. 579 *not fol*. This case has been followed in 1928 Cal 792

——*when the claimant is in possession on his own account or on* account of some person other than the judgment-debtor, though without a good title or even as a trespasser, he is entitled to succeed in a proceeding under R 101, 98 I. C. 541 1927 Cal 339

——these rules have no application when the execution proceeding has been transferred to the Collector. 7 B. 488

——no question of title can be investigated in a proceeding under r 100 (1), 16 C L J. 13.

——purchaser from person who is in joint possession with the *Jt.* Dr may apply, and co-sharer of the Jt Dr living in the same mess may apply. 18 C W N. 695, 3 M 81, 1923 Nag 52, 68 I C. 174, 17 B 718 *not fol*

——Or [illegible] under these rules, 41 C. 1 not [illegible] ult can be restored under Or 9, [illegible] *pproved*, See other cases on the [illegible]

——no appeal lies from an order made under these rules. Punj Rec. no 57 p 201

——where an application under Or. 21 r. 100 is fought out between persons who were parties to the suit or their representatives, the application falls under s 47, and the order is appealable. 41 M. L. J 54 1921 M W N 487 : 14 L. W 83 63 I. C 730.

——if no suit is brought within one year the order will be conclusive 1 Lah L. J 14.

[illegible] pending suit does [illegible] investigation on [illegible] suit within a year.

——order without investigation on the merits of the claim case is not *res-judicata* 44 M. L J. 443 . 23 M. L T. 146 ; 1923 M. 1514 : 72 I. C 582 : 17 L. W. 322.

——where an application under Or. 21, R. 100 was decided *exparte* and on an application to set aside the *exparte* order it appeared that the party who was absent was misled, held that [illegible] by way of suit under *R 103* [illegible] under R 100, but the court [illegible] rent power under s 151. 47

——r. 103 applies only where an order under one of the rules 98—101 has been passed. 1923 Lah. 145 : 69 I. C. 557.

——the r 103 does not apply unless there is an order made under rr. 98, 99, 101. 27 M. 25 and it must be made on investigation. 34 C. 491, 22 N. L R. 94 : 97 I. C. 178 : 1926 Nag. 423.

——*the order under. r. 101 may be one refusing the applicant* to be put into possession 42 B. 10.

Or. 21, Rr. 100-103. Claim against possession—contd

——application under r. 100 is maintainable by person who is representative of Jt. Dr. under s 47 C. P. C., 65 I. C 476.

——the scope of the suit under r 103 is to establish the right of claimant 41 M 227, 16 I C 741 *fol.*

——r. 103 contemplates a suit to establish a right that may be established without showing actual possession at the date of the summary order against the plff. 37 M. L. J. 636 : 28 M. L. T. 342 : 1920 M W N 698 60 I C. 109, 18 C W. N 473 *Ref.*

——the suit contemplated by Or. 21 r. 103 is by a person who is kept out of possession and who claims possession under his auction-purchase The rule does not bar suits based on other cause of action. 30 C W N. 163 90 I C. 575. 42 C. L. J. 578.

——where an order is passed under R. 101 against a person and a suit is not filed in one year contesting the validity of the order, it becomes final Setting up title by way of defence in another pending title suit does not absolve him from the obligation under R 103. 1924 M. W. N 359 : 1924 Mad 602 19 L. W 391 ; 75 I. C. 814.

Or 22, RR. 1—12 Death, marriage and insolvency

(1) Meaning and application of wordings in the section
(2) Legal representative.
(3) What suits and proceedings survive and what do not.
(4) Abatement of suit. (General).
(5) Account suit and mortgage suit, abatement of.
(6) Forma pauperis
(7) Tort-feasor.
(8) Arbitration, reference to
(9) Insolvency.
(10) Abatement of appeal
(11) Execution proceedings
(12) Ignorance of death.
(13) Death before suit or appeal.
(14) Limitation period
(15) Delay in substitution
(16) Estoppel by consent or waiver.
(17) Revival of abatement
(18) Procedure.
(19) Appeal when lies
(20) Revision.

(1) Meaning and application of wordings in the section.

——the expression " RR 3, 4 and 5 do not apply to execution proceeding " in R. 12 means that the procedure laid down therein does not apply. 14 C. W. N. 752

——r. 4 applies even after a preliminary decree. 39 A. 551.

——'court', in rule 5 means the court before which the question arises. 3 Pat L. T. 380 : 1922 P. 197 : 65 I C 131.

——the court can correct an *exparte* order under r. 5. 43 B. 168

——order under r. 5 is not *res judicata* 28 A. 109.

Or. 22, Rr. 1—12. Meaning and application of wordings in the section—*contd*

——r. 6 does not apply where a party dies before application for a final decree is made and heard. 4 Pat. L. J. 240

——devolution of interest is not confined to devolution of interest only. 28 C 171 · 30 B. 250.

——an application under wrong rule may be considered under proper rule, *above case.*

——rule 9 contemplates a formal order of abatement. 44 A. 459 : 1923 A. 209 : 66 I. C 554.

——the provisions of r. 9 do not confine the sufficient cause mentioned in sub-rule (2) to the circumstances given in s. 5 of the L. Act, 42 A. 540 18 A L. J 681 : 50 I. C. 903.

——'assignment of interest' includes a lease granted by the deft. during the pendency of a suit 1 Pat L J. 596

——r 10 deals with assignment, creation and devolution of interest other than those mentioned in previous rules. 9 C W. N 171.

——applications made after the termination of the suit are not applications under r. 10, 41 M 510, 18 A 86

——rule 10 applies only to caseswhich do not fall under the preceding rules of the same order. 1923 M 237 : 42 M L J. 301 30 M. L. T 202 1922 M W. N 775 · 68 I C 942

——r. 10 applies not only to cases when the assignment or devolution is unchallenged, but to cases where the assignment is challenged on various grounds. In such a case the court has power to decide the question as to the validity or otherwise of the assignment when an application is put in under Or 22 r 10, 90 I C 267

——a wrong exercise of discretion on an application under Or. 22 r. 10 cannot be set aside in revision 89 I C. 60 1925 Nag 423.

——Or 22 R 10 applies not only to cases when the assignment or devolution is unchallenged but also to cases where the assignment is challenged on various grounds In such a case the court has power to decide the question as to the validity or otherwise of the assignment. 90 I C 267 1926 Cal. 173.

Right to sue.

——right to sue means the right which the deceased asserted at the time of his death 36 C. 799.

——right to sue is a vested right. 19 C L. J. 549, F. B

(2) Legal representative.

——"legal representative" in R. 3 means the legal representative or representatives of the deceased plff. or all the representatives of whom the representative applying knew or ought to have known. 32 C W N 1020.

——the expression does not necessarily mean all the heirs under the personal law but means some person who in law represents the estate of a deceased person and includes any person who intermeddles with the estate of the deceased 26 A. L. J. 820 : 1928 All. 532 : 111 I. C. 238

Or. 22, Rr. 1—12 Legal representative—*contd.*

——"legal representative" means all the legal representatives to whom the right to sue survives. 1923 Nag. 101, 65 I. C. 542, 76 I. C. 314.

——the legal representative of a deceased deft may of his own accord apply to come on record. 45 M. L. J. 233 : 1923 M. W. N. 867 : 1923 Mad 679.

——for the purpose of r 5 it is sufficient if the person has intermeddled with the deceased s estate and is actually in possession of a portion 1922 Lah 175.

——where the defts are sued jointly as the representatives of their father, their liability is joint and several and if one dies his representatives must be brought on the record. 3 Lah L. J 64. *contra*. 26 Bom L. R. 375

——some of the legal representatives may apply. 23 M. 12, 16 A 211.

——it is not the duty of the court to choose representative of the deft , pliff. is to chose and any person making adverse claim to the nominee of the plff. is to be added a party. 19 C. L. J. 19.

——the transferee of a deceased party has the right to be brought on the record in place of the deceased transferor 1925 Cal. 467. , 82 I C 991

——the legal position of a person as legal representative may be questioned though he has been admitted on the record as such. 1923 Nag 209 70 I C 109, *contra*, it operates as estoppel. 3 Lah. L. J. 181 : 60 I C 716

——if a deft. dies it is sufficient if the plff. puts one of his heirs on record as his legal representative who will then represent the estate for the purpose of the suit. The other heirs can come in if they wish to be represented 80 I C. 758 . 1924 B. 420 : 26 Bom. L. R 375.

——on the death of reversioner suing against adoption, the next reversioner is his legal representative. 38 M. 406 : 42 I. A. 195 P C

——where the manager of a trust is removed by the appointment of another person, the latter is entitled to be substituted in pending legal proceeding prosecuted by the former. 1928 Cal. 651.

——none but the legal representative can be made party. 61 I. C.947.

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——when a suit is compromised between the plff. and the assignee of the deft. both being on the record, the original deft [illegible] from the decree, [illegible] 420 : 101

[illegible] aken up

Or. 22, Rr 1—12. Legal representative—*contd.*

——legal representative cannot change the case, 22 C. 92, nor the deft. can raise any new plea. 19 M. 345

——respondent may raise the objection at the hearing of the appeal that the alleged legal representative is not the proper legal representative. 44 M L. J 60 : 1923 Mad. 367 : 32 M. L. T. 44 : 60 I. C. 529

——suit by heir for the redemption of the ancestral property is not barred under r. 9 by the fact that the suit brought by his father abated. 40 B. 248.

——it is th[illegible] be considered an [illegible] atives 4 Lah [illegible]

——a suit [illegible] appointed can [illegible] R. 10 and not [illegible] L. T. 31 ; 1924 M [illegible]

(3) What suits and proceedings survive and what do not.

——where the object of the suit is to establish a right to a personal office, the suit is of a personal character 22 C 92.

——a suit for malicious prosecution is a personal action and it does not *survive on death of plff. 31 C. 406* 8 C W. N. 329, 28 M. 487, 34 M. 76 ; *contra.* 31 C 993, 26 M 499, but when claim for damages for defamation is perfected by a judgment, it survives in appeal as it is on a different footing 4 B. L. R 325, 26 M 499

——*a suit for damages for malicious prosecution abates on* the death of the plff as the claim is personal. 49 M 208 1926 Mad 243 . 50 M. L J 34, 44 M 828 1921 M. W. N. 438 62 I C. 757, 44 M. 357 F B , 34 M 76, 48 A. 630 1926 All 610 : 24 A. L. J. 796.

——a suit to enforce the right to a pala of worship does not abate on the death of a plaadar, for the cause of action is not merely of a personal *nature. 53 C 132 ; 30 C W N 389 . 94 I. C 212* 1926 Cal. 490.

——it survives when a Hindu widow sues to recover her husband's estate. 17 W R 475, reversioners are her legal representatives, 23 C. 636, 20 A 341, 33 A 15, 39 M 382, 38 A 111.

——*an appeal against an order appointing a guardian survives to* the legal representative. 47 Mad. 459 46 M. L. J 179, 84 I. C. 613 1924 Mad. 484

——suit by agent of an undisclosed principal survives to the agent's representative and not to the principal 17 M L J 116

——suit by a reversioner to set aside alienation by a Hindu widow does not survive 27 M. 588, 22 M L J 375

——right to sue may survive by reason of a vested right antecedent to the suit 11 C. W N 186

——right to sue for defamation does not survive 34 M. 76.

——when a trustee dies or retires and a new trustee is elected the esate devolves on him and it is a case of devolution of interest under R. 10 and the new trustee may be added as party. 92 I C.

Or. 22, Rr. 1—12. What suits and proceedings survive and what do not—*contd*

520 . 1926 Mad. 540, so also a new manager of a trust may prosecute the suit 1928 Cal. 651.

——a trustee who files an action which is properly framed and constituted does not cease to be entitled to maintain and continue the suit merely because of his removal from office. 109 I. C 783: 1928 Mad 607 · 1928 M. W. N. 746, 20 C L. J. 107 *fol.* 1928 Mad 246 and 540 *Rel on.*

(4) Abatement of suit (General)

——where the plff dies, the suit *ipso facto* abates unless an application for impleading the representative of the party is made in time 88 I C 478 . 7 Lah. L. J. 517 ; 26 Punj L. R 732

——all the legal representatives must be brought on the record within time otherwise the proceedings abate. 76 I. C 314

——in a suit under s 53 T. P. Act to set aside a transfer in fraud of creditors, the suit does not abate on the death of some of the creditors and their legal representatives not being brought on the record as a single creditor can maintain such suit. 93 I C. 1013: 1926 *Lah* 167 27 *Punj* L. R 219, 7 Lah 12

——if on the death of one of the defts, his legal representatives are not brought on the record the question whether the suit abates as a whole depends upon whether it can proceed in the absence of the legal representatives 1923 Cal 289, 67 I C. 290, 5 Lah L. J 203 66 I C 405 · 75 I. C 820, 4 Pat 53 89 I. C. 236.

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abates only as against the particular dead deft 4 Pat 53 89 I. C 236.

——suit does not abate for the absence of the representative of a formal party. 45 C. 94, 110 44 I. A. 218, 228. P. C. Punj. rec. 104 P. 393.

41 M. 442
the deceased
23 M 168.
bates on the
926 Mad. 213:
7, 44 M. 557.
J. 796, 31 C
499

——a suit to enforce the right to a *pala* of worship does not abate on the death of a *paladar*, for the cause of action is not merely of a personal nature. 53 C 132 · 30 C W. N. 389 : 94 I C. 212: 1926 Cal 490.

——where the second deft. is only a surety personally. the suit will not abate on his death. 25 A. 206.

Or. 22, Rr. 1—12. Abatement of suit—*contd.*

——death of the *proforma* deft. who is unnecessary party does not abate the suit. 1923 Lah 647.

ent as to

——where one out of two legal representatives of a deceased deft is brought on the record in time the suit does not abate. 7 Pat L T 746: 1926 Pat 276 · 94 I C 209 1926 P H. C C 97.

——where an application to bring the representative of a deceased party is made after the suit has abated the application should be treated as one to set aside the abatement under Or 22 r. 9. 80 I. C. 761 (B).

——where pending a suit filed by a partner on behalf of a firm ... nt at all. 23 1. C.

uring the pendency

——where a suit was brought against a firm and the alleged sole proprietor died and the legal representatives were not substituted, the suit abated. 49 C 524 1922 Cal 408

——in a redemption suit all the mortgagees must be before the court. 3 Lah L J 252

——where applications for abatement and for revival were set down for hearing together, the proper order to pass was held to be, to declare the suit to have abated and then at once to pass an order under rule 9 on sufficient cause being shown 9 C W N 369, 33 M. 167.

——the death of a plff. before hearing does not justify a dismissal of the suit for default of appearance under Or. 9 r. 8, 17 C W N. 829: 35 A. 331 40 I A. 151. P. C.

——where after the hearing of a suit a deft. died and his representative was brought on the record before the decree was passed r. 6 has no application as the decree was passed not against a dead man but against a living man. This rule deals with a decree against a dead man. 1924 All. 892

... 21 Bom L. R. 549) *Ref.*

——a suit does not abate for a deft. who died long before the institution of the suit and who was erroneously impleaded as party. 1922 Lah 359, 9 Lah 526: 29 Punj L R, 626, 110 I C 281: 1928 Lah 359, 1926 Lah 153 *fol* 31 M. 86 *Dist*

——in order to work abatement of a suit it is not necessary for the court to pass any order. 48 A 334: 93 I. C 313: 1926 All 21. 24 A L. J. 369 F. B., 44 A. 459 *overruled*, 42 A 540 *upheld.*

Or. 22, Rr. 1—12. Account suit and mortgage suit, abatement of

(Account suit)

taking of accounts died after the was put in for bringing on record Or. 22 r. 4 applied and the suit

Mortgage Suit.

——until the final decree in a mortgage suit is passed, the proceedings following the preliminary decree are proceedings in a pending suit. 33 C L J. 115 40 A 203.

——when under a mortgage decree the property is to be sold it is not necessary that the heirs of the deceased party should be made party before the right of sale is exercised 50 Cal 650 : 74 I. C. 929, *contra*, 20 A L J. 575 : 1922 A. 296 : 68 I. C. 151.

——where after the passing of a preliminary mortgage decree one of the defts died and his heirs were not brought on the record in time but notice was served on the heirs at the time of final decree and they did not object to the passing of the final decree, held that the heirs cannot raise objection to the validity of the decree in execution proceedings, 29 Bom. L R. 244 : 101 I. C. 129 : 1927 Bom fter the passing of the was not brought on the 100 I. C. 288 : 1927 All

——the right to sue in Or. 22 r. 3 includes, in the case of mortgage suits, the right to obtain final decree after the passing of preliminary decree, 1923 Mad 237 : 42 M. L J. 301 : 30 M L T 202 68 I. C. 942 . 1924 M W. N. 216 : 46 M. L. J. 181 : 78 I. C 64, 39 M. 488, 28 M. L. J. 491, 42 M L. J. 301

——but it has been held by a Full Bench of the Madras H. C that Or. 22, RR. 3 and 4 do not apply to cases of death after the passing of the preliminary decree. 1928 Mad. 434 F. B, 4 P. 61 F. C *Rel. on.*

——where a Jt. Dr. under a preliminary decree for foreclosure dies between the passing of the preliminary decree and the final decree and the decree holder honestly substitutes the person whom he believes to be the sole representative of the Jt Dr and that person accepts that position and a final decree is passed, a person who has a right to be a co-representative of the Jt. Dr.'s estate and has a right to redeem the property cannot enforce his right to redeem. 87 I. C. 799 : 47 A 466 : 23 A. L. J. 332.

(6) Forma pauperis.

——application for leave to sue in *forma pauperis*, before it is granted, does not survive, 33 C. 1163.

——right to sue in *forma pauperis* does not survive, 64 I C. 63, 1927 M W. N. 886 : 1928 Mad. 278 : 54 M L. J. 582, but the court may allow the legal representative to proceed by transforming it into a regular suit by payment of court fee. *same case.*

Or. 22, Rr. 1—12. Tort-feasor.

——in case of death of any joint *tort-feasor* want of substitution does not affect the case but the share of the deceased deft. must be excluded in execution. 2 Pat. L T. 234 : 60 I C. 722. *contra.* Plff. appellant cannot proceed against some of the joint *tort-feasors.* 62 I. C. 714,

(8) Arbitration, reference to.

——suit does not abate when reference has been made to arbitration, 27 M. 112, 33 A, 645, nor even after award has been made. 4 C. W. N. 280

(9) Insolvency.

——*when plff becomes insolvent the court ought not to*
W. N.
or the
oration
of his name on the record after the adjudication is annulled 43 A. 621 · 19 A. L. J. 685 64 I. C. 52.

(10) Abatement of appeal.

——the whole appeal abates where the legal representatives of deceased respondent who is the member of a joint family is not made party. L R 4 All 391 6 Pat. L T 451 : 88 I C 669

——where the rights of the appellant defts are independent and one of the appellant dies the appeal does not abate if his representative is not brought on the record 82 I. C 420 1925 Mad. 235 · 1924 M. W. N. 789.

——death of a *proforma* deft during the pendency of appeal does not render the decree a nullity 45 A 286 : 1923 A. 211 21 A. L. J. 91 : 7 Lah. L J 466 . 26 Punj L. R. 827 . 1925 Lah 651

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the death of a respondent without revival cannot exonerate the others from liability, and appeal abates only so far as the deceased is concerned 33 C 580 . 26 B. 203, 23 A 22, 30 M 67, 89 I C. 953 : 23 A. L. J. 938, 9 Lah L. J. 136 102 I. C. 304 . 28 Punj L. R. 241,

——the whole appeal against joint decree abates if the legal represe t been made
party 549 . 1926 Cal.
893, 1 313 . 88 I. C
865 ; 1 I C. 41, 22 A.
L. J 1 94 I. C. 300 ;
1926 I C. 569 : 7 Pat.
L. T. 797.

Or 22, Rr. 1—12. Abatement of appeal—*contd.*

——where [illegible] of tenants in which separate [illegible] (tenants) died [illegible] were not made parties, held there was an abatement of appeal so far as they were concerned. 85 I. C. 678 : 1926 Cal. 193, 85 I C 553 1926 Cal 252, 94 I. C 30 (c).

——but in the case of joint tenants, though the landlord has an option to sue any one of them for rent, yet when he makes them all parties, an appeal against some is not maintainable 92 I C 616 · 1926 Cal 667, 109 I C 305 : 1928 Cal. 570.

——where a suit by landlords for the assessment of fair and equitable rent was decreed and during the pendency of the appeal by the tenants one of the respondents died, failure to bring within time his legal representative on the record caused the appeal to abate as against the other respondents also, because the decree was a joint and indivisible one. 88 I C. 959 : 1925 P. H C C. 153 : 6 Pat. L T 849

——where on an appeal from a suit for possession and mesne profits against a number of defts. alleged to have jointly trespassed on the land, some of the defts —respondents die and their legal representatives are not brought on the record the appeal abates as the claim is an indivisible one. 94 I C. 253, (c)

——where in an appeal from decree for joint possession of land one of the plff respondents dies, his legal representative must be brought on the record 30 C W N. 45 : 90 I C. 986

——when in a pre-emption suit the unsuccessful plffs appeal [illegible] is not brought [illegible] ded [illegible] All.

——in order to work abatement of an appeal it is not necessary for the court to pass any order. 48 A 331 : 93 I. C. 313. 24 A L. J. 369 : 1926 All 217 F. B , 44 A. 459 *overruled*, 42 A. 540 *upheld*

[illegible] in favour of several [illegible] not [illegible] of his [illegible] after

partial abatement is whether the appeal can be heard in the absence of the appellant who is dead It depends on the nature of the suit and the decree made. Where in a suit for the correction of entry in the record of rights the only question was whether the rate of rent could be altered and it appeard that if the appeal was allowed it would effect different results on the several parties, held that the entire appeal abated, 47 C. L. J. 82 : 32 C. W. N. 299 · 107 I. C. 726 : 1928 Cal. 184

[illegible] defts, belonging [illegible] and his [illegible] regards

Or. 22, Rr. 1—12. Abatement of appeal—*contd.*

——where the omission to implead all the legal representatives of the deceased respondent is not *mala fide* there is no abatement. 4 Pat. 320 : 89 I. C. 280 : 1925 Pat. 551, 7 Lah. 438, 23 M 125, *contra.* 30 A. 117

——when all the heirs of a deceased respondent are already parties to the appeal no formal application under R. 4 is required. 27 Punj L. R. 688. 1926 Lah. 607 : 7 Lah 399.

——appeal abating against one respondent does not necessarily abate against the other though both may be tenants in common. 49 B. 118 · 26 Bom. L R. 1217 : 85 I. C. 197

——where in an appeal relating to declaration of appellant's rights to an exclusive fishery some of the respondents died and their legal re[illegible]
not aba[illegible]

tatives [illegible]
held to [illegible]

——where in a partition suit one of the defts. died after the decree of the trial court and an appeal was preferred by some of the representatives, held that the complete interest of the deceased was not represented and therefore the appeal abated. 100 I. C. 418 : 1927 Lah. 94 28 Punj. L. R. 3. (16 A. 211, 30 A 117, 3 A. L. J. 719) *Ref.*

——as on the death of one of the appellants the right to appeal survives to others the appeal does not abate L. R 6 All 234

——death of a respondent before the hearing of appeal in [illegible] decision if the fact of such death [illegible] C L J. 494 1923 Cal 676 : 74 I. [illegible] .es. 72 I. C 479 (c), 73 I. C. 604 : [illegible] 927 68 I. C. 194.

[illegible]
defend[illegible]
from [illegible]
court [illegible]
89 I. C [illegible]

——on the death of a plff. appellant in a case of malicious prosecution the appeal abates 44 M. 828 41 M L J 304 1921 M W. N. 438 · 62 I C 757, 44 M. 357 F B, 34 M 76 *fol. contra,* after decree such personal right is heritable. 39 I. C. 939

——a [illegible]
tion lies [illegible]
cannot cor[illegible]
796, 34 M. [illegible]
I. C. 366.

——in a suit by the plff a lease in favour of a tenant granted by [illegible] on him but he was not [illegible] ne of [illegible] s not [illegible] was

Or. 22, Rr. 1—12. Abatement of appeal—*contd.*

——where during the pendency of an appeal in a suit for redemption by second mortgagee the legal representative of the deceased prior mortgagee is not made party within time, the appeal abates 4 L. L J. 178 77 I C. 176

——an appeal abates if no legal representative is made party even if no objection is taken. 73 I. C. 387

——the question whether an appeal abates entirely or only against the deceased respondents depends on the nature of the suit or rather the nature of the right to sue. 90 I C. 324 : 23 A L. J. 935 L. R. 6 A 557.

——'dies' in r 3 refers to death before decree, so it does not apply to cases in which a plff. dies after decree and before appeal. 3 M 236

——names substituted in appeal from interlocutory order stand for all stages of suit. 1925 Pat 145

(11) Execution proceedings

——upon the death of a D. Hr (here, in appellate stage) his legal representative may be substituted. That rr 3, 4 and 5 do [illegible] ...res laid [illegible] to the [illegible] ...ply for [illegible] 96 I C. [illegible] ...s 75 I [illegible] C. L J [illegible] 7 I A. [illegible] M. 211, 219, 32 C 296 2 A. L J 72 I. C. L J 584 : 9 C W.N 201 P C, 87 I C. 21 ; 1925 Oudh. 448, 26 M L. J 267 : 23 I. C. 251 Dist 22 M 119 : 8 M. L. J 288, 26 M L J 267 : 23 I. C. 251, 68 I. C 667. 41 M. L J. 547 1921 M. W N. 732 *not fol.* 20 C. 570, 23 C. 635, 19 B. 276 *considered.*

——but it has been held that where an appellant decree-holder dies during the course of appeal in execution proceedings his legal representatives can be substituted. 51 M. 858 : 55 M. L. J. 497 · 1928 Mad 772 : 110 I C. 662

——unless the legal representatives of a deceased Jt. Dr are brought on record the order in appeal is a nullity. 5 Lah L. J. L. 70 I. C. 929

——Or 22, R. 10 does not apply to execution proceedings. 39 M L. T. 92 : 104 I. C. 420 · 1927 M. W. N. 790 : 1927 Mad 824, 53 M L. J. 512, (44 M. 919, 22 L. W 860) *Rel. on.*

——a pending execution proceeding does not abate by reason of death or devolution of interest of any of the joint D. Hrs 2 Pat L. T. 619 : 62 I. C. 30.

——when after attachment but before sale the Jt. Dr. died and his legal representative was not brought on the record the sale

Or. 22, Rr. 1—12. Execution proceedings—*contd.*

was not null and void. 33 M. L. T. 25: 45 M. L. J. 413: 1923 M. W. N. 817, 18 L. W. 577: 75 I. C 46

——when tenancy is created *pendente lite*, joinder of such tenant in execution application for mesne profits is bad. 27 C. W N. 29 · 36 C. L. J. 542 · 43 M. L J. 589: 31 M L. T. 131: 20 A. L J 988: 24 Bom L. R 1251 · 68 I C. 973 P. C.

——an application for the ascertainment of mesne profits in pursuance of a decree is a proceeding in execution of that decree and not a proceeding in a suit 4 Pat 507 41 C L J 389 6 Pat L. T. 366: 30 C W N. 361 · 26 Puj L. R. 243 27 Bom L R. 848 . 48 M. L. J 482 . 88 I. C 482 · 1925 P C 117

(12) Ignorance of death

——ignorance of the death of deceased may be sufficient cause for setting aside the order of abatement under R. 9, 36 C 418; 101 I C 910: 8 P L. T 269.

——where an appellant died but the appeal was decreed in ignorance of his dea
was a nullity and the
appeal to deal with an
and bringing his heirs
1925 Bom 290

——ignorance of a *pardanashin* lady's death in a different district is excusable where appellant is not guilty of laches. Appellant need not always be watchful to see if the respondent is

ment depends on the facts
of the death is not sufficient
but when the appellant is l
of death it is a case for showing latitude 91 I C. 560

(13) Death before suit or appeal

——a suit against a dead man is a nullity and cannot be cured by bringing his legal representative on record, 25 Bom L R. 7, 31 M

the death cannot
cure

eal and a decree is passed in ignorance of the death of one of the joint plffs. the judgment is a nullity 45 A 286: 1923 A. 211: 21 A. L J 91. 4 Lah L. J. 171 1922 Lah. 61 · 67 I. C 596 *contra*. ignorance may be sufficient ground 49 C 62 1922 C 33, 67 I C 917.

——a suit does not abate for a deft who died long before the institution of the suit and who was impleaded as party erroneously, 1928 Lah. 359, 1926 Lah, 153 *fol* 31 M. 86 Dist.

(14) Limitation period.

——the provisions of Act 26 of 1920 curtailing the period of limitation to three months have retrospective effect. 1923 Nag 166 : 7. I C 176

——the court has no power to extend the time of 3 months, L. R 4 A 148

——mistake as to amendmet of limitaion law saves limitation 1923 Bom 40 72 I. C 832 ; 1923 Lah. 475, 24 Bom. L. R 909, 83 I C. 807 ; 192 Lah. 475.

——where the sole Jt Dr (mortgagor) dies before the making of the final decree his lagal representative must be made party within six months of his death. 25 C W. N. 495 : 33 C. L. J 115 59 I C 177.

——where the legal representatives of a deceased defendant or respondent are already on the record it is enough for the plff or appellant, at some time before the hearing of the suit or appeal, to state the fact and get it noted on the record. It need not be done within 3 months 51 M 347 54 M. L J. 675 : 27 L. W. 422.

(15) Delay in substitution.

——where the legal representatives were minors and could not get succession certificate before the time of limitation the delay was excusable 73 I. C 215

——where the [illegible] died and the appellant came t [illegible] it was fit case for [illegible] ative on record. 74 I. C. [illegible]

——ignorance of death may be sufficient cause for setting aside abatement if there be not great delay and dilatoriness. 49 C 62 1922 Cal 335 : 67 I. C. 917, 101 I. C 910 : 8 P. L. T. 269, but cause of ignorance of death must be assigned 75 I. C. 909.

——where for want of information of a grant of probate, the plff. substituted the heir of the deceased and then applied beyond time to substitute the executor, there was sufficient cause for the delay 7 C. W N. 529.

——when an application purports to be one under Or. 22, R 4 and does not assert that there has been any delay in applying to substitute legal representative or does not give any reason for excusing such delay it cannot be treated as one under Or 22, R. 9 for setting aside abatement. 94 I. C. 300 : 1926 Lah. 474.

(16) Estoppel by consent or waiver.

——deft's consent may operate as estoppel to raise any objection. 3 Lah. L J. 181 : 60 I. C. 716, 26 M. 224, 27 B. 162 *fol.*

Or. 22, Rr. 1—12. Estoppel by consent or waiver—*contd.*

——waiver as to objection of limitation on the part of the deft. operates as estoppel 28 C. W. N. 559

——addition of party after the expiry of period of limitation without objection by opposite party, effect of. 83 I. C 438 : 1924 Cal. 633.

——where the legal representatives were substituted after the period of limitation without any objection by opposite party it was held in appeal that the first court having ordered substitution

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The order

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51 C. 693 ·

(17) Revival of abatement

—— revived under Or. 9, 9 C. W.

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rescribed by art. 177 of the

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417

——where an application to set aside abatement of suit by excusing delay of two days in making it, was rejected and in appeal from the order the H C accepted the appeal and directed the lower court

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——no substitution can be made unless an abatement is set aside under Or 22 r

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Act applies to such pet

——abatement was

within time from the

3 Pat 853 6 P. L T. 31

——where an application to bring on record the legal representative of a deceased respondent is filed under Or 22, R 4 after the period of limitation it must be treated as one under Or 22, R 9 to set aside the abatement and then bring on record the legal representative. 2 Pat. L R. 279, 51 C. 690 : 28 C. W. N. 559 39 C. L. J 434, 1924 Cal 633, 78 I C 958 (c).

——no doubt in the interest of justice if it is necessary to brush aside technicalities the court will not be too scrupulous in enforcing them but if the merits of the case are against the petitioner the court will not go out of the way to clear the plff's path of technical obstacles 34 M. L. T. 196 1924 M W. N. 633 : 80 I. C. 379. 1924 Mad. 713

Or. 22, Rr. 1—12. Revival of abatement—*contd.*

——when an application is put in to set aside abatement a court should first investigate if party was lawfully prevented from making the application in time and whether in the circumstances he ... s. 5 of the L. Act. 90 I. C 811 ; 1926 Cal. 175

... ichment before judgment also ... 'r the abatement is set aside ... judgment. 47 C. L. J. 282:

——an order setting aside abatement of a suit is not appealable, but when it is passed without adverting to the period of limitation fixed by law to set it aside, the order is bad and can be set aside in revision 87 I. C 173 1926 Cal 444

... the court's order and hence does ... the deceased deft on ... and s. 5 of the L ... 25 Pat. 765.

(16) Procedure.

——on the death of plaintiff or appellant the defendant or respondent may apply to bring on record the legal representative ...

... is already on the record as ... 'd to made. 24 O C 374:

——but application for substitution is not dispensed with by the fact that one of the legal representatives is already on record 3 Pat. 853 6 P. L T 313 , 85 I C. 25 3 Pat. L R. 97

——where a creditor obtained a decree against the widow of ... the birth of a posthumous son ... that under Or. 22 R. 10 the ... 26 All 285.

... rning cases not provided for in ... Lah. 181.

——a trustee ceasing to hold offices during the suit filed by him can still continue suit. 1928 Mad 607, (20 C L. J. 107, 1923 Mad 246, 1926 Mad 540) *fol*

——where a compromise petition is filed the suit remains pending until the passing of the decree and a purchaser before compromise may apply to be added as a party to the suit 27 C. W. N 755

——a surviving deft can object to a decree on the ground that the decree passed against a deceased deft. is nullity. 75 I. C. 321 (Pat). 32 A. 301 : 7 A. L. J. 238 : 59 I C. 897.

——names substituted in appeal from an interlocutory order stand for all stages of suit. 1925 Pat. 145.

——where the plff. was misled by the order of the court ... he is entitled under S. 5 of the Limitation ... 765.

... th and the ... treated as

Or 22, Rr. 1—12. Procedure—*contd.*

application for bringing the legal representative on the record and necessary court fee was allowed to be paid up. 95 I C. 236.

(19) Appeal when lies

——no appeal lies from an order made under r. 3, 39 M 488.

——there is no appeal from an order dismissing an application to be inpleaded as legal representative when there is no rival claimant 49 M. 450 : 1926 M. W. N. 436 : 50 M L. J 485 : 95 I. C. 489 : 1926 Mad. 586

——where in a case of devolution of interest the Judge ordered the addition of parties it was an order under R. 10 and remedy of the party dissatisfied with the order lay in preferring an appeal under Or 43 R. 1 cl, (1), and not by invoking the aid of S. 115, 54 C. 716 : 104 I. C. 842 1927 Cal. 844.

(20) Revision.

——Or 22 and the whole theory of abatement contained therein is inapplicable to revision applications as in such cases the order is made by the Court of his own motion to redress grievances which come to its notice 80 I C 456.

OR. 23 rr.—1—4 WITHDRAWAL AND ADJUSTMENT OF SUITS

WITHDRAWAL.

(1) Appellate and Revisional power
(2) Application to withdraw
(3) Conditional grant of leave.
(4) Effect of withdrawal with liberty to bring fresh suit.
(5) Execution proceeding.
(6) Form of order.
(7) Grounds of withdrawal
(8) Limitation.
(9) Minor plaintiff
(10) Partition suit
(11) Pleader's authority.
(12) Power of appellate court to allow withdrawal.
(13) Power of Revenue Court to grant leave to withdraw.
(14) Probate proceeding
(15) Public right
(16) Reference to arbitration.
(17) When permission is not granted, procedure and effect
(18) Withdrawal against some of several defts.
(19) Withdrawal by some
(20) Withdrawal after preliminary decree.

(1) Appellate and Revisional power.

——the H. C, can interfere, on revision side, with an order passed under Or 23, r 1. if that proceeds on grounds other than those laid down in r. 1. 7 Lah L J. 290 26 Punj L. R 319 : 90 I. C 632.

Or 23, rr. 1—4. Effect of withdrawal with liberty to bring fresh suit—*contd.*

——permission to withdraw part of the claim without stating any ground is illegal. 64 I. C 82

——where no evidence is given on a particular claim (here claim for additional rent for additional area) permission may be granted to withdraw that claim. 62 I. C 699 (o)

——an order for withdrawal, though upon the circumstances not within the scope of these rules, is not without jurisdiction and cannot be assailed in subsequent suit, 48 C. 138 : 24 C. W. N. 723 : 31 C. L. J. 432 58 I. C. 806 F B (44 C. 367 : 58 I. C. 670) *overruled* 49 A 612, 3 P. L T. 80 : 64 I. C 337 : 1922 Pat. 17 : 1922 Pat. 44 F. B) but the High Court may revise the previous order. 44 C. 367, 3 P L. J. 460.

——when withdrawal is allowed without formal defect subsequent suit is barred by *res judicata*. 20 C. W. N. 514, 23 C L. J. 489, 1918 Pat. 220.

——where the court while rejecting an amendment petition of the plffs. dismissed the suit but gave the plffs. liberty to bring a fresh suit on the same cause of action and the plffs brought another suit and the defts. pleaded *res judicata*, held by the Privy [illegible] to the second [illegible] court had after [illegible] plffs. to begin [illegible] M. L. J 64 27 Bom. L R. 725 : 48 M L. J 64 P C.

——where there was no withdrawal petition and the court in dismissing the suit remarked that the plff might sue afresh if they chose there was no grant of leave to withdraw. 10 O L. J. 132 74 I C. 543

——permission need not be express, it may be implied from the order read with the application 2 Lah. L. J. 242 : 67 I. C 1002.

[illegible] permis-[illegible]

[illegible] be withdrawl of the first suit [illegible] withdrawal of the first suit [illegible] fully satisfied. 110 I. C 818

(5) Execution proceedings.

[illegible] D. Hr. to withdraw an execu-[illegible] loes not in terms apply to such [illegible] 232 : 1922 P. 325

——Or. 23 R. 1 uses not apply to execution proceedings. 15 M. L T. 100 : 1924 M. W. N. 159 : 22 I. C. 76, 1912 M. W. N. 1245 . 17 I C. 752 . 24 M. L. J. 88.

Or. 23, rr. 1—4. Execution proceedings—*contd.*

——provisions as to withdrawal do not apply to execution proceedings, therefore an application for execution of a decree cannot be withdrawn with liberty to make a fresh application. 12 A. L. 235 : 21 I. C. 961 : 36 A 172.

——Or. 23 is inapplicable to proceedings in execution of a decree or order, 72 I. C. 477 : 1924 Lah. 342.

(6) Form of order

——a court granted permission to plff to withdraw a suit with liberty to file another "as the frame of the suit was bad." The application or the order did not contain what the ground was, held that the order was illegal and could be revised. 47 A. 319. 87 I. C. 175 : 1925 All 466.

——permission need not be express, it may be implied. 1924 Nag. 285, 67 I. C 1002. 2 Lah L J. 242, 4 C. W. N. 110, 9 M. L. T. 468, 28 I C 91, *contra* 97 P. R. 1916 37 I. C. 128.

——the court cannot impose the limitation of time for instituting the subsequent suit. 44 B. 939. 22 Bom. L R. 939 58 I C. 45

——where the court passed the order "plff. is permitted to withdraw from the suit" held that the order must be read with the petitions and construed as granting permission to file fresh suit. 34 M. L J 515 44 I C 889.

——the court cannot divide the application into two parts allowing the suit to be withdrawn and refusing the permission to bring a fresh suit, but it can dismiss the application and hear the suit *or dismiss it if the plff does not desire to proceed* 1 Pat. L. T. 292. 56 I. C. 286. 1921 Pat. 208, 56 I. C 756. Pat. L T 299

——where the plff filed an application for liberty to withdraw with permission to bring fresh suit and the court gave permission to withdraw from the suit but did not in terms give liberty to bring fresh suit, held that the order ought to be read along with the petition and construed as granting permission to file fresh suit. 5 Pat. 23.

(7) Grounds of withdrawal.

——objection to jurisdiction and court-fees are only 'formal defects." 41 M 701, 1918 M. W N 497 46 I C 265. 35 M. L J 27

——a defect which goes to the root of the plff's case is not "formal defect" 88 I. C 665 : 1925 Mad. 617. 21 L. W. 282

——"formal defect" must exist, mere allegation will not do 64 I. C 556

——the court has jurisdiction to permit withdrawl unless there is something to show that the suit must fail by reason of some formal defect 32 C W. N. 1244

——when the value of some item of claim is found to be Rs. [illegible] the plaint, it cannot be called a [illegible] ithdraw the claim with regard to [illegible] I. C 985. 7 L. W. 131, 41 M.

Or 23, rr 1—4. Grounds of withdrawal—*contd.*

——after one witness is examined, plff. should not be allowed to withdraw to bring a fresh suit after curing the defects 16 C W. N. 1027 16 C L. J 103 14 I. C 38.

——withdrawal should not be allowed without sufficient ground. 23 C L J. 459, 25 C. L J 454, 1917 Pat .141.

——apprehension of failure is no ground of withdrawal, 20 C. W N 1000 23 C L J 459, 44 C. 367, 40 A 612, 46 C. 168, 90 I. C. 217. 1926 Pat. 128, 1925 Mad 617 : 21 L. W. 282, nor the failure to produce documents 37 B 682, 27 M. L J. 480

——the "other sufficient" grounds must be analogous to those provided in sub-clause (a). 90 I C. 217 : 1926 Pat. 128, 1915 Mad 1268 22 L W. 535, 21 L W 282 : 1925 Mad. 617, 3 P. L. J 651 : 48 I. C 197, 117 P W. R 1918 46 I C. 181, 16 M. L. T. 253 : 27 M L. J. 480 26 I. C 57

——"other sufficient grounds" must be construed as being *ejusdem generis* with the grounds mentioned in Cl (a) *viz.* "some formal defect" 50 B. 192 28 Bom L. R. 440: 94 I. C. 777 : 1926 Bom. 315

——the fact that an appellant's claims failed on a mistaken view of law is no ground for granting permission to withdraw with liberty in second appeal. 88 I C 512 1926 Cal 432

——inability to produce evidence is no ground of withdrawal. 6 Pat L J 112 2 Pat. L T 634 ; 61 I. C 639, 34 C. L. J. 161, 7 Lah L J 290 · 26 Punj L R 319 90 I. C. 639 : 1915 Cal. 497

——the fact that notices on the heirs of the deceased deft. could not be served is not sufficient ground for withdrawal. 24 Bom L. R 909.

——mere allegation of formal defect is not sufficient, it must exist 64 I C. 556.

——r. 1 does not give power to allow withdrawal where once it has been decided and a decree passed. 2 Pat. L. T. 581 · 16 I. C. 831, 61 I. C. 584.

——a petition of withdrawal may be withdrawn for proper reason and the suit may be proceeded with. 44 M. L. J. 77 : 1923 Mad 246 · 71 I. C 288

——grounds of permission must be stated where a part of the claim is allowed to be withdrawn. 64 I C. 82 (c)

——in a suit for enhancement of rent the plff. also claims additional rent for excess area but does not give necessary evidence under s. 52 B. T. Act, he should be allowed to withdraw with liberty to bring fresh suit. 62 I. C. 699

(B) Limitation.

——the fact that [illegible] the plff to a deduction durin[illegible] 20 I. C 205 (c), 9 C. 255 P. C.

——as to limitati[illegible] sec. 14 L. Act. 35 C. 921.

Or. 23, rr. 1—4. Minor plaintiff.

——the courts should be very jealous of the interests of the minors and should not allow a suit instituted on minor's behalf to be withdrawn without being satisfied that it is for his benefit. When a next friend of a minor withdraws a suit or abandons a portion of *the claim without the leave of the court the minor will not be* prevented from bringing a fresh suit for the same relief. 59 P R. 1919: 164 P. W. R 1918: 47 I. C. 508, 107 I. C 431. 1928 Mad. 496.

(10) Partition suit.

——a party cannot be allowed in a partition suit to withdraw the suit after the passing of the preliminary decree. 1912 M. W N. *494: 11 M L. T. 390; 14 I. C 259.*

(11) Pleader's authority.

——where by *vakalatnama* the pleader was empowered to do "all necessary acts" in connection with suit, the words "all necessary acts" included an authority also to withdraw the suit 16 C. W. N. 932: 14 I. C 190

(12) Power of appellate court to allow withdrawal

——the Privy Council allowed the suit to be withdrawn with liberty [illegible] the subject. *matter* [illegible] *17 M L. T.* 321. 13 [illegible] C

—— [illegible] nder Or 23 r. 1, cl. ([illegible] thing in the nature [illegible] 88 I. C. 1029: 1925 Cal 711

——but where the defects were those which had been embodied in the objections in the written statements and had been made the subject of issues in the first court and the plff being aware of those defects had gone to trial and fought the case out with a view to pursuade the court to hold that the defects pointed out had not existed, the plff, could not say in the appellate stage that there were really formal defects 41 C L J 186 86 I C. 1029, 1925 Cal. 711

——withdrawal was disallowed in appeal. 11 C L. J. 45, 512.

——*appellate court can permit to withdraw* 37 A 326, 40 M 259: 37 I C 414 32 M L J. 477 F B, 45 B 206 59 I C. 210, *contra*. 35 B 261, 27 M. L J 244.

——order allowing withdrawal of appeal does not amount to confirmation of decree appealed from 50 A. 608: 108 I. C. 564: 1928 All 216 · 26 A L. J 407, (36 A 350, 23 A L. J. 578, 24 A. L. J. 465), *Rel. on.*

Or. 23, rr. 1—4. Power of appellate court to allow withdrawal—*contd.*

be very cautious before allowing
though it order the entire costs
96 I. C. 480 : 24 A. L. J. 721

——where a decree is based upon a concurrent finding of fact.
uestion
epends
he plff.

——an appellate court can grant permission to withdraw. 45 B 206, 22 Bom L R 1183 59 I C 210, 74 I. 894, 1924 All. 260.

——under s 107 (2) an appellate Court has power to allow withdrawal of suit under Or. 23, R 1, provided it sets aside the decree of the first court 95 I C. 424 1926 Nag. 444, 40 M 259, *fol.*, 47 A. 158, P. C *Dist.*

—— fresh
suit wa earing
of the c e, the
court d r was
illegal, the court should have either allowed the withdrawal as *prayed for or ought to have heard the appeal.* 95 I. C. 199.

——plff respondents should not be allowed to withdraw the suit against only the defts appellants while there are other defts 46 M. 811 45 M L J 212 1923 M W. N. 677 : 74 I. C. 4

——the order of the appellate court granting withdrawal without giving reasons is liable to be set aside in revision. 39 C. L J. 371

——where it is apparent from the plaint and the proceedings *in the lower court that plff has no clear conception* of his rights leave to withdraw with liberty to file fresh suit should be granted 1912 M. W N. 1003 : 17 I C. 395.

——leave should not be granted if it prejudices the deft 20 I C 17, (29 B. 13, 35 B 261, 11 M L T. 390) *Ref.* 2 Pat. L. T. 591, 61 I. C. 831.

(13) Power of Revenue Court to grant leave to withdraw.

——a Revenue Court can grant permission to withdraw with liberty to bring fresh suit in civil court 50 C 626 : 27 C. W. N. 987 : 1923 Cal 624 : 74 I. C 1001.

——the Revenue Court cannot permit one of the plffs to withdraw without the consent of the other co plffs 52 C. 139 · 86 I C. 1035 ; 1925 Cal. 637.

——where under the order of the Revenue Court a plff was required to institute a suit in a civil court within three months and the plff. after filing it within that period withdrew it and *then* instituted it beyond three months but within the ordinary period of limitation, the suit was within time. 12 A. L. J 989 : 25 I. C. 188.

Or. 23, rr. 1—4. (14) Probate proceeding.

——or 23 r. 1 does not apply to probate proceedings. 2 Lah. L. J. 242 · (20 C. W. N. 986, 21 Bom 335) *Rel.* 38 B 309 *Dist.* 2 P. L. J. 535 ; 5 P. L W. 230 : 40 I. C 345 . 1917 Pat. 192.

(15) Public right.

taking
provin,
41 C L

——where in a scheme suit under s. 92 C P. C the plff, applies to withdraw the suit the court can transpose some of the defts as plffs under Or 1, r 10 and proceed with the suit. 12 L. W. 25 59 I. C. 233

(16) *Reference to arbitration.*

——the matter having been referred to arbitration no permission to withdraw can be granted 7 C W. N. 168 . 9 A. 168 but where award of private reference to arbitration is filed in court it may be allowed to be withdrawn 31 C 516

——where a reference to arbitration was invalid for want of consent of one of the parties the court ought not to have allowed the plff to withdraw the suit with leave to bring fresh suit but should have proceeded with the suit. 1925 M. W. N 97 . 86 I. C 839 · 1925 Mad 621 · 48 M. L J. 142.

(17) When permission is not granted—procedure and effect.

Procedure

) withdraw from the suit the court is not disposed to dismiss the application. 32 B 345 *fol*

——when permission is not given the suit will be dismissed. 20 C W. N 100, 1011,

——where the plff applies for withdrawal with liberty to bring fresh suit, the court's order, allowing him to withdraw but refusing him ... improper The court cannot ... ing to treat it as one ... t L. T. 292 . 1921 Pat. 86 I C 548, 1 Pat. L. ... 1928 Cal. 273

——an order giving permission to withdraw from the suit without giving in terms liberty to bring fresh suit ought to be read along with the petition and construed as granting permission to file fresh suit. 5 Pat 23 7 Pat L T. 495 · 93 I C 1001 · 1926 Pat. 259.

Effect.

——a suit for ejectment against deft as trespasser if withdrawn without leave to bring fresh suit does not bar a subsequent suit for ejectment after notice 59 I. C. 84.

——an ejectment suit having been withdrawn without leave, for no previous notice to quit having been sufficiently served, a subsequent suit after due service of notice is not barred. 42 B. 155 ; 43 I. C. 752 : 20 Bom L. R 35.

Or. 23, rr. 1—4. When permission is not granted—proced and effect—*contd.*

——in ejectment suit as in suits for partition cause of actio a recurring one and the withdrawal of a suit in one year with leave to sue afresh is no bar to a suit in the subsequent year. L 5 A, 156.

——a second suit on a cause of action and relief different fi those in the first which was withdrawn without permission can be a suit on the same "subject matter." 39 M 987 : 31 M. L. J 35 I C 185 · 20 M. L T 62 36 M. 325 : 1913 M. W. N. 86 : 12 M T. 571 28 M L. J. 658.

——before a suit can be barred under R. 1 it is necessry establish the identity of the parties and the identity of the cau of action 1928 All 689

——withdrawal of unnecessary plff does not necessitate a missal of the suit. 60 I C 592

——a prior suit by reversioner against widow impeaching alienation by her will bar a second suit for possession on the sa ground if the first suit was without possession to bring fresh suit. I C. 91 · 2 L. W. 177 *contra*, 32 M 987 · 35 I C. 185

——the withdrawal of a suit without permission bars only plff and his privies from bringing a fresh suit but not a person w has purchased the plff 's interest in execution under an attachm before withdrawal. 1917 Pat. 141 . 39 I. C. 276 : 1 Pat L W. 741.

——where the legal representatives of a deceased deft. were brought on the record within time and the suit against that de abated and the plff. thereupon withdrew his suit with permissi no fresh suit is maintainable against the legal representative the deceased deft. 38 M. 643 22 I. C. 260 : 1924 M. W N 6 14M L J 485.

(18) Withdrawal against some of several defts.

——a suit may be withdrawn against some of the several def at any time before actual judgment. 18 M L. T. 460 : 1925 M. W. 1021 : 31 I. C 312.

——if in a suit for mesne profits the plff exonerates some def [illegible]

[illegible] ,rincip [illegible] C 87

13 S. L R [illegible]

(19) Withdrawal by some.

——an appellant may withdraw from an appeal under sub-ru (1) of R 1 of Or. 23 without the consent of the co-appellants as an rule (4) does not govern sub-rule 1 101 I. C. 348 ; 1927 Bom 24 29 Bom. L. R. 299.

(20) Withdrawal after preliminary decree

——where in a suit for accounts the plff applies for withdraw of the suit after the preliminary decree ordering the taking c accounts but the deft desires the case to proceed the proper cours

Or. 23, rr. 1—4. Withdrawal after preliminary decree—*contd.*

and make the deft. 60 I C. 144, 23 I. C.

nesne profits after thout leave of court,

ADJUSTMENT.

(1) Adjustment or compromise, what amounts to

——an award arrived at by reference of the subject-matter of the appeal to arbitration pending the appeal cannot be recognised as an "adjustment by lawful agreement" by the parties to the appeal or as a "compromise', Rule 3 deals with what is known as compromise of a suit 88 I. C 768 · 47 A 637 1925 All 503 F. B.

——it has been held by the Calcutta H. C. that an award made

——but it has been held by the other High Courts that an award passed in a pending suit without the intervention of the court is not invalid and may be considered as an adjustment under R. 3 Sec 89 is no bar to the award being so regarded, 104 I. C. 674 ; 53 M. L. J 444 · 39 M. L. T. 593, 51 B. 908 : 105 I. C. 516 · 1927

Adjustment or compromise, what amounts to—*contd.*

Bom. 565 F. B. (42 M. 625), 45 B. 245, *Rel. on*, 49 C. 608 *considered.* 99 I. C. 1002 . 1927 Lah 156, 97 I. C. 465 :1926 Mad. 1211, 51 M. 800 : 55 M L. J 429 1928 Mad 1025 F. B

——where some third person is asked to settle the difference and on that person giving an opinion the parties accept it as good enough for themselves it is the unity of the minds that constitute the adjustment. 102 I C. 608 25 A. L. J 787: 1927 All. 614: 50 A. 51.

[illegible] the shareholders' meeting [illegible] W. N. [illegible] C [illegible] entered [illegible] as in [illegible] W. 41 [illegible] ns with [illegible] a concession for his costs to which he is entitled, constitutes compromise. 37 I C. 421.

——where the deft offered that if a witness would take the food prepared by the plff. the suit would be decreed and that offer was accepted and acted upon accurately and fully, the promise made by the deft. must be carried out by him and the suit decreed. This has nothing to do with adjustment of suits within the meaning of R. 3 47 A 456 : 23 A. L. J 251 : 87 I. C. 174 : 1924 All 271.

——an agreement between the parties to a suit to abide by the decision of another proceeding amounts to an adjustment of the suit when that decision is actually passed. 24 M L T. 356 · 51 I. C 540 1918 M. W. N. 745, 37 M. 408 Dist. *Contra.*, this sort of agreement cannot be regarded as an adjustment of the subject matter of the suit by a lawful agreement or compromise. 37 M. 408 22 M. L. J. 447 , 15 I. C. 378 1912 M. W N 598.

——the word "lawful" in Or 23 R. 3 does not merely mean binding or enforcible. The word refers to agreements which in their very terms or nature are not unlawful. 50 A. 748 : 110 I C. 573 : 1928 All. 494 : 26 A. L J 691.

(2) Agent's authority to compromise.

——any party has the right to repudiate the action of an agent compromising it without his knowledge and consent before a final order is passed upon it. 31 C. 357.

——though a [illegible] of the litigation to his agents, he is [illegible] those persons ma[illegible] extends only so [illegible] but they cannot consent to a decree on compromise without special authority. 36 I. C. 375 : 21 C. W. N. 366.

(3) Appeal.

——an order directing compromise to be recorded is appealable 43 C. 85, 87 I. C. 124 : 1925 Mad. 606, 48 M. L. J. 249, 6 Lah. L. J 187 1924 Lah. 466, 80 I. C. 696.

(3) Appeal—*contd*

——an order holding that no compromise has been proved is not appealable 73 I. C. 177.

——where the parties agreed to leave the matter to the decision of the Munsiff whether right or wrong after local inspection, the decision was to be treated as one based on compromise and was no longer open to appeal. 23 A L, J. 525 : 86 I C. 611 : 1925 All. 558

——the appellate court should *record lawful compromise and* pass decree accordingly. 80 I C 527 6 Lah. L J 261

——the question as to the validity of consent decree cannot be gone into in appeal against that decree. 13 C. L. J. 16 . 9 I. C. 210, 5 C. W. N. 877 fol

——the appellate court should accept the petition of compro*mise filed* before the passing of judgment *41 M L J 38 1921 M.* W. N. 866. 202, 7 B. 304, 8 M. 482, 9 M 103, 37 B 639, 24 C. 908 : 1 C W. N 597, *contra*. 11 C 250.

——when a party has abandoned his claim voluntarily the appellate court may decline to proceed with it 88 I. C. 768 : 47 A 637: 1925 All. 503 F B

(4) Arbitration.

——Or. 23 R 3 applies to cases referred to arbitration. 1925 Mad. 50.

——where the parties to a suit for partition compromise it by a greeing [illegible]
and cou[illegible]
in case t[illegible]
L R. 82[illegible]

[illegible]

shares in a certain property, by which the question as to giving share to appellant was to be referred to arbitration but it was never so referred, held that such compromise is not effective as it was only a provisional one 88 I. C 149 1925 P. C. 7

——the court may pass an order on award as modified by lawful compromise 9 O L J 219 : 1922 Oudh 1899 68 I C. 209

——an invalid award cannot be enforced as compromise. 1921 M. W. N 756

——an award arrived at by reference of the subject matter of appeal to arbitration pending the appeal cannot be recognised as an "*adjustment by lawful agreement,' by the parties to the appeal* or as "a compromise" Rule 3 deals with what is known as compromise of suit 88 I C. 768 : 47 A 637 : 1925 All. 503 F. B,

[illegible] a submitted their dispute [illegible] enforced under Or. 23 r [illegible] C. 140 ; 18 Bom. L. R

(4) Arbitration—*contd.*

made on a reference to ar
of a suit connot be given ε
objects to it. 55 C 538 : 47
——but it has been
award passed in a pending suit without the intervention of the court is not invalid and may be considered as an adjustment under R 3 Sec 89 is not a bar to it. 104 I. C. 674 · 53 M L J 144 39 M. L T 593, 51 B. 908 : 105 I C 516 · 1927 Bom. 565 F. B 42 M 625, 45 B. 245 : 22 Bom L. R 1048 : 59 I C 53, *Rel on*, 49 C 608 *considered* 99 I C. 1002 1927 Lah. 156, 97 I C. 465. 1926 Mad 1211, 37 B 639, 15 Bom L R 340 19 I. C. 788.

——an application by the parties to the suit requesting the court to dispose of the suit on the ascertainment of a simple fact is to be dealt with under Or 23, R 3 as it is not in the nature of a reference to arbitration 23 C L J 482 · 34 I. C 220

——proceedings under R 17, Sch II of the C. P C. can be *compromised and a decree passed thereon* 27 P. W. R 1914: 69 P L R 1914 23 I C 591

——an agreement to refer to arbitration together with the award can be treated as an adjustment A simple agreement to refer cannot be so treated. 36 M 353 21 M. L. J 990. 1911 M. W. N. 249 12 I C. 372.

——a private reference to arbitration in pending suit followed by a lawful award is lawful agreement amounting to an adjustment 1912 M. W. N 1091 ; 23 M L J 290 12 M L T. 133 : 16 I. C 478

——when the arbitrators go beyond the scope of the reference and pronounce an award the excess portion can be enforced in a separate suit as an agreement of parties. 92 I C 847 : 1926 M. W. N 1: 1926 Mad. 366

(5) Compromise by some of the parties

a compromise between the plff. and some of the defts. cannot affect the position of other defts 2 Pat. L T. 471, 45 I C. 33 (c)

——an assent to a compromise should be given by all the parties in court 1923 Lah. 4 ; 69 I. C 395

——where a compromise has not been assented to by all the parties it is contrary to law and the court is justified in refusing to

compromise the other can object to its being recorded and show proper grounds 85 I. C 678 : 1926 Cal. 193.

(5) Compromise by some of the parties—*contd.*

——a compromise in which all the parties are not represented cannot be given effect to by court. 51 C 432: 124 Cal 722.

——but so long as any compromise is between the parties to a suit who are *sui juris*, the court will not be called upon to decide the question whether such compromise may not affect persons who are not parties to the suit and who are not *sui juris* 55 C 210: 104 I. C. 219 1927 Cal 870.

——a compromise entered into by some tenants out of those holding undivided shares in land might not be given effect to by the court, in as much as rent could not be decreed at different rates against different tenants 50 I C 363 (c)

——absent respondents are not bound by the compromise arrived at in appellate stage 19 I C 915 (c)

——where a plff compromised his difference with some of the defts and prayed for withdrawal of suit the proper order of the court to pass would be one of dismissal for want of prosecution 20 C W. N 752, 34 I C 186

——in an ejectment suit compromise with one of the defts is legal and it will not be affected by the result of the suit 62 I. C. 933, 2 Pat L T 471

——in a partition suit no decree can be passed on compromise between some of the parties and such decree if passed cannot bind the persons not parties to the compromise 27 I. C. 243, 13 C. L. J 16: 9 I C. 210.

——a decision in an execution proceeding of a question properly arising for consideration is final even when it is made with the consent of some of the parties and on adjudication as to the others. 24 C. W N 267

(6) Compromise by way of compounding a non-compoundable offence.

——compromise of non-compoundable case,--terms there-under or any bond in consideration thereof, cannot be enforced, 16 C W. N 854, 18 C. W N. 192 n, 19 C. W. N 383, 20 C. W N. 760.

——it may be compounded with the person aggrieved and a contract may be entered into with him, (in this case aggrieved person was dead) 37 M 385

——when the complaint is both under compoundable and non-compoundable secs., but the accused is summoned under compoundable sec it may be compromised 20 C W N 44n

(7) Compromise decree.

——compromise decree in title suit is admissible in evidence in rent suit to prove rent stated therein 13 C. W. N. 217.

——compromise in contravention of sec. 29 B. T. Act is a nullity. 17 C. W N. 496

(7) Compromise decree—contd.

——a compromise decree in scheme suit *i. e*, under s 92 C. P. C. is not binding on others *i. e.*, the public. 55 C. 519 : 32 C. W.N. 482 : 108 I. C 361 : 48 C L. J 55 : 1928 **P. C.** 16 : 26 A. L J. 462 : 30 Bom L. R 744 P C

(8) Compromise-deed.

——is admissible without registration. 38 B. 576.
For other cases see below.

(9) Compromise of matters outside suit.

(i) *It is binding and does not require registration when it is acted upon by the Court.*

——the provisions of sec 17 of the Registration Act do not apply to proper judicial proceedings filed by the parties whether consisting of pleadings or of orders made by the Court 2 C. W N 129 20 A 171 25 I A 9. **P. C.** The same view has been expressed in 3 C W N 485 : 22 M. 508. 26 I A 101 **P. C.** and followed in 28 A. 78, 29 M 365, 2 C. W. N 663 and in 12 C W. N. 849

——a *razinama*, in so far as it is submitted to and acted upon judicially by the Court, is in itself a step of judicial procedure not requiring registration Any order pronounced by the court in terms of the *razinama* constitutes *resjudicata* binding upon the parties, who gave their consent to it Where there was an agreement with respect to matter outside the suit and a separate *razinama* with respect to the subject-matter of the suit and the Court gave effect to the *razinama* only the agreements was not admissible If the decree had referred to or narrated the terms of the agreements it would have been judicial evidence. 3 C. W. N 485 22 M 508 : 26 I A 101 **P C.**

——a *razinama* does not require registration in so far as its stipulations and provisions are incorporated with and given effect to by the order of the Judge, but in so far as the *razinama* is not submitted to and acted upon judicially by the Judge it requires registration. 29 M. 365 p 366.

——where in a suit on *Baki-khata* accounts a decree was made [illegible] the payment of certain sum by [illegible] eclared that certain immovable [illegible] of compromise shall be hypo- [illegible] money and that the defts. [illegible] icumbrance on the same, held that having regard to cl. (i) (which exempts decrees and odrer of court and awards from the rule as to compulsory registration) of s. 17 Registration Act the latter clause, even if it amounted to a mortgage, would not require registration. 35 C. 837 : 12 C. W. N. 849 : 7 C. L. J. 492.

(ii) *It is binding and does not require registration when it forms part of the consideration for the compromise.*

——a decree passed on compromise which contains terms other than those in the suit is not *ultra vires* ; if those other conditions are the considerations for the compromise of the subject-matter

(9) Compromise of matters outside suit—*contd.*

of the suit, they must be incorporated in the decree. 35 C. 837: 12 C. W. N. 849; 7 C. L J 492

——the decree passed on a compromise cannot be regarded as *ultra vires* simply because it goes beyond the subject-matter of of the suit and contains conditions, because if those conditions are considerations for the compromise they must be incorporated in the decree 5 C W. N. 485, 34 C 456, 2 C. W. N 663, 28 A. 78, 1917 Pat 161, 181, 28 A. 78

——a decree passed on a compromise cannot be regarded as *ultra vires* simply because it goes beyond the subject-matter of the ... the terms of the compromise ... it, form, directly or indirectly, ... 88 I C. 648. 1925 Mad 1101:

——anything which forms part of the compromise but is ...

suit

solen

581:

43: 4

——a *solenamah* recording certain agreement between the parties as to how they settled the dispute and for which another document would be executed is a writing by way of memorandum only ...

need

able;

——a composition deed need not be registered 19 C W. N. 91, 38 B 576

(iii) *It is not admissible when it does not form part of the consideration.*

——a petition of compromise so far as it relates to properties ...

71 p. 72.

(9) Compromise of matters outside suit—*contd.*

——comprmise decree in a partition suit with respect to : extraneous to the suit does not operate as *res judicata*, and it relates to a matter to be written and registered, it is inope: 48 C. 1059 66 I C 705 1924 Cal 49 : 25 C. W. N. 990, 51 I. C 31 P. R. 1919

(iv) *How to determine whether it forms part of the conside*

——the questions whether any particular term of a p of compromise incorporated in compromise decree relates suit or is covered by its subject-matter, must be decided the frame of the suit, the relief claimed and the relief allow the decree on adjustment by lawful agreement The the relief granted by a c for consideration in each ie relief is within the scope 7 C. L. J. 492.

——this principle explains the contrary view enuncia the cases of 1 C L J 388 and 5 C L J. 611 wherein it wa that the consent decree is not operative with respect t

23 I C 581.

(v) *How for extraneous matter should be incorpora the decree.*

——where a compromise is not within the scope of the s decree can be made to give effect thereto under or 23, r. proper course to follow is to recite the compromise in the therewith only Cal 485 P C, . 675, 3 P. L

——when the claim is beyond jurisdiction of trial it is not competent to the court to pass a compromise 1922 M. W. N. 83 , 66 I C 837 16 L. W. 155.

ecree 47

485 P. C. *Ref.*

(vi) *It may operate as estoppel between the parties*

Bom. L R 420 . 19 C W. N. 290 : 28 I C 930 · 13 A. L. J.

——a compromise decree constitutes an *estoppel by mat record* between the parties to the compromise though it rel

(9) Compromise of matters outside suit—*contd.*

matters outside the suit, 33 M L J. 615 : 1917 M. W N. 751 : 42 I. C. 223 : 1919 M. W. N 356 : 53 I C. 354

(*vii*) *It is admissible as agreement for a lease when there is no present demise*

——a consent decree in so far as it relates to properties other than the subject-matter of the suit in which the decree is made is not operative to affect such properties but the partition of compromise which recognised the purchase of a non-transferable holding determining the rent was held to be admissible in evidence as indicating the existence of an oral agreement to grant lease 16 C L. J. 71, (2 C L J 343, 11 C L J 543) *fol.*

——such a compromise petition which does not operate as a present demise but is only agreement for a lease may be admissible in evidence to prove the contract to grant lease 19 C W N. 347 (17 M. L. J 218, 14 C W N 65, 39 C 663) *fol*, (9 B 63, 10 B 101) *not fol.*

——petition of compromise containing a recital of previous oral agreement for lease need not be registered. 12 C W. N 59

(*viii*) *How far such decree can be executed*

——where a compromise contains matters outside the scope of the suit and the court orders "it is ordered that the suit be dismissed in accordance with the terms of the *solenama* and the parties [illegible] the order must [illegible] bility of all the [illegible] C W. N 68 *fol.*

——in a testamentary suit the terms of compromise within the jurisdiction of the testamentary court can be enforced but the decree may embody all the terms in a schedule for reference in separate proceedings 69 I C 344 24 Bom L R, 1286.

——a compromise decree cannot be executed with respect to matters extraneous to the suit but it may be evidence of agreement 62 I. C 653

(*ix*) *Compromise petition in criminal court if binding*

——an undertaking given in proceedings under s. 145 Cr. P C not to plant trees in a grove, to remove new trees planted therein and to abstain from digging holes, is not a compromise which requires registration 85 I C 585 1225 All 605.

——compromise petition filed in criminal court providing for enhancement of rents is not admissible without registration If the petition had been filed in a civil proceeding and had been followed by an order or decree which embodied directly or indirectly its terms, then it would not have been necessary to have had it registered. 35 C 1010 12 C W N 854 8 C. L. J 90, (3 C. W.N. 485 : 22 M. 508 P. C, 30 C 783, 1 C L. J. 388) *Ref.*

(10) Compromise petition.

——compromise petition to lease is admissible. 17 C W. N. 347 : 37 C. 808

(10) Compromise petition—*contd.*

——compromise petition relating to properties other than th[illegible] in suit is not admissible 16 C L. J. 71 : 19 C. W. N 347, 36 M. [illegible] 2 C. L J. 343, 11 C. L. J 543 *contra*, is evidence of title, 1917 P[illegible]

[illegible]

[illegible] ...transfer [illegible] 19

——compromise petition is admissible to prove the oral agre[illegible] ment to grant lease. 16 C. L. J. 71, 39 C. 663 : 19 C. W. N, 347.

——compromise petition filed after decree in a mortgage suit regards interest and adjustment which the court accepts, is admis[illegible] ble 17 C W. N. 565.

——compromise petition filed in criminal court as regards inc[illegible] ment of rent, but court making no order upon it, is not admissib[illegible] 12 C. W N. 854 32 C. 1010 : 8 C. L. J. 90 : 30 C. 783 : 22 M. 5[illegible] *contra*. is admissible. 23 C. L. J. 563

——compromise petition reciting mortgage deed may be used a[illegible] evidence when mortgage bond is not forthcoming. 21 C. W. [illegible] 265, **P C.**

——compromise petition is not *res judicata* with respect to pr[illegible] perties other than in suit. 36 M 46, 34 C. 456, *Dist* 27 C. L J 583

——alternative terms in compromise petition must be give[illegible] effect to. 23 C. L J. 483.

——settlement of a dispute or of a doubtful claim is a valid an[illegible] binding agreement which a party cannot deny 21 C. L J. 8.6.

——compromise by next friend on behalf of an infant with th[illegible] sanction of the court cannot be set aside. 11 C. W. N. 178 **P. C.**

(11) Compromise, validity of.

——the compromise must be lawful. 26 M. 31, 23 M. 101.

——it does not include a mere agreement of one party to b[illegible] bound by the oath of another party, 2 M. 356, 22 M. 234, nor a[illegible] arrangement that decree or dismissal will depend upon what wa[illegible] stated in a document in the possession of witness. 14 A. 141.

——a compromise decree [illegible] the provisions o[illegible] the B. T. Act cannot be executed [illegible]

——an adjustment which [illegible] which the court was not asked [illegible] the provisions of this rule. 4[illegible] P. C. 178 **P. C.**

——an arrangement entered into after decree for payment o[illegible] the sum decreed in instalment is not binding and limitation for exe[illegible] *cution of the decree runs nevertheless.* 72 I. C. 477.

——a compromise arrived at under undue influence, coercion or compulsion is good so long as it is not avoided. It can be avoided only by regular suit. 85 I. C. 557 : 1925 All. 266.

(11) Compromise, validity of—*contd.*

——a consent decree wrongly passed owing to some legal or technical defect is not a nullity. The court has jurisdiction to pass a right as well as a wrong decree, the wronged party can only take the course prescribed by the law for setting matters right. 61 I. C. 439, 32 M. L. J. 434 *fol.*

——the court can by virtue of its inherent powers under s. 151 C. P. C. set aside a compromise decree obtained by fraud. 6 Pat. 108 : 105 I. C. 271 1927 Pat 354, 35 A. 331 *Rel. on.* 34 B. 408 *fol.*

——an instalment mortgage decree based on compromise though not in accordance with the provision of the Tr. P Act, can be executed by the sale of the property 34 C. 886 : 6 C L J. 95 11 C W. N 879

——a decree passed upon compromise petition filed by pleader having no authority is *ultra vires.* 34 B. 403, 5 I C. 968, 12 Bom. L R. 223

(12) Court's duty.

——under Or 23, R 3 no option is left to a court to examine the terms of a compromise beyond saying whether the agreement is lawful or not An agreement which carries a penal clause such as may be covered by s 74, Contract Act, is not in any sense of the term "unlawful" and hence it must be recorded and decree passed in terms thereof. 91 I C. 790 · 24 A L J 210 1926 All 278

——it is incumbent on the court to pass a decree in terms of compromise only when it is lawful 38 C L. J. 272, 51 C 432 1924 Cal. 722

——Or. 23, R. 3 which deals with the court's power to record compromise restricts the court's power to only such agreements as are "lawful". 90 I C 378.

——a compromise should be recited in the decree in its entirety. 38 C. L. J 72.

——compromise should be recorded though one party denies, or wishes to withdraw, or objects to enforcement 16 B

——when one party denies the court must take evidence on the question of compromise. 13 C. W N. 1023 6 M L. T. 93, 38 A. 75, 80.

——a decree under Or. 23, R. 3 can be passed only after there has been an order that the compromise be recorded. It is not a mere matter of form and a consent decree passed without such order is liable to be set aside on appeal notwithstanding the bar under s. 96 (3). 43 C. 85, 33 I C 769, 212 P L. R. 1914 . 96 P. R. 1914 · 24 I. C. 630, 41 M. 233, 6 Pat 108 : 105 I. C. 271 1927 Pat. 354

——an order of court adjourning a case and incidentally noting the fact of an agreement made out of court between the parties as a ground of adjournment is not a record of the compromise. 29 I. C. 860.

——when both parties agree the court cannot refuse to record the compromise. 22 B 238, but it shall refuse when the terms are against public policy, 38 M 850, and shall not execute such decree. 26 M 31.

(12) Court's duty—*contd.*

——a decree under this rule can be passed only after an order is made directing the compromise to be recorded as the order is appealable. 43 C. 85.

——a court making a decree by consent is performing a judicial

——on an
a pending suit
the court can
in accordance
C W N. 366

——a court must be satisfied before sanctioning a compromise to which a *pardanashin lady* is a party, that terms were understood by the lady and she acted on independent advice. The term of settle 18 I C 611.

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filed be
866, 19
C. 908;

(13) Effect of compromise.

——a consent decree binds the parties to suit until it is set aside just as much as if it had been passsd after contest. 40 M. 177 : 30 M. L J. 274 34 I. C 57 : 1916 M W. N. 43.

——a party who is present in court at the time of compromise but does not object to it is bound by it though he has not signed it, specially when he gets some benefit under it. 25 I C. 874 . 542 P. L. R 1914 : 139 P. W. R 1914

——a consent decree cannot be challenged on the ground that it is erroneous in law, nor on the grounds on which a contract can be impeached 36 M. 75 : 9 M. L. T. 487 : 21 M. L. J 709 . 9 I C. 875, 29 I. C 854 *fol.*

——a compromise is a binding agreement between the parties and none the less so binding, because followed by a decree 21 I. C. 538 . 18 C. L. J. 187.

——when the rights of both the parties are considered the compromise will be binding even if one of the parties was under a misapprehension as to his rights 24 I C. 491, 31 M 474 *fol.*

——an arrangement entered into after decree for payment of the sum decreed in instalment is not binding and limitation for execution of the decree runs nevertheless 72 I. C. 477.

Or. 22, R. 3, (13) Effect of compromise—*contd.*

——*where the court refuses to pass a decree in accordance with* the compromise because all the parties are not represented it would not prejudice the rights of the parties to enforce the agreement in other proceedings. 51 C 432 : 1924 Cal. 722.

——where a compromise is effected between parties to a suit who are major the court need not consider its effect on minors on the record. 55 C 210 104 I C. 219 · 1927 Cal 870

——a compromise in a suit for enjectment under which the deft is to hold the land in dispute as under-raiyat of the plff. and is not liable to be ejected, is admissible in evidence and binding equally on both the parties. 57 I. C 751, 47 C. 485 P. C. *fol*

——a consent order is an order of the Court carrying out the agreement between the parties A contract of the parties is not the less a contract and subject to the incidents of a contract because there is super-added the command of the Judge A consent decree is just as binding on the parties thereto as a decree after a contentious trial but it cannot have greater validity than the compromise itself. 29 I. C 156 . 19 C W N 565

——a contract of a compromise which has passed into a decree is governed by the same principles as are applicable to the construction of contents 10 M L T. 326 . 1911 M W N 327 · 12 I C 334

——a judgment by consent operates as a waiver of any defect in the process or pleadings or irregularities in the proceedings, provided it does not go to the jurisdiction 35 M. 75 9 M L. T. 487 : 21 M. L. J. 709

——where payment within certain date is prescribed by the compromise decree and in default forfeiture is provided the court is to see whether time was the essence of the transaction ; if not, time may be extended 2 Pat. 906 : *contra*. 47 Bom. 607 · 25 Bom L R 328 : 1923 Bom 441.

——where the compromise is not within the scope of the suit it cannot be given effect to under this rule 38 C L J 72.

——the compromise must be taken with all its incidents. 24 M 265.

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tentious tr [illegible]
itself. 33 C [illegible]
565 : 35 M [illegible]
266, 19 C [illegible]

——a consent decree which is passed in part on an unlawful agreement and is consequently set aside in part, will not necessarily be maintained as to the remainder the test is whether the transaction is divisible 11 C L J 346.

——where in a prior suit for rent between the parties a compromise decree was passed but not embodying the terms of the compromise it did not operate as *res judicata* as to the rate of rent. 87 I. C. 781 , 1925 Cal. 1011.

——where under the compromise decree the respondent undertook to *deliver possession together with rent and p*

Or. 23 R. 3, (13) Effect of compromise—*contd.*

accrued he must be held to hold the property thereafter in fiducia capacity. 1 Pat L. R 145 : 73 I C 359.

——where a prior suit is dismissed on compromise a subseque suit under a different right is not barred. 28 Bom. L. R. 1507 · I C. 814 · 1927 Bom 87.

(14) Execution proceeding

——the *provisions contained in Or. 23, R. 3, relating* to adju ment of suits do not apply to execution proceeding. 1925 Oudh 1 72 I C. 477 : 1924 Cal 342, *contra*. below.

——Or 23, R 3 is inapplicable to execution proceedings. I. C 164, 97 I C. 763.

——but where the application for execution is dismissed consequence of the compromise the Jt. Dr is estopped from denyi the compromise, 13 I C 81

——*the proceeding under Or. 21 r 90 not being a proceeding* execution the court has power to record or inquire into an alleg compromise entered into privately between the parties 6 Pat. L 253 : 2 Pat. L. T 2/3 62 I C 608

——*a decision in an execution proceeding of a* question prope arising for consideration is final even when it is made with consent of some of the parties and on adjudication as to the othe 24 C W. N 269

(15) Guardian's authority to compromise.

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48 C 4
21 M W

——compromise by next friend on behalf of an infant with sanction of the court cannot be set aside. 11 C W. N. 178. P. C

(16) Mortgage suit.

——the proceedings after a preliminary decree in a mortg suit are proceedings in a suit to which Or. 23, R. 3 applies I C. 399

——the court may give full effect to a consent-decree in mortgage suit. 2 Pat. L. T 38 58 I. C. 298

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Bom. 303

——if the preliminary decree is satisfied in part out of co the court in finally taking accounts will take this payment consideration and Or 34 R. 5 cannot prevent such an adjustme 40 I C. 138 : 2 Pat L. W. 66 : 2 Pat. L. J. 533.

Or. 23 R. 3, (16) Mortgage suit—*contd.*

——the mere fact of an oral compromise having been come to cannot supersede the mortgage unless the court accepts it and passes decree accordingly. 12 A. L. J 672 : 24 I. C. 93

——a compromise between a mortgage and his prior mortgagee which affected the puisne mortgagee is not lawful. 38 C L J. 272, 1924 Cal. 159.

——an instalment mortgage decree based on compromise though not in accordance with the provision of the Tr. P. Act. can be executed by the sale of the property. 34 C. 886 ; 6 C L J. 95 . 11 C. W. N. 879

——a mortgagor may waive a final decree by compromise before execution 27 C. W. N. 621.

(17) Pardanashin lady, compromise by

——a tadbidkar of a pardanashin lady cannot compromise a case on any terms he thinks fit and thereby bind the lady 41 C. L. J. 213

——the authority to compromise a case on behalf of a pardanashin lady must be proved 41 C. L J 213.

——the rule of English practice about counsel's inherent power to enter into a compromise which had its root in different traditions and environments, was not applicable in this country particularly in the muffisil and specially where *pardanashin* ladies are concerned. 29 C. W. N. 527 . 41 C L. J. 213 88 I. C 369 : 1925 Cal 866.

(18) Partition suit.

——in a partition suit if the plff has agreed to the terms of a compromise with the defts he cannot withdraw the suit. 49 B. 672 . 89 I. C. 984 : 1925 B. 425

——a partition of joint property cannot be effected by a compromise as between some of the co-owners and a decree based on such a compromise does not bind the persons not parties to the compromise. 37 I. C 242 (c).

——a decree cannot be passed on compromise among some of the parties in a partition suit 13 C L J. 16 9 I. C 210.

——the court cannot partition without giving notice to the defts. who have compromised 1923 P. 393.

(19) Pleader's authority

——compromise of suit by pleader under the authority given in the vakalatnama is binding on the party. 19 A. L. J 63 : 60 1 C. 912.

——counsel has general authority to compromise 27 C. 428 : 4 C. W. N 169.

——when a counsel or vakeel compromises, a presumption arises that he has done so with client's consent. 6 C. W. N 82.

——a decree passed upon compromise petition filed by pleader having no authority is *ultra vires*. 34 B 403 : 5 I. C. 963 : 12 Bom. L. R. 223

Or. 23, R. 2, (19) Pleader's authority—*contd.*

——pleaders unless specially authorised have no authority to compromise. 2 N. W. P. H. O R. 148.

——a compromise effected by parties but reported to the court by pleaders of both parties is binding on the parties. 12 L. W. 562 : 60 I. C. 22 : 12 L. W. 562.

——a court of justice is not bound by the unauthorised act of counsel and is not deprived of its general authority over justice between parties. The rule of practice in England which has the [illegible]

——an Advocate of H C in the course of conducting a case is clothed with authority to compromise a suit in court in which he [illegible]

1925 P. 232.

——where a compromise effected by the parties is conveyed to the court by pleaders on both sides the parties cannot object on the ground that the pleaders had no such authority. 60 I C 22 12 L. W 562.

——unless improper conduct or fraud or collusion is imputed to the pleader his action cannot be challenged by his client when the latter has empowerd the former under a *Vakalatnama* to compromise the suit 4 Pat. 766 : 92 I C 179 : 7 Pat L. T. 362 : 1926 Pat. 73.

——where the parties assented to the terms of compromise but no further vakalatnama was filed the court should not disturb the compromise. 44 M. L. J. 453 . 1923 M. W. N. 734 : 33 M L T. 294 P. C.

(20) Probate proceedings

——a compromise of probate case is binding only on the parties thereof 23 C. L. J. 82 : 33 I. C. 273.

——a compromise in a probate case only makes the case non- [illegible] court's duty to grant or [illegible] his agreement to com- [illegible] of the execution of the [illegible] rawal from contest on [illegible] in accordance with the terms of the compromise but probate in common form should be granted 20 C W. N. 985, 1 Pat. L. J. 377 : 37 I. C 12 : 1 Pat L. W. 41.

Or. 23, R. 3, (21) Public matter, compromise of.

——a compromise decree in scheme suit i.e. under s. 92 C. P C is not binding on others i.e the public. 55 c 519 : 32 C. W. N. 482 : 108 I. C. 361 : 48 C. L. J. 55 : 1928 P. C. 16 : 26 A. L. J. 462 : 30 Bom. L. R. 744 P C.

——a *bona fide* compromise by the trustee of a public trust, relating to trust properties, is a lawful compromise. 60 I C. 22 : 12 L. W. 562, but an agreement by which a *Mahant* agrees to transfer the property of the *Mutt*, for no necessary purpose is not a lawful agreement and cannot be enforced under R. 3. 106 I C. 645 : 9 Pat L. T. 214.

(22) Revenue proceeding

——Or. 23, r. 3 applies to civil as well as revenue proceedings. 39 I. C 545 21 O. C 346

(23) Talk of compromise, admissibility of.

——statement made by a deft in talk of comprise is admissible and it binds the co-deft if there be joint liability 25 C L. J. 42 : 20 C. W. N. 117, 21 C. W. N 996.

OR. 24, RR. 1—4. DEPOSIT

——Or. 24, RR. 1, 2 and 3 do not apply to execution proceedings Previously they would seem to apply to original suit in which to save costs an opportunity is given to the deft to deposit so much of the claim as he admits and in such case the plff will not be allowed costs 1927 Cal 72 97 I. C 479.

——where the amount deposited in court in execution might have been, immediately on deposit, paid out to the decree-holder in part discharge of his claim, the Jt Drs. were relieved from paying any interest on that amount, on the analogy of Or. 24 rr 1. 2 and 3. 40 A. 125 43 I C 520 16 A L. J 15

——where the amount of claim has been deposited in court the court has got a discretion as to the disposal of costs 13 I. C 200 · 1911 M. W. N. 558.

[illegible] deposited [illegible] gor subse- [illegible] the date [illegible] M L J.

——where the deft does not deposit the admitted amount in court the running of interest on plff's claim is not stopped. 32 C W. N. 1082 . 107 I. C 525 1928 Nag 173

OR. 25, RR. 1—2 SECURITY FOR COSTS.

[illegible]

Rang. 244 : 2 Bur. L. J. 78 . 75 I. C. 309.

Or. 25, Rr. 1—2 Security for costs—*contd.*

——temporary residence out of British India for the purpose the suit. 46 B. 589, 1922 Bom. 299, 64 I. C, 703.

——an inhabitant of foreign territory, such as Hill Tipper must give security even though the deft. is also a resident in forei territory, 12 W. R. 465.

——the British Cantonment of Secunderbad was held to out of British India. 21 C. 177 and the Cantonment of Wadhw was held within. 9 B. 244

——the exercise of the power is discretionary regard being h to the circumstances of each case 17 C. 610, 21 C. 283, 3 C. W. 753, 23 B 100.

——a suit for money is wider than a suit for debts as suit i damages or money value comes within the rule. 17 C. 610, 613.

——though courts will not require security because the pl is a pauper or because he is a mere trustee they will do so wh they find that he is not the real litigant but a mere puppet in t hands of another. 14 C 533, 2 C 233.

——the dismissal of a suit under this rule does not bar fresh suit, 26 B 637, 6 B. 482, before dismissal notice must be serv 5 C. 265.

——where the plff's suit is dismissed the deft. is not bound proceed against the plff. first but can straight enforce the sure bond. 92 I. C 546 : 1926 All. 657.

OR. 26, RR. 1—18. COMMISSIONS

(1) **Commission to take down deposition.**
(2) **Commission for local investigation.**
(3) **Commission for partition.**
(4) **Commission to ascertain mesne profits.**
(5) **Commission to take accounts.**
(6) **Commissioner's power**
(7) **Commissioner's report.**
(8) **Commissioner's fees.**
(9) **Evidence taken down by commissioner.—procedu and use.**
(10) **Examinations of Commissioners**
(11) **Local inspection or local investigation by court.**

(1) Commission to take down deposition.

(When commission should be allowed.)

——under order 26 r. 4 C P C the court has discretion to gra or refuse a commission but it must be exercised judicially considerin all matters. 39 C. L J. 598 1924 Cal. 971 : 84 I. C. 9.

——when a trial court exercises discretion to issue commissio being satisfied that the person is sick and unable to attend court, cannot be revised under s. 115 C. P. C., 32 C. W. N. 128 : 106 I C. 880 1928 Cal. 421.

——but an order for examination of a witness can be made onl on the grounds mentioned in the C. P. C. and when such orders ar

Or. 26, RR. 1—18. Commission to take down deposition— *contd*

issued otherwise than on those grounds it is a proceeding without jurisdiction and may be set aside in revision. 1927 M. W. N. 218: 1927 Mad 524, (31 M 60, 39 C. L. J. 98, 42 B. 136) *rel on* 1922 M. W. N. 524 *Dist.*

——where an application is made for the examination of witness on commission and is opposed, it resolves into a question as to whether a court can be said to have acted within jurisdiction in taking away from a litigant the rights which he undoubtedly has under the law of having witnesses brought before the court and examined before the court in accordance with the normal procedure. 39 C. L J. 598: 1924 Cal. 971 . 84 I. C. 9, 19 I. C. 643 (c)

——the case of a plff stands on a different footing and it is an extraordinary thing to pass an order for the examination of a plff. on commission. 3 Pat 863 84 I C. 993 6 P. L T. 520: 1925 Pat. 125

——the court should not allow witnesses to be examined on commission without adequate reason. The grounds upon which the courts can issue commission to examine witnesses are ordinarily those specified in R. 1, 47 B. 136 . 43 I C 729 . 20 Bom. L R. 1, 12 I. C 74: 21 M. L. J 889.

——it would be unfair to compel a deft. who resides at Colombo to come to Cuttack where a suit for account has been instituted against him, to be examined in court or practically to abandon his defence. He should be examined on commission. 16 I C 750 (c).

——where the deft was living more than 200 miles away in a Native State and was his own sole witness and applied for commission his application should be allowed, 73 I. C. 923 1924 Lah 475.

——evidence taken on commission should only be permitted to be used when the witness is proved to be too ill to give evidence in court or is absent for other sufficient reason 28 C W. N 327: 39 C L. J. 165

——when the deft all along insisted upon the presence of the plff in Court, it is for the plff. to show that he was beyond the jurisdiction of the Court at the time when the evidence was going

——when the case comes on for trial the mere fact that a commission had been ordered will be no reason whatever to look at it unless it is found that at the time of hearing, sickness or infirmity or other reason prevented him from giving his evidence in court 53 C 718 . 32 C W. N. 128: 106 I C. 850: 1928 Cal. 421. 36 C. 566 *Ref.*

Or. 26, Rr. 1—18.' Commission to take down depositi- contd.

——the word "may" in Or 26 r. 1 and 4 means "is g authority to". When the witness lives outside the limits under Or. 16 r 19 (b) a commission should issue as a matter of r 46 M. 574 : 1923 M. W. N. 157 1923 Mad. 321 : 44 M. L. J. 71 I. C. 530.

——when the deft. is his own sole witness and lives more 200 miles away the application to examine him on commission sh be allowed. 73 I. C 923.

——in cases under ...
an application by the .
himself and that by th
who are ordered to att
parties to suits, but Or 2
give evidence. 35 C L .

(Pardanashin lady.)

——a *pardanashin* lady has no right to be examined on com sion at a place of her own choice 48 C 448.

——a Hindu lady appearing in public may have the privi of being examined by commission 22 C. W. N. 147, 197.

——a pardanashin lady who had appeared personally in Police Court was allowed to be examined on commission in Civil Court. 3 C W N 753

——a *gosha* lady who according to the custom of the commu is not allowed to appear in public should be examined on com sion. 86 I. C. 513 1923 Mad. 905

(Place of examination.)

——the C. P C. ... as to the pl
where alone a witness
of an old and weak
commission at his own

(Objection)

——objection as to jurisdiction to take down deposition must taken at the earliest opportunity otherwise it will be considered have been waived, 33 C L. J 577

(2) Commission for local investigation.

——a commission for local investigation cannot be issued af the evidence is closed and the case is ready for judgment I. C 399.

——an application for local investigation was made on the d set down for trial and the court dismissed it as being too late, h that the discretion vested in the court was properly exercised a cannot be interfered with in second appeal 13 I. C 194 (c)

——the court can impose any terms that it chooses as a co dition precedent to the granting of a prayer for local investigati 1927 Cal. 907 : 104 I. C. 114.

Or. 26, Rr. 1—18. (3) Commission for partition.

——an application for the appointment of a commissioner to divide the properties after the passing of the preliminary decree is an application in suit and not in execution. 52 I C. 614

——the essential difference between a comissioner appointed to effect a partition and an arbitrator is that the former is appointed by the court to which the party has no choise whereas the latter is selected by the parties to which the court has no choice. 95 I. C. 321 · 7 Pat. L T. 729 : 1926 P H C. C 161.

——an order of court approving of the allotment and division made by a commissioner for partition is binding upon the parties even though a fresh decree was not passed in accordance with the commissioner's report 14 M. L T. 157. 20 I C. 908 : 1914 M. W. N. 144.

——a casting of lots for the purpose of allotting shares to the parties is not opposed to Or. 26, R. 14, 29 I. C. 245 ; 2 L W. 430.

——no appeal lies against on order of court confirming or varying a report of a commissioner made in a partition suit under Or. 26, R. 14 (3) 91 I C 317

(4) Commission to ascertain mesne profits.

——a *Commissioner for the ascertainment of* mesne profits may rely on the local inspection but he must record evidence of witnesses 47 M 800. 1925 Mad. 145 48 M. L. J 89 92 I C 133 1925 Mad 145.

——the H. C refused to interfere in revision with an interlocutory order of the lower court directing a Commissioner to ascertain mesne profits as the applicant had a remedy by way of appeal from the final decree 74 I C 812. 31 M L. T 180 · 1922 M. W. N 562 1923 Mad 43

——Commissioner for ascertaining mesne profits may rely on local inspection but must record witnesses' evidence. 92 I. C. 133.

——where a successful appellant prayed for restitution with regard to the period for which he was out of possession and the Commissioner was appointed to ascertain the amount of mesne profits, he cannot enter into the question of possession 9 Pat. L. T. 258 : 1928 Pat 278 109 I C 641.

(5) Commission to take accounts.

——it is not open to any principal who has got all the accounts of his agent in his possession to employ the machinery of the court for examining his accounts on the off-chance of making his agent liable for any sum which on such examination may be found due from him 52 C 766 · 90 I C 944 1925 Cal. 1069

——it is contrary to the spirit of Or 20 r 16 C. P. C. to authorise a Commissioner to determine not merely the *quantum* but the *factum* of liability of an agent, a matter which falls entirely within the *province of the court* When the order for examination of the account is made without proper findings or materials the decree is not justified 52 C. 766. 90 I. C. 944 1925 Cal. 1069.

Or. 26, Rr. 1—18. Commission to take accounts—contd

——in a suit for accounts the proper course is to try the sui order to determine first if the defendant is liable and if that established, to direct accounts to be taken. 87 I. C. 764 (c)

——definite lines of work of the Commissioner should be l down for his work. 91 I C. 766.

(6) Commissioner's power.

——a case cannot be referred to Commissioners to try on me 17 C W. N. 369, 16 M 350

——a court cannot delegate all its powers and function in matter of taking evidence and determining issues to Commissio 89 I C. 333, 52 C. 766 : 90 I C. 944

——the court cannot delegate all its judicial powers to Commissioner. In a mortgage suit the most that the Commissio can do would be to investigate and report on the profits arising fi the mortgaged lands during the years in suit but he cannot be as to take the evidence as to the possession of any party or the ext of that possession. 3 Pat. L R. 136 · 89 I. C 343 : 1925 Pat. 576.

(7) Commissioner's report.

——where the result of a local investigation is unsatisfact the court is not bound to order another inquiry. It can decide case on the evidence, 50 I C 30 (c), 23 C L. J. 600 : 28 C. L. J. 2 *47 I. C. 650*

——it is within the discretion of the court to accept a repor the Commissioner. 28 C L J 203 · 47 I. C 650.

——the Commissioner's report is evidence but not binding the court ; if the report is not satisfactory the court may or another Commissioner to be appointed 7 Pat. L. T. 795 : 1926 P 462 : 96 I. C 327

—— a deft. who does not appear before a Commissioner can ordinarily object to his report. 60 I C. 434

——where a party to a local investigation which he knows be badly and carelessly carried out, goes on with the trial with su knowledge, he cannot at the last moment ask for giving fr evidence 16 I. C. 39 (c).

——the result of a long and careful local investigation sho not be interfered with except upon clearly defined and sufficie grounds 28 C W. N. 318 : 1924 Cal 623 : 90 I. C. 55 , 60 I C. 43 13 M. I. A. 607 · 6 B L. R 677, 15 W. R. 428 *Fol.*

by an Asst. Collec
T. Act cannot be a
7 and 18 of Or 26 of

Or. 26, Rr. 1—18. Commissioner's report—*contd.*

——objection to the report cannot be taken for the first time in second appeal. 9 P. W. R. 1915 · 27 I C. 598, 70 P. L. R. 1915

——a decree based on an incomplete report of the commissioner should be set aside, 1927 Lah. 736.

(8) Commissioner's fees.

——if money is not deposited in court an order passed on the commissioner's application directing payment to him is covered by sec. 36 and is a decree under s. 47, 52 C 269 : 84 I. C 724 : 1925 Cal. 57.

——the Dt. Judge has no power to disallow a portion of the remuneration claimed by a commissioner for local investigation in connection with a case pending before the Subordinate Judge. The Subordinate Judge is to deal with the matter 23 C W. N. 295 : 44 I C. 496

——the order of the court directing the parties to a partition suit to deposit the Amin's fees is not capable of execution as there is no final decree in the case. 21 I. C 191.

——It is not proper that the commissioner should be left to realise his fees by execution. The proper course is to call on the plffs to deposit the full amount in court and refuse to draw up the decree before the sum is so deposited If the deft is also liable to pay a share the plff ought to be made to deposit it in court and such sum ought to be allowed to the plff. in the decree 15 C W. N 221 : 9 I C. 313

——under Or. 26 r 15 the court has to order the parties to make the deposits for the necessary remuneration of the commissioner and as it has to be entered in the decree, it is necessary to determine the fee of the commissioner before the final disposal of the case. There is no justification for the court to open the matter of the commissioner's fees which had been fixed in the presence of the parties and paid by them after the case was disposed of, when the commissioner applied for withdrawal of the amount deposited by the parties as his remuneration. There must be some confidence reposed in the commissioners, who are pleaders and officers of the court and their reports as to the amount of work done by them can only be set aside on substantial and definite grounds 1 P. L. T. 171 57 I C. 291

(9) Evidence taken down by commissioner, procedure and use

——a commissioner for the examination of witness is entitled by law to note his observation as to the demeanour of the witness examined. 28 C. L J 306 · 48 I C 561

——70 days in examination of witnesses, 13 days in arguments, 11 days in report, involves a scandalous imposition upon the proceedings. 1917 Pat 146.

——when at the instance of one party commission was issued for taking the evidence of a particular witness and inspite of the objection of the other side another witness was also examined,

Or. 26, Rr. 1—18. Evidence taken down by Commissioner, procedure and use—*contd.*

court would be justified in ignoring the evidence of such person 47 C 583 : 59 I. C. 539

——evidence taken on commission may be read at the instance of any party to the suit, even if it is not he who applied for evidence being taken on commission. 90 I C. 64

——evidence taken on commission is a part of the record though not [tendered. 35 C. 28, 36 C 566 13 C W. N. 525, 26 C 591, *contra* it need be tendered 30 C. 999 · 7 C. W. N. 84, 9 C. W. N. 794.

——when the deft. applied to be examined on commission pending an application to set aside an *exparte decree* and the evidence having been recorded by the commissioner the case was adjourned to a certain date and the deft having remained absent on that date the petition was dismissed for default, the case fell within Or 17 R 2 and the court was not bound to consider the evidence taken on commission 47 C. L. J 467 1928 Cal. 341

(10) Examination of commissioner

——a commissioner may be examined only with permission of the court 19 C L J 87, 18 C. W. N 697.

——the court is to see the ground for examining a commissioner and it has the discretion to refuse. 28 C. L. J. 203

——parties are entitled to object to the commissioner's report and prove their objection by examining the commissioners or other witnesses 42 I C. 221 : 154 P W R 1917.

——it is against established practice to find fault with the report behind the commissioner's back and to reject it *in toto*, without his being examined and allowing him to substantiate the report. 38 I. C 491.

report of the commissioner
reason for his finding, the
be examined as a witness
858

——if objections are filed upon the report of a commissioner the objectors should be allowed to examine the commissioner to substantiate their objection by his evidence 72 P. L. R 1914 : 22 I. C. 526 : 45 P. W. R 1914

(11) Local Inspection or local investigation by court.

——r. 9 does not prohibit the local inspection by the judge himself but it only enlarges the power of the judge to issue a commission. 44 M 640 : 40 M. L. J. 554 : 29 M. L. T. 279 : 1921 M W. N. 336 : 62 I C 790 *contra* A Judge can hold a local inspection by himself only for the purpose of undertaking the evidence and for no other purpose 52 I C. 241.

——the power of a court to have local inspection does not entitle it to decide the suit purely on the basis of that. It must decide

Or. 26, Rr. 1—18. Local Inspection or local investigation by court—*contd*

the case on the evidence adduced by the parties. There is nothing in the C P C. to compel the court to leave a note of a local inspection on the record 80 I C. 292

[illegible]

on the spot 24 I. C 618.

——a court can hold a local investigation under Or. 26, R 9. and a commission is to issue only if it cannot do it itself. But the Judge making an investigation should put the result on record *for the scrutiny of the parties and he cannot use the information* obtained as a basis for his judgment though he may do so for the understanding of the evidence 15 C. L. J. 138: 14 I. C 377, 1 C. W. N. 682 *Rel.* 35 I C 344, 52 I C. 241.

——the judgment of a court based entirely on a local investigation of the judge cannot be sustained. 52 I C 241.

OR. 27 RR. 1—8, SUIT AGAINST GOVT. &c.

——it is not necessary for a plff to set forth in the plaint anything more than the facts entitling him to a decree that he asks for 83 I C 807. 1923 Lah 475

——where in a Govt. appeal the *vakalatnama* was signed by the Personal Assistant to the Collector under the authority of a Govt. order authorising such signature, held that it was not in proper form but it could be altered after the appeal was disposed of 105 I. C. 84; 39 M L T 112 · 1928 Mad 96

For other cases see, ' *C P. C S 80 notice* "

O. 29, RR. 1—3 SUIT BY OR AGAINST INCORPORATED COMPANY &C.

——Or. 29, R 1 requires that a suit against companies should be formed so as to describe them by the proper names, 43 C. 441: 22 C. L J 241 · 31 I C 35

——an unregistered body cannot sue or be sued as a corporation, all its members must be impleaded and therefore a partition of property belonging to an unregistered body without issuing notice to all its members is not binding on the members not served. 47 A. 342 23 A. L. J, 37. 86 I C. 255 1925 All. 337, 103 I C. 45.

——if a person who signs the plaint is the duly authorised [illegible]

in addition would not invalidate his act as the Principal Officer 20 C. L. J. 39 · 22 I C 674

——a plaint of a company must be verified either by the secretary or director or other principal officer of the company competent

Or. 29, Rr. 1—3. Suit by or against incorporated company &c —*contd.*

to depose to the facts of the case Attorney appointed by a company cannot verify the plaint. 100 I. C. 450.

——when a plea[illegible] must be established that [illegible] and this is generally [illegible] 1 does not abrogate [illegible] 568 · 1927 Cal. 780 22 C. 268, Expld.

——it is open to a company in liquidation to sue *in forma pauperis* through its liquidator 41 M 624 . 45 I. C. 164 : 34 M. L J. 421

——a plff is bound to serve notice according to Or. 29, r. 2 after amendment of the plaint has been made and the suit properly constituted. 43 C. 441 22 L L J. 241 : 31 I. C. 35.

——neither Or. 29 of the C P. C. nor ss. 140 and 141 of the Railways Act say anything about the manner in which a suit against a Company is to be framed The form in which a Company is to be sued is given in Sch 1 App A of the Code 2 Pat. L. T. 679. 64 I C. 125

——a suit [illegible] delivery of certain goods t[illegible] described as a [illegible] the suit was [illegible] 614 · 52 C 783

——in a suit against a Railway Company it should be sued in the name and style under which it carries on business. If a plff deliberately chooses to sue not the Company but the Agent he cannot by any decree which he may obtain bind the Company, but if upon a fair reading of the plaint it is made out that the description of the deft. is a mere error and that the Company is the real deft then the suit may proceed against the company. 90 I C. 680. 5 Pat. 128, 1926 Pat 40

——suit against Railway Company in the name of Agent, if proper 7 Pat L T. 57 5 Pat. 128 · 1926 Pat 40.

——the service of summons on a junior assistant of a company which acted as agents of the primary company is not sufficient service on the principal company under R. 2 In the case of a foreign company having a place of business within British India s. 277 of Indian Companies Act. provides for the mode of service, so Or. 29 R 2 does not apply to such service. 108 I C. 660 : 1928 Sind. 111.

OR. 30 RR. 1—10. SUITS BY OR AGAINST FIRM AND PARTNERS.

——Or. 30, R. 1 does not apply to foreign firm. 104 I. C. 94 · 1927 Bom. 428 : 29 Bom. L. R. 660.

——sub rule (3) of R- 2 does not contradict the provisions of R. 4. 48 C L. J. 357.

——if the plff. firm has not made a full disclosure of their partners, the proper procedure is not to dismiss the suit but to allow the firm to put in further declaration. 41 C. 581.

Or. 30, Rr. 1—10 Suits by or against firm and partners—*contd.*

——*where a partner is sued personally* along with the firm, he may put in a personal defence. 30 W. R Eng. 701.

——executionn of decree against partner, what is the procedure. 19 C. W. N. 1008

——r. 4 applies to a case where the suit is brought in the name of the firm, but when the su
the representative of the
appeal 28 C L J 268
suit 91 I. C 573, 28 Pun
71 I. C. 951, 29 Bom L. R

——R 4 applies to such firms as are owned by two or more persons, but where sole proprietor dies and the firms cease to exist the legal representatives should be brought on the record under Or 22, R 3 103 I. C 142. 1927 Lah 556

——when two or more persons sue in the name of a firm on a mortgage and a decree is passed on compromise and thereafter one of the decree-holders dies but the legal representative is not brought on the record, the proceeding does not abate because the suit could under R. 4 be maintained at the instance of one partner and moreover there was no existing suit after the passing of the compromise decree: 48 C L J 357

——the effect of provisions regarding suits against partner in the name of the firm is merely to give a compendious mode of describing the partners who compose the firm. In fact the partners are sued individually, the firm's name being a mere expression and not a legal entity 49 C 524 1922 Cal 408: 69 I C 885

——a suit for dissolution of partnership and for accounts cannot proceed in the absence of any partner or his legal representative 34 C. L. J. 405, 67 I C 10

——no suit lies as between partners or between firms having common partners for money or monies without asking for accounts. 34 M L J, 408: 45 I C 86 (34 M 112, 28 Mad 344) *Dist*

——each of the parties to a partnership suit is really in term plff and deft and in both capacities comes before the court. 167 P. W. R 1917 42 I. C. 436, 7 B. 167 Rel.

——where a decree is passed in favour of three partners of a firm

[illegible] Bom L R. 390 1924 B. 233

——a person who has been served as a partner under Or. 30, R 3 and has *entered appearance under protest* is *not entitled to file a written statement* on his own behalf denying that he is a partner. 54 C. 1057 31 C. W N 1004 · 1927 Cal. 758: 105 I. C. 356.

Or 30, Rr. 1—10. Suits by or against firm and partners—c

——a person may appear as defendant under protest and wh he is a necessary party should be decided by the court 23 Bo R 1219 · 64 I C. 688.

——even where an issue is raised as to whether the deft partner, it is not open to the plff. to raise alternative issues whether the deft. held himself out as partner or whether h bound to pay compensation to the plff, 50 B. 665 : 99 I C 1926 Bom 585 ; 28 Bom. L R. 1275

——where a suit is brought ... mere fact the case w the referen ... minor me need sign the reference to arbitration 5 Lah. L. J. 5 ; 1923 212 · 71 I C 734, 61 I. C 750, 25 I C. 955, 50 I. C. 471, 16 A. I. C. 363 *Ref.*

—— the fact of the owner of the plff. firm being a minor limitation 1923 Bom 3C8 . 77 I C 476

——if one of the partners returns and a stranger comes in new partnership cannot enforce the contract entered into b old nor the substitution of the name of the old partner afte period of limitation can avoid limitation . 15 S L. R. 152 : Sindh. 13 · 65 I. C 26

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nst a firm in its firm name

i liability arose at a time the firm was in existence. In such a suit writ should be se either upon a partner or at the principal place of business. 1922 390 49 C. 394 : 69 I C 236, 34 C. L. J 405 . 67 I C. 10

——one person carrying on business in the name of the cannot sue in the name of the firm A firm must consist of tw more persons and one partner can sign and verify the plaint in a by the firm 12 A L J. 1020 ; 25 I C 131

——where a firm ... name of the actual he name, the omission of suit, does not amount L R 1917 · 44 I C 283

——it is permissible in India as it is in England to sue only solvent members of a firm when a decree is sought against 41 M. 923 : 48 I C. 756 : 35 M L. J 581 . 1918 M. W. N. 796

——a suit on behalf of a partnership firm by one partne agent, is not barred by limitation When the other co partners joined as plffs the suit would be barred on the latter date 28 210 : 2 L. W. 239.

——Or 30 r. 1 does not empower one partner to refer a c to arbitration so as to bind the other partners who have not agr or joined in the reference. 91 I. C. 930 : 24 A. L J. 235 : 48 A. 2 1926 All 238.

Or. 30, Rr 1—10 Suits by or against firms and partners—*contd.*

——the provisions of Or. 30, R. 2 deal only with the case of plffs Or. 21 R 50 is not controlled by Or. 30 R. 2 (3). 51 B. 794 · 103 I. C. 256 : 1927 B. 447 : 29 Bom L. R. 921.

——a bank being a limited company can be sued only in its own corporate personality and not in the name of its manager, and if sued in name of its manager, the manager is not personally liable. 40 I. C. 549 : 1917 M. W N. 459.

——a mortgage suit by or against the firm is on the same footing as other suits relating to the properties of the firm and the service of summons on the manager of the firm is service on all partners of the firm. 12 I. C. 629.

——in a suit by or against a firm trading in different names if one of the partners be dead, it is not necessary to join the representative of the deceased as a party, since Or 30, R 4, C P C. contains a modification of sec. 45 of the Contract Act. 17 C L J 648 : 21 I. C. 509

——on the death of sole proprietor of a firm unless it carries on business which justifies a presumption that his heirs are its partners, a suit cannot be instituted under *Or. 30, R. 10* in the old name of the firm R. 10 will apply only if the business is carried on at the time when the suit is instituted 89 I C 22 23 A L. J 961 : L. R. 6 A. 553 1926 All 161

——a person who sues some of the partners in their individual capacity cannot change his front and sue for a relief against them

——the concluding words in Or 30, R. 5 lay down a definite rule of law that service on a person without notice is equivalent to service on a partner. R 7 must be read subject to R 5 and it contemplates a case where service is on the manager. 19 C L J. 531 : 19 C W N 1008, 26 I C 866

——Or. 30, R. 6 entitles a plff suing a firm to know who the persons are who constitute that firm and the information cannot be withheld The word "individually" in Or 30, R 6, is not synonymous with "in person," 105 P L. R 1918 47 I. C. 422 78 P R 1918 : 155 P. W. R 1918

——a suit by one firm lies against another firm notwithstanding that the firms have common partners. The law in India as laid down in Or. 30, R. 9 C P
parties in different capacities

——a plff. is entitled to
respect of a firm transaction
of no importance to determine the jurisdiction of the H. C., 10 I C. 895

——it can never be said a decree against the firm if *exparte* against one of the partners because he has not appeared. 26 Bom L R. 388 80 I. C 773 : 1924 Bom. 366.

Or. 30, Rr. 1—10. Suits by or against firms and partners—*contd.*

——the individual partners need not be separately served. 90 I. C. 242.

——service on any one or more of the partners or on the manager shall be deemed to be good service upon the firm. 27 Bom. L. R. 541 : 87 I. C 1051 · 1925 Bom. 331.

——when a person served under Or. 30, R 3 puts in an unconditional appearance, R. 5 comes into operation and he will be liable as partner of the firm 89 I C. 401.

——under Or 30, R. 1 C. P. C any two or more persons being liable as partners may be sued in the name of the firm. An individual partner may be sued personally along with the firm. It is not therefore correct to sue persons as partners in the name of the firm by a partner or manager. Each partner can put in separate written statement but each written statement is the written statement of the firm It is only when a person is sued personally along with the firm that he may put in a personal defence 27 Bom. L. R 993 1925 Bom 494 94 I. C. 969 : 1925 Bom. 494.

——when a partner in business refuse to join as plff. the correct procedure is to make him a defendant in the suit and not to dismiss the suit altogether. 7 L L J 280 : 26 Punj L. R. 699 : 1925 Lah. 514 · 92 I. C. 569.

——when a suit is against the partners of a firm individually and not against the partners in the name of the firm Or. 30 R. 3 does not apply. 1925 Cal 1136 88 I. C. 489.

OR. 31 RR. 1—3 SUITS BY OR AGAINST EXECUTORS AND ADMINISTRATORS.

——one of the several administrators of an estate can maintain a suit to recover rent with the consent of the other administrators who are impleaded as *proforma* defts. 53 I. C. 478.

——under s. 82 of Pro. and Adm Act and Or. 31 R. 1 of this Code none but an executor is competent to prosecute a suit as representative of the deceased 55 I C. 504 : 2 U. P. L. R. Pat. 31.

——in a suit against a temple all the trustees are necessary parties even though there is an agreement between them authorising one of them to represent the temple 1922 Mad. 405

——under Or. 31 R. 1. a beneficiary is not necessary party to a suit as he can be represented by the trustee. A *shebait* of an idol therefore can sue for possession of property belonging to the idol. 17 C. L. J 233 : 18 I. C. 969.

——but in a suit on a mortgage created by an administratrix without the sanction of the Court beneficiaries are necessary parties, the administratrix having committed a *prima facie* breach of trust. 51 B. 16 : 28 Bom. L. R. 1360 : 98 I. C. 915 : 1927 Bom. 49.

OR. 32 RR. 1—16 SUITS BY OR AGAINST MINOR &c.

(Including all matters relating to minors)

(1) Application of Or. 32 rr. 1-16.
(2) Appointment and duty of guardian.
(3) Appointment and duty of next friend

Or 32, Rr. 1—16. Suits by or against minor &c.—*contd.*

(4) Certificated guardian.
(5) Compromise of suit on behalf of minor.
(6) Continuance of guardianship and when the guardian can retire.
(7) Effect of minor not being properly represented.
(8) Execution proceeding.
(9) Limitation.
(10) Lunatic
(11) Probate proceeding
(12) Proof of minority
(13) Suit by or against major as minor.
(14) Suit by or against minor as major
(15) Suit by or against minor, procedure in.
(16) Transaction by or with guardian
(17) Transaction by or with minor
(18) Withdrawal of guardian or of suit.

Application of Or 32, rr 1-16.

——the provisions of Or. 32 relating to "suits by or against nors" have no application to execution proceedings In deterning whether a minor was sufficiently represented in the execution oceedings, courts are at liberty to look to the substance of the insaction. 35 C L J 9 64 I C 25.

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Appointment and duty of guardian

——it is obligatory on the court to appoint a proper person as ardian of the minor deft 34 C L J 293

——it is the duty of the court to see that minor's interest is operly represented, 13 W. R. 202, and is bound to appoint guarin *ad litem* 26 C. L. J 258, 39 A 8 30 C 1021 · 7 C. W. N. 4 : 30 I. A. 82, 29 A 675 28 A 137.

——no person can be appointed guardian *ad litem* without his nsent, 15 C L. J. 446, but the omission to obtain consent is not tal if minor is not prejudiced. 1917 Pat 198, 4 Pat L. T. 147 : Pat. 335 : 71 I C 705 (15 C L. J. 446 . 25 C W. N 781, *Diss*) C 296 Dist 4 Pat L. T 127 ; 2 Pat, 296 : 1923 P. 231 : 1 Pat R. 59 : 3 Pat L. T 451 : 66 I. C 137.

——consent of the person proposed to be appointed guardian is andatory and imperative. 34 C L. J. 293 : 24 C W. N 541 : 25 W. N. 525 37 C L J. 496 · 1923 Cal 692 : 26 C. L. J. 258 : Pat L. T 451 20 C L. J. 469 . 1923 P 418 : 47 M. 783 : 83 I. C. 2 : 47 M. L. J, 273, F. B.

——consent is necessary even if the proposed guardian be a ardian of the person and property of minor appointed under the uardian and Wards Act. 34 C. L J. 293. But consent might

Or 32, Rr 1—16 Appointment and duty of guardian—contd

be presumed unless he declined the appointment. 34 C. L. J. 302 4 Pat L. T 127 1923 Pat 88 19 C. W N 537 : 43 I. C. 563 : 83 I C 323 ; 1925 All 214.

——the consent need not be express 47 M. 783 : 83 I C. 312 1925 Mad 30 F B

——but in a recent case the Calcutta H C. has held that it cannot be said that while a decree will be void if no guardian is appointed or if the guardian is not a competent person, some different result will follow where a person is appointed who never consents to act at all 54 C 450, 31 C W N 634 · 103 I. C. 124 : 1927 Cal 498, 30 C. 1021 7 C W N 774 P C *Expld* 2 Pat. 335. *doubted*.

——appointment of guardian without notice to the minor is bad and liable to be set aside 2 Pat L T 116 : 6 Pat. L. J. 83 ; 1921 Pat 156 59 I C 936 *contra* 1923 Lah 575 : 75 I C. 449, it is simply an irregularity when the minor is represented 29 Bom L. R 1357 105 I C 573 1927 Bom 613, but no such notice is required in appointing a guardian under r 11 (where the original guardian retires, dies or is removed) 1 Pat. L R. 86 : 2 Pat 223 : 4 Pat L T 329 1923 Pat 159 71 I C 341

——a court is not competent to appoint a person as the guardian *ad litem* of an infant without his express consent, 78 I. C. 219 40 C L J 39 1924 Cal 1042 *contra* the consent need not be express. 35 M L T 12 47 M L J 273 47 M 783. F. B.

——where a court appoints an officer of the court as guard an *ad litem* it must require the party who gets him appointed to make a deposit for the purpose of defending the case 1926 M. W. N. 8 93 I C 84 1926 Mad 950 37 A 179, 41 A 235, 28 I C. 852 (All)

——provisions of the rule are mandatory and should be strictly followed 30 C 1021 . 7 C W N 774 P C, 26 C. 267, 24 A 595, 1922 P. 448.

——formal order of appointment is not necessary, 1917 Pat. 21, 3 C. 1021, 14 C. 204 26 C 272, 12 M 90, 30 C. 1021 : 30 I. A. 152. 7 C W. N 774 P. C, 9 O & A L R 463 74 I C. 821 : 26 O C 113 : 74 I C. 403 3 Pat L T 451 1922 P 291 66 I. C. 137, 26 C. L J 258, 20 C. L J 468, 28 I C 341 1926 Nag. 267, 106 I. C. 468 28 Punj. L. R, 628 9 Lah L J 206

——mere absence of formal recording of an order of appointing guardian would not vitiate the proceedings when the court has by its action given its sanction to the appearance of a person as such guardian · but the case is otherwise when a minor having a good defence to make no such defence is made by the guardian and the interest of the natural guardian was adverse to that of the minor 55 C. 1241, 32 C. W. N 665 , 1928 Cal 844

——every irregularities in the appointment of a guardian *ad litem* does not vitiate the proceedings in the suit. 93 I. C. 813 · 1926 Lah. 435.

——no order should be made appointing a guardian unless and until the necessary notice is given under Or. 32, R 3. But if no notice is given, but all the same the minors interests are in fact

Or. 32, Rr. 1—16. Appointment and duty of guardian—*contd.*

effectively represented the absence of notice which is merely an irregularity does not vitiate the proceeding. 29 Bom. L. R. 1357 · 105 I. C. 537 : 1927 Bom. 613.

——appointment of court guardian should be notified to the minor and the natural guardian. 41 A 235 , 50 I. C. 101.

——the object of giving notice to the minor is that the [illegible]

——when the natural guardian does not appear and the clerk of the court is appointed guardian *ad litem* on an affidavit by the plff. to the effect that there was no other guardian for the deft. it is sufficient representation. 46 M. L. J 12 : 1924 M. W N. 125 : 77 I. C 464 · 1924 Mad 281.

——when an appointed guardian sues the minor he must be represented by some other person whose interest is not adverse 7 C. W. N. 149 : 30 C. 613.

——a guardian cannot do anything prejudical to the minor, if he can do no positive benefit to the minor he ought simply to leave the matter to the court. 17 W. R 142.

——notice must be served upon the natural guardian before the appointment of court's [illegible] under will be set aside [illegible] N. 537 : 20 C. L J. 469 [illegible] the consent [illegible]

—[illegible] ordinarily represents the minor [illegible]

—[illegible] guardian, the plff. must at first bear the cost of minor [illegible] A. 235, 28 I. C. 852 (A).

——the mother cannot be made guardian without her express consent : and a sale in execution of a decree making the mother guardian without her consent should be set aside 19 C. W. N. 537, 25 C W. N 525, 17 C. L R. 707, 15 C L J. 3, 15 C. L J 446 *Fol.* 16 C. L J. 318.

——in choosing a guardian of an infant, the court must be guided entirely by the interest of the ward. 18 C. W. N. 160.

——the sister's husband of a Mahamedan girl is not fit to be appointed guardian 24 I. C 59.

——in a suit for restitution of conjugal rights by a husband a person who [illegible] with the pl[illegible] minor girl 1[illegible]

——In appointing a guardian the court must consider the existence of any will. 19 C. W. N. 513

——a pardanashin lady cannot be appointed guardian of the person and property of the minor. 17 C. L. J. 405 *contra.* 12 C. W. N. 160.

Or. 32, Rr. 1—16 Appointment and duty of guardian—*contd*

——a married woman cannot be guardian *ad litem* of a minor, 15 C L J. 3 but can be a next friend 17 C. 488 F. B.

——a father who has divorced his wife cannot be a guardian of [illegible] majority : her consent is neces- [illegible] W. N. 429 [illegible]

[illegible] W. N. 219, 15 C. L. J. 1, F [illegible]

——a natural father [illegible] his right as adopted heir against rival claimants 49 M. L [illegible] 1925 Mad 1285, 43 M 288 *fol*

——a *minor cannot be guardian ad litem* or next *friend* of other minors and proceedings based on such representation are null and void 80 I. C. 602

——a guardian can be validly appointed of the property of a minor in the hand of the administratrix of his father's estate 48 C. 802.

——no guardian should be appointed without inquiry and no guardian should be removed without being heard 25 C. L J 149 · 21 C. W. N. 668.

——a married woman cannot be guardian *ad litem*, proceeding becomes a nullity. 15 C L J 3, 29 M. 58, 17 C. 448 F. B., 11 C. 733 *overruled*

——a vakil is an officer to the court for the purpose of Or 32, r. 4, 45 A. 395 1923 A 298 71 I. C 975.

——a guardian *ad litem* is not within the scope of sec. 3 of the Majority Act. 21 B 281, 285

[illegible] a proposed guardian the court [illegible] W. N. 525.

[illegible] at any stage of the suit or proceeding 19 C W N [illegible], 20 C. L J 469, 34 C L. J. 293, 24 C W N. 541, 25 C W N. 525, 37 C. L J 496 . 1923 Cal. 692, 3 Pat L T 451, 26 C. L. J. 258

——a minor is not properly represented although there was an affidavit that the proposed guardian was willing to act 24 C. W N 172n

——the sanction of the court under Or. 32 R 7, is necessary to the transfer of a decree in favour of a minor by his guardian *ad litem* 90 I C. 1049, 1925 Mad. 1287 : 49 M. L. J. 443.

(3) Appointment and duty of next friend.

——when a suit is in violation of the rule, the plaint should be returned for rectification 10 C 102

——a married woman may be next friend. 17 C. 488 F. B., 11 C. 733, *overruled*; but cannot be guardian *ad litem*. 29 M 58, 6 C. L. J. 36, 29 A 728, 15 C. L J. 3.

——Hindu widow adopting during appeal by her, but not putting the adopted son on record—she is justified in pursuing *the litigation bona fide* for his benefit and he is bound by the decision even if it diminishes the estate. 16 C. 40 · 15 I. A. 195 P. C., *20 C. 11*, 21 B. 534, 23 C. 374.

Or. 32, Rr. 1—16, Appointment and duty of next friend—*contd*

——when a next friend withdraws a suit, the minor may through another next friend apply to have the suit re-opened on review on the ground that the former next friend was grossly negligent. 29 C. 735.

——where a next friend sues in forma ... order the nex

——when

appointed or

597, 27 M. 377, 22 C 270.

——when compromise is effected with leave of the court no *appeal lies, remedy is in review. 7 C. W. N 419.*

——when the next friend does not work well, the court is to stay proceeding until a new next friend is appointed, or the minor, on coming of age, elect to proceed with the suit or to withdraw from it, 27 M 337: this may also be done on the motion of a party. 23 B 100.

——a decree may be impeached when there has been gross negligence by the next friend. It is not every kind of negligence nor any amount of negligence which would render proceedings otherwise regular and proper to be opened. 48 A 44 1926 All 36: 90 I. C. 749, 23 A L. J. 901.

——the representative capacity of the next-friend or guardian *ad litem* comes to an end *with the death of the minor and the* minor's legal representative should then move in the matter. 14 W. R 162.

——r. 6 prohibits payment of decretal amount to next friend without leave of the court; a co Jt -Dr. making such payment cannot sue for contribution 1923 M W. N 925

——when the next friend of a minor sues in *forma pauperis* the court may order the next friend to pay the cost of the deft 1923 Nag. 43

——the next friend of a minor suing in *forma pauperis* need not be a pauper 80 I C. 748 (B), 3 M. 30 *Rel.*

——an appeal by a minor without a next friend is not a nullity as the court may appoint a guardian at any time 103 I. C. 767: 1927 Lah. 663.

(4) Certificated guardian.

——where there is certificated guardian, the appointment of another guardian vitiates the proceeding. 59 I. C. 842, 83 I. C. 290 : 1923 Pat. 231.

Or. 32, Rr. 1—16. Certificated guardian—*contd*

——a natural guardian being appointed certificated guar does not lose his capacity as natural guardian. 3 C. L. J. 12, 407 30 I A 165 P C Fol 22 A 59

——a certificated guardian may sue for specific performan a contract on behalf of minor 35 A 499.

——when a certificated guardian takes loan for the bene minor without District Judge's permission, it should be repaid C. W N 63

——transfer of minor s interest by certificated guardian wit the leave of the District Judge is voidable. 27 C. L. J. 110.

——transfer by certificated guardian of minor's property wit the leave of the District Judge is voidable at the instance of person 27 C L J 110

(6) Compromise of suit on behalf of minor.

——compromise without leave of court is not binding 20 C N 201, 23 C L J 337 P C 24 C L J 74 P C., 1917 Pat. 73, 782, 88 I C 429 1925 All 570

——compromise without leave of the court how far binding. C W N 1165 18 C L J 384 35 A 487 P C.

——it is only voidable by minor 1924 All. 625 : 83 I C. 22 A. L J 52 46 A 575, 99 I C 814 28 Bom. L. R. 1507 : Bom 87

——a compromise sanctioned by court cannot be set aside me on the allegation that the compromise was not in the interes the minor and unconscionable The court must, before it sanct compromise, consider the question whether the compromise is the benefit of the minor, so the court will not set it aside un there is fraud. 50 B 716 28 Bom L R 1225 : 99 I. C. 307. Bom. 11, 94 I C 104 28 Bom L R 362 1926 Bom. 291.

——it will be sufficient if the circumstances show that court did in fact apply its mind to the terms of the compror and considered them beneficial to the minor, the order need contain these in terms 28 Punj L. R 184 102 I. C. 358 : 1927 L 330, (94 I. C. 104, 8 C. L. J 33, 36 P. R. 1917) *Ref.*

——but in a recent case the Calcutta H. C. has *held tha* sanctioning a compromise on behalf of an infant the order grant the sanction should in terms state that the question whether compromise was for the benefit of the infant was *considered* C. L. J. 441, 1927 Cal. 796 32 C W N 459 · 103 I. C 522, 29 104 *fol.* (36 M 53, 13 C W N. 163) *Rel on*

——a guardian appointed under the Court of Wards Act u compromise without the leave of the civil court 33 C L 211, P. C.

——*sub R. 2 of R 7 of Or. 32 contemplates the case of mi* on one side ranged against adults on the other as regards the mat of compromise. It has no reference between adults *although minor may be a party to the suit.* 41 C. L J. 213 : 29 C. W. N. 59 88 I C.369 : 1925 Cal. 866.

Or. 32, Rr. 1—16. Compromise of suit on behalf of minor— *contd.*

——an agreement to compromise entered into by the next friend of a minor against the imperative provision of sub-rule (1) of rule 7 of Or 32 cannot be set aside on the ground as not being lawful. *above case.*

interest between a father who is acting as next friend to his minor son and that minor son. 87 I. C. 42 : 48 M. L J 417 · 1925 Mad 734.

——guardian not consenting to a compromise, the court cannot compel though the terms are beneficial to minor. 22 M 378, 27 C. W N. 792 · 1923 Cal. 685 75 I C. 682, but the court can appoint another guardian or next friend 27 C. W. N 792 1923 Cal 685

——in case of consent decree against a minor the D Hr is to prove that the person (guardian) consenting had authority 23 C. 934.

——leave of the court must be express. 18 C. L J. 384 P C, 28 A. 385, there cannot be any presumption. 3 C L. J 119 *contra.* 4 Pat L. T. 311 2 Pat. 538 1923 Pat 184 1923 P. 375 : 72 I. C. 1040.

——no exception is for certificated guardian, 7 C. W. N 90 or for natural guardian (as father) 17 C W N 765 18 C L J. 1 : 36 M. 295 · 40 I. A 132 P C

——the court must have materials before it to grant leave. 26 B. 109.

——the court is to consider the reasonableness of the terms of compromise 16 W. R. 232, 17 A. 531 if leave is given under misrepresentation &c. it is not binding. 6 C. 687

——leave *is to be taken in execution proceedings also* 26 B. 109.

——guardian cannot refer to arbitration· 24 M. 326, 19 C. 336, *contra* 38 A. 35, 36 A 69 F. B, cannot withdraw a suit 27 M. 377, without the leave of the court

——the mere fact that leave of the court has not been obtained for a reference to arbitration on behalf of the minor does not vitiate the reference if the minor has not been prejudiced 71 I C. 7.

——an agreement to file an award where it affects a minor can only be done with the leave of the court expressly recorded. 83 I. C 913

——when final reference is by court, want of application under R. 7 does not *affect proceedings* 1925 Cal. 475 78 I. C. 335.

——when the guardian of a minor entered into a compromise on behalf of the minor but before it was sanctioned by the court the guardian resiled from the compromise, the court had power to pass the decree according to the compromise. 107 I. C. 477 : 1928 Cal. 247.

Or. 32, RR 1—16. Compromise of suit on behalf of minor— *contd*

——offer to be bound by the oath of the opposite party does not require leave of the court. 27 C 229 : 4 C. W. N 327, 28 A. 25 : 2 A L J 493, 24 M 326, nor the agreement to be bound by the statement of the witness 49 A. 842 : 102 I. C. 38 : 1927 All. 584 : 25 A L J. 729.

——a decree by consent without leave of court is invalid 12 M 503, 26 B. 109, 24 M 326, 35 B. 322

——the modes to set aside the decree are by review under sec 114 or by separate suit 15 B. 594, 10 357, 23 B. 620, 27 M 377, 3 C. L J. 119, but when the decree is fraudulent, the only remedy is by suit 3 C L J 119, 13 C. W. N. 1197 . 10 C L. J. 420 2 I. C. 129

... should not be ...

the compromise was effected. 32 C, W. N. 59 : 46 C L J. 441 : 103 I. C. 522 : 1927 Cal. 796 34 M. 314 *fol*.

——when a minor after attaining majority seeks to set aside a compromise under sub-R. (2) of R 7 the question whether he derived any benefit under the compromise or not is not a matter of inquiry. 46 C. L. J 441 : 1927 Cal 796 : 103 I. C. 522, 35 B. 322 *fol*.

——when both parties are minors, a compromise with the permission of the court on behalf of one party only is not valid 24 C L. J. 74 P. C. ... obtained ... ere ... ger ... ied

——when a minor attains majority during the pendency of the suit but does not elect to continue the defence *himself* he cannot ... to be set aside

the person who had attained majo... 763 : 1928 Mad. 294 : 55 M L. J 374

(6) Continuance of guardianship and when the guardian can retire.

... appellate stage unless revoked ... 0 A. L J.

... ntinue as ... oceeding. ... ere must ... fed by a

decree there is no longer any *lis pendens*. A mortgage decree or a

Or. 32, Rr. 1—16 Continuance of guardianship and when the guardian can retire—*contd.*

decree for delivery of accounts may be a continuing one. 39 C. L. J. 591, 5 C. L. J. 434 *Ref.*

——guardian *ad litem* does not continue in his office after decree. 1925 Cal 23 84 I. C. 68.

——the defect of proper representation of a minor in execution proceeding does not make the sale void. 39 C. L. J 284, 40 C. 635: 17 C. L. J. 673 P C, 35 C L J 9, 25 B 337 P. C *Ref.*

——it is not open to a guardian appointed by the court to retire at his sweet will without the permission of the court. It lies to the discretion of the court to permit him to retire. 94 I C 340: 1926 All. 437, 1922 All 416. *Dist.* 1928 Mad. 980.

(7) Effect of minor not being properly represented

——so long as the minor has not been prejudiced mere irregularities in the appointment of guardian *ad litem* does not render the proceeding void 47 A 357 86 I. C 86: 23 A. L. J 44 1925 All. 351, 83 I C. 323 1925 All. 214.

——a mere defect in following the procedure of appointment of guardian does not render a decree void. 43 M 842 32 M. L. J. 375: 12 L. W 243

——when a minor sues without a next friend and objection is taken by the deft. until the case comes before the appellate court when the minor attains majority, irregularity is waived 19 M 127.

——if the minor is represented by such a person whose interests are also adverse to the minor, the minor is not bound by the proceeding. 83 I. C 913.

——where in a suit for right of way the minor deft is not represented by a guardian *ad litem*, the whole suit should be dismissed. 64 I C. 90 (C).

——a guardian is not necessary when a Ruling Chief attains majority according to his personal law. 29 C. W. N 287 · 1925 Cal. 513, 80 I. C. 100

——where no guardian is appointed for a minor deft the decree is a nullity, 2 Pat. L. T 617 1921 Pat 335. 63 I C 484 or the suit may be revived. 18 C L. J 384 17 C. W. N. 1165 35 A 487: 15 Bom. L R. 1001 P C.

——when a suit has been hotly contested and the minor was not prejudiced *in any way it may not be revived.* 30 C. 1021. 7 C. W. N. 744 P. C., 14 A. L. J 589, 2 P L J. 390, 40 I. C. 227

——no order binds minor who is not properly represented. 5 C. 450, 14 C. 754, 8 C 656, 10 C 105, 11 B 130, 12 B. 18, 23 A 459, 11 W. R. 300.

——*where during the pendency of an appeal the guardian of a* minor respondent dies and the appeal is disposed of without a fresh guardian being appointed, it cannot be binding against the minor. 9 Pat. L T. 547. 106 I. C. 540. 1928 Pat. 168

Or. 32, Rr. 1—16. Effect of minor not being prope presented *contd*

——where order for sale is made when the minor is p represented, the absence of guardian in subsequent proceedi not matter 23 C 686

——fresh suit lies against minor when previous suit is di for improper representation 34 A 474 F. B

——a minor on attaining majority may proceed with t already brought 22 C 270

——but when he does not elect to continue the defence h he cannot set aside the decree passed against him, but if the is passed on compromise by the guardian, the decree is not b 1927 M W N 89

——if nazir refuses to represent, the mother may rep but all the procedure up to that date is vitiated. 17 C. W. N. 6 C L J 573 40 C 635 19 I C 296 P C

——if the minor brings a suit to set aside a decree on the g that he was not validly represented in the prior suit at guardian *ad litem* was grossly negligent he must prove th guardian withheld evidence 44 M L. J 299. 1923 Mad 73 I C 409

——in a suit to set aside a decree passed against a minor o ground of fraud of the guardian the Court will have to con whether the facts alleged were brought about intentionally o fully by the pltf and whether the appointment of the guardia obtained by a contrivance In the absence of fraud the decree not be set aside 46 C L J 287 105 I C, 199 · 1927 Cal 865

——when a widow adopts during litigation and does not b the adopted son on the record, the decision in the suit is bin against him 16 C 40 15 I A 195 P. C., 20 C. 11, 20 Bom. 23 C 374.

——if a person entitled to represent a minor does represent a mere misdescription in pleading or irregularity in form will affect 14 C. 159 F B, 11 C 509, 14 C. 204, 30 C. 1021 P. C, 1 481, 20 C 11, 17 W. R 144, 12 C 48

——minor, on attaining majority, can assail the decree on ground of fraud or collusion of the guardian. 12 C. 69, 25 W R. 4

——if the omission by a guardian to plead a defence is frau lent or amounts to gross misconduct, the decree may be avoi 6 C L J. 448.

——the test is whether the inaction of the guardian amou to neglect of duty or was in the best interest of the infant. If th has ben a gross negligence on the part of next friend in the condu of a suit, the decree may be successfully impeached by the infa 6 C. L. J 448, 44 M. L J 299 , 78 I. C. 409, 1926 All. 36 : 90 I. C. 7 23 A. L. J. 901

——where the irregularity in service of summons upon the mi deft does not cause any prejudice, it is cured by sec 99, 30 C 10 32 A. 287 : 37 I. A. 77 P. C., 3 Pat. L. T 450 . 66 I. C. 137, 26 C. L. 258, 20 C. L. J. 469, 88 I. C. 294 : 1925 All. 548.

Or 32, Rr. 1—15. Effect of minor not being properly represented—*contd.*

——no irregularity by way of an omission to send a notice as required by Or. 32, R (5) vitiates the suit, against a minor unless such omission has in fact prejudiced his defence, 80 I. C. 541 : 46 M. L. J. 363 : 1924 M W. N. 363.

——no guardian *ad litem* being appointed, an *exparte* decree is to be set aside, 23 A. 383, 24 C 25

——a ward of court cannot marry without court's consent, 19 C W. N. 290.

(8) Execution proceeding

continue as proceeding there must ended by a decree there is no longer any *lis pendens* A mortgage decree or a decree for delivery of accounts may be a continuing one 28 C. W. N. 963 : 1925 Cal 23 . 39 C. L J 590, 5 C. L. J 434 *Ref.*

——the defect of proper representation of a minor in execution J 284 . 40 C. 635 . *Ref*

no presumption of 23

——the provisions of Or 32 relating to "suits by or against tion proceedings. In determin- represented in the execution look to the substance of the

(9) Limitation.

——limitation counts from the date of the plaint and not from

suit to set aside alienation by taining majority 24 I. C. 110,

(10) Lunatic

——before appointing a guardian for the lunatic the court should first inquire into the unsoundness of mind of the deft. 62 I. C. 770.

——mere weakness of mind is not sufficient Party must prove total incapacity to understand business and forming rational judgment 4 Pat L T 17 1923 P. 187, 68 I. C. 372

——person renouncing world and neglecting worldly affairs does not of itself justify the court in holding that by reason of unsoundness of mind or mental infirmity he was incapable of protecting his interest. 1927 M W. N. 456 ; 31 C. W. N. 1037 ; 39 M. L. T. 155 . 101 I. C. 363 1927 P. C. 123

——the court should apply its independent judgment after independent enquiry as to whether the rule required the appointmen

Or. 32, Rr. 1—18. Lunatic—*contd.*

[illegible]

adjudged to be of unsound mind is by reason of unsoundness of min[illegible] or mental infirmity incapable of protecting his interest in the su[illegible] 50 A 335 108 I. C 141 . 1928 All. 108 25 A. L. J. 1082.

——contract by lunatic is void and he cannot be compelled t[illegible] refund the consideration money. 20 C. W. N. 59 n , 30 C. 539. P. C *Fo*[illegible]

(11) probate proceeding.

——until probate proceedings become contentious the provision[illegible] of Or 32 do not apply to them 24 C W. N. 541 : 59 I. C. 644.

(12) Proof of minority,

——a person setting up minority is to prove it. *36 B. 103, 192*[illegible] M. W. N. 89 (note), 43 C 907 p. 917. P.C

[illegible] person wh[illegible] [illegible] P.C

——[illegible] ence 2[illegible] C. W. N. 257, P C.

(13) Suit by or against major as minor

——when an alleged minor plff. is found not to be so, the sui[illegible] should not be dismissed but the deft. may be indemnified *by cost*[illegible] and the deft. should apply to have the plaint taken off the file o[illegible] amended, and if this is not done the next friend's name may b[illegible] treated as mere surplusage. 21 C 866, 23 C. 686, 20 A 90.

(14) Suit by or against minor as major.

——if the plff suing as major is found to be a minor the cour[illegible] should appoint a next friend. 25 W. R. 184. 13 C. 189, 44 M. L J. 515 · 32 M. L T 107 1923 M. W. N 301 : 74 I. C. 309, and canno[illegible] *reject the plaint. 4 Lah 390*

——decree againt a minor describing him as major is [illegible] nullity, 18 C. L. J 18, 31 A. 572 : 13 C. W. N 1182, P. C., 15 C. L J 3, 1924 All. 892, 17 C. W N 549, but if the minor pays rent unde[illegible] the decree he cannot recover it 17 C. W. N 549.

(15) Suit by or against minor, procedure in.

——it is the duty of the court to appoint a minor's guardian 39 A 8, 26 C L. J. 258.

——one of two joint promissors cannot plead the *minority* of the other and his consequent immunity is a bar to the promissee's claim against him. 24 C. L. J. 74 P. C., 34 M. 314, *affirmed.*

——when minor is sued as major, the decree is a nullity, but i[illegible] the minor has paid rent under the decree he cannot recover it. 17 C. W. N. 549.

Or. 32, Rr. 1—16. Suit by or against minor, procedure in—*contd*.

——when a mortgage suit against minor and other is dismissed against minor for not being properly represented, a fresh suit lies against minor for his share of debt. 34 A. 474.

——when *nazir* refuses to represent, mother may represent but all the procedure till unrepresented is vitiated. 17 C W. N. 637 : 17 C. L. J. 573 · 40 C 635 . 19 I. C. 296, P. C.

——a previous decree against a ward of court may be executed in the ordinary way, s 48 of the Court of Wards Act has no application, 18 C. W. N. 1055.

——a minor should bring his suit to set aside alienation by guardian within 3 years of his attaining majority 24 I. C 110, 13 C. L. J. 227 *fol.*

——when a contract is valid and there is mutuality, specific performance may be allowed 34 C. 163 . 11 C. W N. 207 : 4 C. L. J. 431, F. B.

——suit for specific performance against minor is maintainable if the contract was entered into by the guardian appointed by the District Judge with his sanction 21 C. W. N, 104 n., 39 C. 252. P. C. *Dist*

——when the guardian of a minor sues for specific performance of a contract and on attaining majority the minor elects to continue the suit under Or 32 r 12 it is not as if he is instituting a fresh suit. His right to claim specific performance should be determined as on the date on which the suit was originally instituted 88 I. C. 116 18 S. L. R. 230

——the omission to obtain consent of the guardian before appointment, under O 32, rr. 3 and 4, is not fatal to the proceeding if the minor is not prejudiced 1917 Pat 193.

——a minor on attaining majority may proceed with the suit brought on his behalf 22 C. 270

——RR 12 and 13 prescribe the course the plaintiff may follow on attaining majority during the pendency of the suit but there is no corresponding rule relating to a deft The reason for this omission is that while a plff. on becoming major can put an end to the litigation a deft on attaining majority cannot do so and the case must proceed. 110 I C 725 : 1928 Lah 371

——as no provision has been made in the Code in respect of a minor deft. attaining majority, a minor deft. on coming of age may, if he thinks fit, come on the record and conduct the defence himself, if he does not elect to do that the decree passed against him as minor will be binding but the decree passed on compromise entered into after his majority by his guardian though sanctioned by the court will not be binding on the minor. 51 M. 763 : 1928 Mad. 291 · 55 M. L J. 374

——presentation of plaint and prosecution of a suit by a minor without next friend, is an irregularity which may be waived by the deft. by his conduct. 19 M. 127.

Or. 32, Rr. 1—16. Suit by or against minor, procedure in—*contd.*

——when both plff and deft. are minors, compromise with the permission of the court on behalf of one party only is void. 24 C. L. J. 74 P C

——the service of summons should be on guardian *ad litem*, service of summons at the place of partnership business will not suffice 36 C 267 3 C W. N 261

——minor must be properly represented, otherwise the decree is not binding against him 17 C W N 637. 17 C. L. J. 573: 40 C. 635 19 I C 296, P C, 15 C L J 3, 10 C. L. J, 318 P. C, 27 C. L J. 258, 39 A 8, 28 A 137, 29 A 675, 37A 179, 9 Pat L. T. 547 105 I C 540, 1928 Pat. 168

——when *Amin* of the court was appointed guardian *ad litem* but the plff did not deposit any amount as cost for inquiry and the *Amin* did nothing, the decree against the minor was a nullity. 37 A. 173.

——but where there is only irregularity in the appointment of the guardian *ad litem* the decree is not to be set aside. 6 C. L J 448, 30 C 1021 31 I A. 182 7 C W N 774 5 Bom. L. R. 882, P. C. 29 A 290 32 A 287, 12 C 109, 2 C 283 25 W R. 449.

——the proposed guardian *ad litem* must appear and give consent to act on behalf of the minor otherwise the decree against the minor is a nullity. 26 C L J 258, 19 C W N 537

——it is not every kind of negligence nor any amount of negligence which would render proceedings otherwise regular and proper, liable to be opened up It ought to be alleged and proved that an available good ground of defence was not put forward 6 C L, J. 448.

(16) Transaction by or with guardian.

——it is established law that a guardian cannot bind his ward's estate, except by a document purporting to bind it. 35 C. 340 12 C. W N, 256, 5 M. L T 156, 20 B 61 *Ref.*

——indemnity clause in a sale deed executed by the guardian on behalf of the minor, binds the guardian personally. 1920 M W N. 340

——when a third person enters into dealings with a guardian and advances money for the necessities and benefit, and takes a bond, the responsibility rests on him to take care that the bond is also so drawn as to render the estate of the minor liable. 35 C 320 12 C. W. N. 256 2 M L T 156

——a guardian cannot bind the minor by personal covenant 34 C. 892 7 C. L J 87

——sale, otherwise unauthorised, of minor's property, by guardian, cannot be valid by the only sanction of the District Judge, 14 years back 35 A. 150

——a pardanashin lady when borrows money as the guardian of the minor with the sanction of the District Judge, the lender, acting *bonafide* is not to see the application of the money. 21 C. W. N. 854

——an executor is personally liable for the money he borrows, though he may be indemnified from the beneficial owner. 21 C. W. N. 1043.

Or. 32, Rr. 1—18. Transaction by or with guardian—*contd.*

——a Hindu natural guardian can alienate for the benefit of the minor, though not for necessity 20 C W. N. 695 : 23 C. L J 432, *26 C. 820 . 3 C W. N. 770.*

——alienation by Hindu guardian of minor's property not for necessity but to save from bigger sacrifices is binding. 22 C. W. N. 858.

——as natural guardian, a Hindu mother has no power to sell immoveable property of the minor except for legal necessity, 9 C. W. N 1019 : 32 C. 832.

——manager of a joint Hindu family mortgaging the family property and being sued cannot be appointed guardian of a minor member and the decree passed on confession is a nullity. 44 A. 525 . 20 A. L. J 329 : 1922 A. 91, 25 B. 333, 30 C. 1021, 38 A 315, 43 A. 104.

——a natural and *de facto* guardian, can alienate for necessities notwithstanding that there is a testamentary guardian. 13 M. L. J, 223.

——dealing with married niece's property as *de facto* guardian for necessities, is valid 28 C L. J. 250, (6 M. I. A. 393, 23 C. L. J. 432 ; 20 C. W. N. 645 p 647), *Fol.*

——a decree being a property a guardian of a minor may transfer it with the leave of the court under r. 7, 40 M L. J. 124 : 29 M. L. T. 99 : 13 L W. 97 62 I C. 255, 41 M L. J. 75 : 63 I C. 285.

——where there is a decree in favour of a joint Hindu family [illegible]

——under the Mahamedan Law, a *de facto* guardian such as the mother can alienate her minor children's property for legal necessity and for their benefit. 34 C 36 : 11 C. W N. 71 : 4 C. L. J. 485 34 C 65 ; 11 C. W. N. 160 : 4 C. L. J. 578, 1917 Pat. 40, *contra*, 23 C. W. N. 50, P. C

[illegible] other is not a natural [illegible] d and cannot alienate [illegible] N. 50 P. C.

[illegible] cannot bind his ward [illegible] a covenant or by any promise to pay money or damages, is subject to this modification that the promise will not bind the minor unless it has not been merely to keep alive a debt for which the ward's property was liable. 35 C. 320 : 12 C. W. N. 256 : 3 M. L. T. 156, 26 M. 330 *Ref.*,

——where the promise is to pay money which has been expended for necessities, estates of the minor may be liable not on the promise [illegible] 35 C. 320 : 12 C. [illegible]

[illegible] of a minor

un [illegible]

Or. 32, Rr. 1—18. Transaction by or with minor—*contd.*

——when guardian under the Indian Majority Act is once appointed the minor cannot attain majority before 21 1921 Pat 100.

——a decree against a minor representing him as major is a nullity. 1921 Pat 100

——when the issue is raised as to minority, an order appointing a guardian is no evidence of minority. 1921 Pat 100.

——a ratification by an infant of the work done by relative (here husband) under an invalid power of attorney may bind her when position cannot be changed 19 C W. N. 787, P C

——a debtor is not bound to pay his debts to minor without [illegible] not liable for costs if the

[illegible] girl) cannot marry without

[illegible]

——a minor on whose behalf an ancestral trade is carried on, is not personally liable for the debts incurred in such business. 22 C. W. N. 488.

——if contract is validly entered into on behalf of a minor by his guardian, and there is mutuality in the contract, it may be specifically enforced 34 C. 163. F. B But where the contract is not for the benefit of the minor no specific performance should be allowed. 10 C. W. N 763, 26 B. 326, 337, 27 C. 276, 29 A 213, 11 B. 551

——when there are two promissors, one cannot take the plea of minority of the other in a claim against himself 20 C W. N. 840; 24 C. L. J. 74 P. C , 34 M 314, *Fol.*

——sec. 68 (claim for necessaries supplied to person incapable of contracting) applies to minors as well as to persons of unsound mind 30 C 539; 30 I A 114 P C.

——costs incurred in successfully defending a suit on behalf of a minor in which his property was in jeopardy or costs incurred in defending him in prosecution for dacoity, are necessaries within sec 68 7 C. 140 *contra* 17 M 257, 22 M. 314

(18) Withdrawal of guardian or of suit

——in case of withdrawal of the next friend of a minor plff. from the suit, the minor is entitled to have the suit re-opened or revived through another next friend 29 C. 735.

——when the proposed guardian does not enter appearance, the duty of the court is to appoint one of its officer to act as guardian *ad litem*, otherwise the decree will be inoperative against the minor 26 C L. J. 258

——guardian's suggestion of fresh appointment and declining summons does not amount to retirement 50 M. 357 101 I. C. 399; 1927 Mad. 538 · 38 M. L. T. 197.

——the court can refuse to permit a guardian *ad litem* to retire from a case. 1928 Mad. 980, 1926 All 437, *Ref* 1911 M. W. N. 98 *expl*

Or. 32, Rr. 1—18. Withdrawal of guardian or of suit—contd.

——withdrawal of a suit by a next friend without the leave of the court is voidable at the instance of the minor. 27 M. 377: 11 M L J 159, and the minor's remedy is (1) by applying to the court in which the suit was withdrawn, (2) by regular suit to set aside the judgment (3) by bringing a fresh suit for the same cause and setting up the fraud as an answer to the statutory bar 10 C. 357, 21 C 605, 22 C 8, 26 C 891 3 C W N 670, 3 C. L. J. 119 Ref.

Or 33, rr. 1 16, SUITS BY PAUPERS.

Applications

——the application must contain a schedule of the moveable as well as immovable 9 O L J 610 74 I C 344.

——the petition must be presented by all the petitioners or by their joint agent 80 P L R. 1915 28 I. C. 448, 12 O. C. 331 - 41 C 783, 10 M. 193

——r 15 contemplates the refusal of a second application when it is in respect of the same rights to sue 3 C. L. J. 351, 50 M 63, 96 I C 962 1926 Mad 875 51 M L J. 79, 85 I. C. 982 fol, 98 I. C. 26 1926 Rang 200

——when an application for leave to sue in forma pauperis is dismissed for default, it is not competent to the court to entertain a fresh application for leave 40 C L J. 188. 1924 Cal. 1039: 81 I C 703 contra 85 I C 982 1925 Mad 936.

——an order rejecting an application for default bars a second application on the same relief to sue in *forma pauperis*. 40 C L J 88, 20 B 86, *contra* 16 C W N 104

——the mere fact that an applicant in *forma pauperis* presented his application to the sheristadar is no ground for rejecting the same. 1924 M. W N 749 1924 Mad 901 47 M. L J 522

——the mere omission of an item of property is not a non-compliance of R 2, which deals rather with the form of the application than with the truth of its contents. 104 I. C. 364 8 Pat L. T. 794, 1 L W. 1063, Rel on

Who can apply?

——the court can allow a def[illegible] C. 819 and [illegible]

[illegible] 3 M. 3, 26 Bom. L. R 330. [illegible] Bom 440, an executor or administrator can sue in *forma pauperis*. 7 M 390, 18 B. 237.

——the word "means" [illegible]

[illegible] sues in representative capacity such as a mutwalli, trustee, a shebait, he may be allowed to sue as a pauper even if it is shown that he has sufficient personal property, unless

Or. 33, Rr. 1—16. Who can apply?—*contd.*

it is shown that he has in his possession property belonging to the wakf estate or trust or idol. (2) Ornaments which a woman ordinarily wears are her personal properties like her wearing apparel. (3) The words "is not possessed of" in the explanation to R 1 mean [illegible] Thus a woman cannot [illegible] from the husband so as [illegible] L J 68 100 I C. 264:

——the minor son of a member of a joint Hindu family cannot sue in *forma pauperis* unless it is found that the minor could not obtain funds 47 A 872 1925 All 547 88 I C 420

——an official liquidator of a company can sue in *forma pauperis* 41 M. 624

——a benamdar cannot sue as pauper 1910 Pat 232: 50 I. C. 520

[illegible]

3 W [illegible]

exec [illegible]

a pa [illegible]

88 I. C [illegible] *Diss*

——the right to obtain permission to sue as a pauper is only personal right, so on the death of an applicant his legal representative cannot come as such but if the right to sue survives, the legal representative may present a fresh application. 33 C 1163 4 C. L. J. 234, 64 I C. 63 (C) 1927 M W N 886, 18 B 237, *contra* 109 I. C. 258 · 1928 Mad 66, 7 M 390, 41 M 624, 1925 Mad 765

——the representative of a pauper cannot continue a suit in *forma pauperis* if not a pauper himself and the assignee of a pauper also must pay the necessary court-fee or else have himself *qua pauper* declared entitled to sue in *forma pauperis*, 1925 Md 819: 91, 104 I C 347 1927 Lah 665,

——the term "authorised agent' in Or. 33 R 3 does not mean "recognised agent" as defined in Or 3 R 2 nor does the land require that the authority should be in writing. So an application for leave to appeal in *forma pauperis* may be presented by the husband of a *pardanashin* lady, 7 Pat. 825

Court's power in disposing of application.

——it is not permissible to go into an elaborate enquiry on the merits of the plff 's case 97 I C. 349: 1926 Mad 1160, (27 M. 37, 27, M. 120) *not fol.*

——it is not desirable to go into a complicated question of limitation 92 I C. 415 1926 Mad 135. 1925 M. W N: 779: 23 L. W. 406

——a court can enter into merits of a case under R. 4 of Or. 33 and for that purpose the Judge can examine the plff. who applies for permission to sue as a pauper. 3 Pat 275: 83 I C. 871; 6 Pat. L. T. 209 1925 Pat. 30, but it is undesirable to enter into a complicated question of limitation 1925 M. W. N 779, 1924 Cal. 659.

Or. 33, Rr 1—16. Court's power in disposing of application—contd

——a court cannot reject an application to sue as a pauper on the ground that the plaint does not disclose a cause of action but on the ground that the deft had a good defence to the suit 83 I C 781: 23 A L J 200 1925 All 275

——a court cannot dismiss a pauper application on the sole ground that sometime subsequent to the application but before orders were passed on the same, the petitioner became an insolvent Insolvency is not one of the grounds mentioned in Or 33 R 5 on which suit on application can be rejected. 48 M. L J. 491 87 I C 720 1925 Mad 791.

——where the allegation in the plaint discloses a cause of action however weak it may be, permission to sue as a pauper must be granted 1925 Cal 990 87 I C 737

——when the court has found that the applicant is a pauper, it is not necessary for it to give a finding on the other matters mentioned in R 5 unless it finds that there is ground for the rejection of the application for any of the reasons mentioned therein 96 I. C 830 1926 Lah 642

——the court acts without jurisdiction in disposing of an application when it does not take evidence offered by the opposite party and does not give notice to the opposite party and the Govt 100 I C 726 1927 Cal 464

——cause of action means subsisting cause of action. 46 C 651, 8 C. W N 70, 41 M 620 54 I C 462 (B), 59 I C. 676 (B)

——the court is bound to proceed on the valuation put upon the suit by the plff 61 I C 891

——husband's ability to pay court-fee cannot be ground for rejecting his wife's application 3 P L J 178 44 I C. 723

——an application cannot be rejected on the ground that the claim is doubtful for such a conclusion can be reached only when the case is tried 75 I C 744

——acquisition of property by a pauper by way of compromise of the suit with some of the defts does not affect his position 86 I C 234; 1925 Mad 793 21 L W 111

——but where money was paid into court under decree of the lower court sufficient to meet the court fees of appeal the petitioner's application to appeal in *forma pauperis* was rejected 50 M L J. 114 23 L W 219.

——though Govt pleader reports applicant to be pauper the deft must be allowed to prove otherwise 48 M 700: 85 I C 201 1925 Mad 167.

Appearance and examination of applicant

——applicant must appear in court unless exempted. 21 A 171. Appearance cannot be dispensed with even if there are several joint applicants 10 M. 193

——a pleader may be an authorised agent 15 W. R. 198, but he must be specially authorised 21 W R 308.

——the husband may appear on behalf of a *pardanashin* lady 7 Pat 825

Or 33, Rr. 1—16. Appearance and examination of applicant—*contd.*

——before granting applicant the court must be satisfied on examination of the application not only as to pauperism but as to the merits of the case also 13 C L. J. 395, (20 A. 299, 27 M. 37) *Fol. contra.* 13 M. L J. 292, 13 M L J. 425, 2 C W N. 474, 8 C W N. 70, 1924 M. 80 : 1923 M. W. N 412 73 I. C 946, 3 Pat. 275 83 I. C 871 · 1925 Pat. 30

——evidence as to the title of the plff. cannot be taken. 45 A. 548 · 21 A. L J. 441 1923 A 577, 46 C 651, Appl. 50 I C 521, *not appr*, 20 A. 299 *Dist.*

——the examination must be conducted by the Judge in person. 14 W. R. 281.

——the opposite party is entitled to cross-examine the applicant on the merits of the case to test the statements made in examination. 60 I C 738 (c).

Procedure when application is allowed

[illegible]

——subsequent receipt of fund is ground for dispaupering the applicant. 13 L. W 76 · 61 I C 958

——it is not competent to a court to direct the plff. suing in [illegible] amendment of the plaint then [illegible] the suit 24 Bom. L. R 924 :

——the mere fact that the plff. appears through an eminent [illegible]

[illegible]

——when application fails, only remedy is to sue in the ordinary way, there is no distinction between rejection under r. 5 and an order of refusal under r. 7, 20 C. W. N. 669, fresh application is barred. 31 C. L J. 351, 20 B. 85, 52 I. C. 562 (C), 73 I. C. 897. But the dismissal of an application for default does not bar a fresh application. 2 Bur L. J. 217

——where plff. has applied for leave to sue as a pauper no order [illegible] whether leave [illegible] the permission [illegible] defts. cannot be served. [illegible] I. C. 283.

Or. 33, Rr 1—16. Court fees.

—— when application is dismissed the plaint still remains and the court may grant time to pay court fee 40 M. 687, 33 M. L. T 18 18 L. W 431, 49 A 381 but if the court fee is paid beyond the period of limitation the suit will be barred 1 Rang 196 : 1923 Rang 256 · 74 I C 835, 28 C 428, 3 O L J 647 37 I. C. 921.

——the time when the application to institute suit as a pauper is made is the point of time which the court has to consider when the application comes to be dealt with and the subject matter of the suit itself is in no case at the disposal of the applicant for payment of court-fees, 47 B 523 25 Bom L R, 199 . 72 I. C. 224 : 1923 Bom 247, 10 B 207 *Diss*

——in a suit for redemption the value of the property to be redeemed should be included in considering the means 19 N. L R 165

——when a pauper application was filed under the old Act but leave was granted when the New Act came into force court fees are to be paid under the Old Act 22 L. W 732 : 49 M L. T. 538, 50 M L J 280, 1926 M W N 363 96 I C 112 . 1926 Mad. 474

——the amount of court fee is the first charge on the subject matter of the suit 9 A 64, 25 M 733, 42 M L J 191 : 31 M L T 38 1922 Mad 125, as well as on the sale proceeds of *other properties* 33 C 1040, but it cannot be enforced against the property of others 16 C W N 433 15 C L J 327, 39 I A. 62 34 A 223 : 22 M. L J 457 P C.

——the Govt can realise court-fee by proceedings in execution 18 A 410 or by appointing Receiver 50 M L. J 279.

——Crown-debts must have priority over other debts 16 C. W N 433 15 C L J 327 34 A 223 22 M L J 257. P C.

——R 10 leaves it to the discretion of the court to direct which of the parties should pay court-fees due to the Govt The equities *of a particular case should be considered by the court in making the* order 32 C. W N. 48 105 I C 725 55 C 488 . 1928 Cal. 196, 38 A. 469 *Doubted*, 14 M 163 *Ref*

——in case of partial success, if costs decreed to deft exceed the cost decreed to plff the Govt can recover nothing out of the amount *decreed* towards the *court fees* 1921 M W N. 805 14 L W. 529, 21 M 113 fol 9 All 64 *Dist*

——but in the case of partial success the plff. is bound to pay the difference between the total amount payable on the plaint and the amount which is ordered to be recovered from the deft on the portion of the claim which is decreed 1926 M W. N. 363 · 96 I C 112 · 1926 Mad 474 50 M L J 280, 1928 Mad. 216 : 108 I. C 712 54 M. L J 530

——where the plff suing in *forma pauperis* for maintenance obtains a decree for maintenance for which charge certain properties of the deft are made liable under R 10, the first charge of the Govt. for costs must be on the subject-matter of the suit so far as the plff succeeds, but if the Govt. instead of proceeding against the arrears of maintenance proceeds against the properties by selling them, the

Or. 33, RR. 1—16. Court-fees—*contd.*

effect of it would be a sale of equity of redemption subject to the plff's charge for maintenances 94 I C. 391 : 1926 Cal 859.

——when the plff's property is confined to a right to future maintenance the proper method of recovering such court fee is by the appointment of a Receiver to collect the maintenance amount and pay to the Govt (by instalment if necessary, in order that plff may have something to live upon) the fee due by the plff 49 M 567 : 50 M. L J 279 · 1926 M. W N. 362 : 94 I C. 254 · 1926 Mad. 565

——when the plff. suing in *forma pauperis* agrees to pay certain sum to his pleader after succeeding in the suit but there is no condition enabling the pleader to recover the fees from the decretal amount R. 5 (e) does not apply 96 I C. 830 1926 Lah 612 . 9 B. 371 *Dist*

——RR 10 and 11 are applicable to suits by paupers filed on the Original side of the H C 109 I C. 173 1928 Mad. 385 : 54 M. L. J. 263

Appeal and revision.

——an order rejecting an application for leave to sue in *forma pauperis* is not open to revision 44 A 248 20 A. L. J 55 · 1922 All. 1 · 65 I. C 255, 19 A L J 558, *contra*, 88 I. C. 157 : 1925 Nag 343.

Or. 34, rr. 1—5, Suits relating to mortgages. *See.* "*Tr. P. Act mortgage*"

Or. 35, RR. 1—6. INTERPLEADER.

——a suit is not maintainable by a tenant to have it determined which of two defts. both of whom claimed rent from him, is his landlord 2 C. W. N. 61, 48 I C 733.

——but a tenant is not debarred from bringing a suit against two sets of defts who had both obtained rent decrees against him in order to compel to interplead one another. 5 C. L. J 34 n.

——where a tenant was sued by an alleged landlord for rent and a decree was passed against him on the ground that he was the plff s tenant and the tenant thereafter sued to have it declared that he was the tenant of another, such suit was in the nature of interpleader suit and was not maintainable under s 42 Sp R. Act as the deft. was not a person interested in denying the plff 's tenancy to another and as no injunction was asked for and it was also barred by *res-judicata* 15 C L J. 653 . 13 I. C. 40.

——where the defts do not claim adversely to each other nor the plff. admits the title of any of the defts or is ready to pay the debt or deliver the property to him, it is not an interpleader suit. 1923 Cal 138

——in an interpleader suit in which each of the contesting defts, attacks the title of the other, each is virtually in the position of a plff. 48 M. I · 1925 Mad. 497

Or. 35, Rr. 1—6. Interpleader—contd.

——where a mortgagee does not deny an assignment by him of his rights under the bond but contends that it is void, the mortgagor is not bound to bring an interpleader suit making the mortgagee and his assignee to interplead as between them. 23 I C. 607. 15 M L T 331 27 M L J 134 1 L. W. 419.

——investment of money deposited in court pending decision with a party is objectionable as the successful party is entitled to the money from the court without further proceeding. 13 M. L T. 326 24 M L J 404 19 I C 219 1913 M W. N 363.

——the plffs in possession of a sum of money filed an interpleader suit against two rival claimants who did not appear at the trial, held that the proper order would be to discharge the plffs from all liability to the defts in respect of the money and dismiss them from the suit and to direct them to pay the balance into court to the credit of proper claimant after getting their cost. 58 I. C. 365. 21 Bom L R 948

——a railway company by accepting goods for carriage does not become the agent of the consignor within the meaning of the rule The company may file an interpleader suit against consignor and another party claiming adversely against consignor. 17 Bom L R. 339 28 I C 948

Or. 36, rr. 1—5 Special case

——it is settled practice that where a special case is stated by consent it can only be re-opened by mutual consent. 43 B. 281. 20 Bom L R 839 47 I C 642

Or 37 rr 1—7, Summary procedure in Negotiable instruments.

—— Or 37 refers only to the mode of trials in suits and does not confer any jurisdiction 13 I C 244 5 S L. R 155.

——where in a suit on a promissory note the deft applies for leave to appear and defend the suit and the court doubts the sincerity of the defence it should grant leave on condition that the deft should pay into court the amount claimed 60 I. C 639 · 12 L. W 712

—— in a suit on a promissory note when no leave was obtained to defend the suit the plff is not entitled to a decree for interest at 18 per cent on the strength of an oral agreement alleged in the plaint The plff can only get interest at 6 p. c, 49 C 716: 1923 Cal 513.

——when the court doubts the sincerity of the defence, leave to defend may be granted on condition of deposit of the amount claimed 60 I C. 639 · 12 L W 712

——an order charging the property of an insolvent debtor for the repayment of plff's claim on condition of granting permission to defend his suit is a permanent charge till repayment of claim. 58 I C 10 : 24 C W. N 401

——the only remedy of the deft against whom a decree has been passed summarily, he having found it impossible to obtain the required leave to defend within the time allowed, is by an application

Or. 37, rr. 1—7. Summary procedure in Negotiable Instruments—*contd.*

to set aside the *ex parte* decree and on such application leave

——when money is deposited by a deft as a condition precedent to the setting aside of a decree under the rule the decretal amount is a charge on the deposit if final judgment is passed against him. 38 I C 481 . 32 M L J 503 5 L. W 407.

——in summary suits under Or 37 it is impossible to go into partnership accounts and so the plea that it is part of the partnership account cannot be raised 9 I. C 299

——when a partner enters appearance in a suit against a firm under Or 30 it is necessary that the patner should obtain leave to defend under Or. 37 R. (2), 50 B 665 1926 Bom 585 . 28 Bom. L. R 1275

——suits under Or 37 are not governed by Art. 5 of the present Limitation Act 52 C 954 : 29 C W N 589 . 41 C L. J. 368 : 88 I C. 400 1925 Cal. 781

——where *after many hearings deft's vakil states on the* final hearing day that he has no instruction but the court disposes

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it cannot be investgated in summary procedure. 49 I C. 193 : 12 S L R 70

——the question to be considered on application under Or 37, R 3 C P C is whether or not a triable issue is disclosed on affidavit or otherwise by the deft By triable issue is meant a plea which is at least plausible The defendant must prove that his defence is *bona fide* 1924 M. W N. 240 . 34 M L T 310 . 78 I. C. 505 46 M. L. J 255

——cl (e) to R 1 of Or 37 added by the Lahore H. C. with the sanction of the Governor General in Council is not *ultra vires* as offending against ss 122 to 128, 28 Punj L. R. 539 : 99 I. C. 648 . 8 Lah 156, 9 Lah L. J. 57 1927 Lah. 174

——a Subordinate Judge exercising Small Cause powers has not authority to act under Or 37, R 1 because he is not then acting as a court of ordinary original jurisdiction 51 M 491 . 109 I. C. 446 : 1928 Mad 517 55 M. L. J. 114

Or 38, RR. 1—12, Arrest and attachment before judgment. *See, "C P. C. Attachment"*

Or. 39 Temporary Injunction and Interlocutory orders "*Injunction and* '*Interlocutory orders*"

Or. 40. Appointment of Receivers See "*Receiver*"

Or. 41, RR 1—37 Appeal from original decrees. See "*C. P. C. Appeals*"

Or. 42 R 1 Appeals from appellate decrees. See "*C. P. C. Appeals*."

Or 43, RR. 1—2 Appeals from orders See "*C P. C. Appeals*"

Or 44, RR. 1—2, Appeal in forma pauperis. See, "*C. P. C. Appeals.*"

Or 45, RR 1—16 Appeal to the Privy Council. See, "*C. P. C. Appeals*"

Or 46, RR 1—7, REFERENCE,

——a power of reference is not a modified form of appellate jurisdiction A right of appeal is a right conferred on the suitor whereas a power of reference is a power vested in court. It is in the sole discretion of the court to exercise or not to exercise. 47 A 513 1925 All 380 87 I C 51 23 A L J. 385 F. B., 26 A L J 729 1928 All 371 F B

——the power of reference is exercised when the case is still pending in order to enable the court to arrive at a correct decision *above case*

——a court to whom a reference can be made is not necessarily authorised to hear appeals from the court making reference *above case*,

——when a court entertains a reasonable doubt regarding a question of law involved in a case he is competent to make a reference to the H C under Or 46 R 1., 24 A L. J. 69; 48 A 18; 93 I C 24 1926 All 204

——proceedings before Rent Controller-Reference to the H C Rent Controller is a court but inquiry before him is not a suit within R 1, 29 C W N 521 84 I C 543 1925 Cal 391

——s 113 read with Or 46 R 1 permits reference to the H C of only such cases as do not admit of further appeal. 37 I C. 22; 130 P. R 1916

——no reference can be made in suits or appeal in which the decrees are subject to an appeal, 107 I C. 649 · 1927 Mad. 1179; 54 M L. J. 66 39 M L T 657

——where no appeal lies to an Appellate Court, the court has no jurisdiction to make a reference to the H C. under Or. 46 R 1 C P C. Where the referring court has no reasonable doubt on the question of law referred, no reference can be made. 61 P. R 1913; 123 P L. R. 1913 · 117 P W R 1913

——when a H C. hears a reference it acts like court of appeal quite as much as it undoubtedly does when it hears an application for revision 25 C W N 81 32 C L J 433

——where a munsiff returned a plaint holding that the suit was triable in a Small Cause Court which however returned the plaint

Or. 46, Rr. 1—7. Reference—*contd*

back holding that it was not cognizable by it, held that the procedure adopted by the Sm. C. C Judge was wrong, he should have referred the matter to the H C. Or. sent the record to the Dt. Judge for action. 21 C. W. N 784 . 27 C. L. J. 96 ; 41 I. C. 929.

OR. 47, RR. 1—9. REVIEW.

(1) Application of the order.
(2) "Any other sufficient reason"
(3) Court-fees
(4) "Discovery of new and important matter or evidence"
(5) Limitation
(6) Notice.
(7) Revision and appeal
(8) Where to apply.

(1) Application of the Order.

——when a suit is dismissed for default under Or 9 r. 3. and the plff allows his right under Or. 9 r 4 to have it restored barred, he cannot come under this rule. 2 C W N. 318. But where the suit is dismissed under Or 9 r 8 and no step is taken under Or 9, a *review under this rule is admissible.* 26 C. 598.

——an application for review is not a suit, and cannot operate as *res judicata.* 40 C 541.

——the provisions of Or 47 are applicable to an Insolvency Court. 1926 M. W. N 256 . 23 L. W. 644 94 I. C. 351 ; 51 M. L J 60 . 1927 Mad 175

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——when review is granted the decree previously made is vacated with the consequence that an appeal preferred against that decree can no longer be prosecuted But the parties can appeal against final decree passed on review. 36 C. L. J 484 . 1923 Cal. 113 73 I C 34.

——an order granting review cannot be questioned under Or. 47, r 7 44 A. 645 . 20 A. L J. 517 . 1922 All 206 . 67 I C. 317.

——where a [illegible]
filed, the D Hr. [illegible]
order on the grounc [illegible]

——a consent [illegible]
when fraud is pra [illegible]
necessary to nullify the proceeding. 19 C. W. N. 419.

——even after satisfaction of a decree, the D. Hr. can re-open the matter under sec 47 and rule 1, on the ground of mistake in calculation. 5 C W N. 627.

——rule 1 applies to an order dismissing an execution case, 2 C. W. N 606, and order disallowing a claim to property attached

Or. 47, Rr 1—9. Application of the order—*contd.*

7 W. R 79, an application to amend a sale certificate. 29 C. 52 C. W. N. 374

——apart from Or. 47. r. 1, the court has inherent power u/ s 151 to make such orders as may be necessary for the ends of jus and then to review its wrong orders or decisions passed previou 5 Pat. L. T. 425 3 Pat. 930. 1924 Pat. 673, 4 Pat. 180: Pat 435

——a petition under Or. 9. r 9 may be converted to a peti under this rule. 21 C W. N. 30: 24 C. L. J. 446.

——a petition under Or 9 r 9 being dismissed for default of plff. in presence of the deft petition for review under rule 1 21 C W. N 30, 24 C. L J 446

——an appeal cannot bar the disposal of review on me 28 B 418

——where application for review is preferred before the filin appeal, it must be decided on merits, 65 I. C 125.

——review opens the whole case 18 C. W N. 22, 43 C. 178 C L J 225 and fresh decree in made, 30 B. 56 from which ap lies 107 I. C 751: 1928 Cal 418

——when an application for review is ordered, the judgm sought to be reviewed is not set aside but only held in suspe until the case has been re-heard 48 B 210: 26 Bom L R. 103. I. C. 755: 1924 Bom 310.

——review being rejected, a regular suit on the same groun not maintainable. 18 C. W N. 1204, (2 C. L. J 508: 10 C. W. N *Fol contra*. 17 C. W. N 219.

——Or 47, R. 9 does not mean that a second application review on new grounds cannot be entertained if made within li tation, but the plff cannot go on for ever presenting petition af petition containing the same grounds until somehow he succe and has the obnoxious order reviewed and reversed. 102 I. C 52 1927 Lah 200 8 Lah. 54, (1 W. R. 287, 5 W. R. 93) *Dist.*

——when appeal has been dismissed the lower court can review its judgment. 21 A. L. J 416 1923 A. 576. 74 I. C. 29 Bom L R 371. 101 I. C. 766. 1927 Bom. 232, 4 C L J. 566, C. 759, *Appl* 21 B. 548, *Dist* when appeal is preferred review out of question and the party's procedure is to apply to appellate court to admit additional evidence 28 C W. N. 277: Pat. 676: 4 Pat L T. 477: 45 M. L. J. 578: 33 M. L T. 233. Bom L. R. 1259 P. C.

on as continuation of the first one for the purpose of limitati 33 M. L T 221: 18 L. W. 876

——a minor can pray for review when his guardian has conduc ed the case with gross negligence 38 A. 452.

Or 47, Rr. 1—9 Application of the order—*contd.*

——the whole case is opened by review. 18 C. W. N. 22 : 19 C L. J 225 *contra* 24 O C 280.

——appeal and review can proceed at the same time at the instance of the same party 37 A. 208, 38 B. 416, 32 M 416 F. B. 16 N. L. R. 65 : 50 I. C 329, 42 A. 79, but after the appeal is disposed of the review cannot be proceeded with. 44 C. 1011 · 41 I. C 497

——grounds of appeal and review cannot be the same. 21 C W. N. 430 : 24 C. L J. 517, 35 I C 867, 42 A. 79.

——subsequent filing of appeal is no bar to review, and appeal when withdrawn must be treated as not filed. 43 A. 288 19 A L J. 24 · 61 I C. 334.

——r. 1 does not apply when subsequently to filing of review

——where an appeal from a decree is pending there is no ... the review

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evidence was

(2) "Any other sufficient reason."

——the expression 'any other sufficient reason" in Or. 47, r. 1,

those specified in the rule Fraud and undue influence do not constitute grounds analogous to those specified in Or. 47, R. I., 92 I. C 1013

——a point which might have been, but was not, discovered at the trial *by the exercise of due diligence* was not a sufficient reason for review 13 C. 62, question of limitation is sufficient ground. 3 Pat. L J. 571.

——an error of law is not sufficient reason for granting review, "Any other sufficient reason must be taken *ejusdem generis* with the clauses preceding. 26 C W N 697 · 36 C. L. J 459: 30 M. L. T. 295 : 43 M L J 332 : 1922 Pat. 435 · 41 P. L. R. 1922 : 24 Bom. L. R. 1238 P C., 46 A. 245 · 82 I. C.1022 : 1924 All. 398 : 22 A. L. J. 118, 49 B 839 90 I C 610 : 1925 Bom. 521, 89 I. C. 946 : 23 A. L. J. 1029 , 6 P. L. T. 40 : 86 I. C. 143.

Or. 47, Rr. 1—9. Any other sufficient reason—*contd.*

——if there is any error on the face of the record there may be an application for review of judgment under Or. 47, R. I, 44 C. L. J. 441 100 I. C. 309 · 1927 Cal. 203.

——an error apparent on the face of the record must be an error which does not admit of extraneous matter to show its correctness, 1928 M. W N 595

——an error of law to be apparent on the face of the record must relate to some proposition of law which is well settled and beyond controversy and on which the judgment rested. 1928 M. W. N. 911, 49 I. A. 144, P. C. Ref.

——review does not lie on the ground of want of court's jurisdiction in the case. 22 C W. N 446 . 26 C. L J. 325.

——nor on the ground of fraud. 3 C. L. J. 119.

——the power of reviewing own order when sufficient cause is shown is wide enough to include the power to revise an order of costs 6 Pat L. T 284 63 I. C 768

——mere absence of party's pleader is not sufficient reason. 62 I. C 253

——default of appearance is not a reason contemplated by Or. 47, R I C P C, 99 I C 954 1927 Mad. 355 ; 52 M. L. J. 123, but see 54 C 374 : 31 C. W N. 332 45 C L J 142 : 101 I. C. 133 : 1927 Cal 312

——sufficient reasons, what it means, discussed. 39 C. L J. 247.

——non-production of authority is no ground 1921 Pat. 152 · 1 Pat. L. T 561, 57 I C 147

——wrong decision on a question of law is no ground 24 O C. 154, 63 I. C. 344.

——the discretion of the court in saying what is "sufficient ... be rigidly circums- ... P C. *Ref.* 1866 ... 459, 11 C. 379.

... 16 · 64 I C. 895. ... ht to have been ... a different view ... 24 C. 336, 16 ...

I. A. 104 P. C ...

... not a ground for ... T. 295 73 ... J. 332 · 24 ... 1926 Mad.

... court was ... decision, but ... the pleader ...

... the decision ... brought to ... no ground

Or 47, rr 1—9. Any other sufficient reason—*contd*

——omission to raise a point of law is not necessarily a "mistake or error apparent on the face of the record 1923 Pat 1 1922 P 149, 20 C W N 100.

——error need not necessarily be limited to errors of fact Ignorance of the ruling of the H C. may be sufficient ground for review 46 M 955 45 M L J 309 1923 M W N 761 : 18 L W. 363, but error of law in computing the period is no ground 1922 P 308

——where the H C. disposed of a second appeal relying on a particular interpretation of a decision of the Privy Council and subsequently the Privy Council construed its own decision in a different way and application was put in for review of the judgment of the H C relying on the latest decision of the Privy Council, held that the ground relied on for review was an 'error apparent on the face of the record" and that the application for review was competent 29 C W N 148 1925 Cal 304 85 I C 65

——when a suit is dismissed on the basis of another judgment in a connected case but subsequently the latter decision is reversed in appeal, the reversal of the judgment which was put in evidence was not a ground for review either under Or, 47, R, 1 or s 151, 104 I. C. 135 1927 Cal 920 31 C W. N 822, it was also held in the same case that a ground for review must be something which existed at the time of the decree and the Code does authorise review of a decree which was right on the happening of some subsequent event.

——where an appeal dismissed summarily under Or. 41, r. 11 is admitted on review, it is not restricted to the single ground of review. 43 C 178.

——it is the discretion of the court to re-hear the whole case, 9 C. 209

——fraud or undue influence unaccompanied by the discovery of any new fact is not a ground for reviewing a compromise decree as it does not amount to "other sufficient reason." 89 I. C, 946 : 23 A. L J. 1023 48 A 160 1926 All. 50, 92 I. C 1013.

——the act that the burden of proof was thrown on the wrong party or that a different conclusion might have been arrived at in view of certain decisions is no ground for review. 6 P L T. 40 : 86 I. C 143 1925 Pat 386.

——a party against whom a decree has been passed is precluded after dismissal of appeal, from applying for a review, 30 B 625, but if the appeal is withdrawn, the party can apply for review. 7 B. 287

——where appeal is preferred after review, the reviewing court is not deprived of jurisdiction. 32 M. 416. F. B., 38 C. 416, 44 C. 1011.

——but that power exists so long as the appeal is not heard. 44 C. 1011.

——if the application for review is granted and new decree passed no appeal can be heard. 28 A. 240, 42 A. 282, 44 C. 1011.

Or. 47, rr. 1—9. Any other sufficient reason—*contd.*

——one Judge of High Court cannot set aside the order of another Judge even though it is wrong: remedy lies in review 44 C. 28

——the court in exercising inherent power when reviews a suit *which was dismissed for default, without sufficient ground,* no appeal lies against the order 37 C L. J. 99 : 1923 Cal. 450 : 72 I. C. 306

——orders that may be passed under Or. 41 r. 33 may be ... 71 I C 416

... dence ... of the ... rrant ... 586:

——where an appeal is dismissed for non-payment of printing fees, appropriate remedy to set aside the dismissal is by way of review and not under Or 41 R 19. If the person shows good cause for not paying fees it will fall under "other sufficient cause" 4 Pat 704.

——an *ex-parte* order on review setting aside summary dismissal of appeal was held to be valid 1925 Cal. 114 : 84 I. C 147.

(3) Court-fee.

——court-fee is to be paid not upon the portion of the decree sought to be reviewed but upon the value of the whole suit 3 C W N 292 *contra*. 4 B 26.

(4) " Discovery of new and important matter or evidence "

——review on this ground exacts very strict condition so as to prevent litigants to be negligent. 11 C. W. N 721, P C

——greatest care must be taken in granting a review on the ground of new evidence. 21 C. W N 1076, 45 C. 60.

——must be strictly proved, strict proof refers to formalities ...

... ig to the ... of proof ... Ref ... he time" must refer to the words which precede, namely, " was not within his knowledge" 75 I. C. 91 (Pat). 1924 Pat 809.

——the new evidence must be clear and conclusive. 23 W R 323

——whether a party is confined, in rehearing, to the evidence on ... ent views. 53 C. 856.

... inds new evidence on ... nes to the knowledge of the litigant and if he can show that decree against him was obtained by perjured evidence, his remedy is in review. 16 C W N 1002, 14 C. W. N. 695, *Fol.*

Or. 47, rr. 1—9 "Discovery of new and important matter or evidence"—*contd*

——new evidence to prove a fact having been discovered, it is good ground for review, 32 A. 71, 4 B. L R. 213, 14 C L R 103, and not of appeal. L. R 3 A 12

——the court has discretion to receive at the review hearing documents not tendered at the original hearing, 103 I. C 246 . 1928 Cal 416, but a *Quaere* was made by Their Lordships in the Privy Council as to whether a party is entitled, by a proceeding in review, to take a point not taken at the original hearing [illegible]

second appeal, 45 A 458 · 1223 A 541 . 21 A L J. 377 . 73 I C 1016, 36 C L J. 76 · 1922 Cal 165.

——a decision based on one ruling of the H. C. cannot be reviewed on the basis of another [illegible] when the latter ruling was not in [illegible] C. L. J. 416, 6 A. 292, 7 W R [illegible] L J. 33 · 1922 M W N. 304 : [illegible] 4 M L T 86 *fol* 13 B 380, 33 [illegible] 3 Pat. L J 372, *Ref* 78 I C, 993, c [illegible] W. R. 415, 13 B 330, 33 A. 566

——review cannot be granted on the ground of the happening of some subsequent event 4 C W N 725 27 I A 197 24 M. 1 P C

——the ground of review must be something which existed at the date of the decree, 4 M L T. 86, 72 I C. 4, 64 I C. 324, 24 M. 1, 50 C. 119, *fol* 51 I C 625 *Dist*

——when review is granted on the ground of discovery of new and important evidence, the appellate court will not generally consider the evidence afresh and disturb the decision of the lower court. 61 I C 219

——when it is clea[illegible] that it is irregular or [illegible] vision of law, review [illegible] and correct and is to [illegible] remedy is by regular sui[illegible] J. 520, but see next case

——a mistake in the matter of copying out a petition of compromise may not be good ground for review but if fraud was practised in connection with the petition there is good ground for review. 10 C. W N 286 13 C W N 1197

——the fact that a party to a compromise-decree has affixed his signature to the compromise at the instance of his agent in [illegible]

Or. 47, rr. 1—9. "Discovery of new and important matter or evidence"—*contd*

——fraud practised upon a party in connection with compromise petition is a good ground for review though a suit is a more appropriate remedy. 64 I C. 259, 13 C. W. N. 1197, 10 C W. N. 286 *Ref*

——wrong entry in the collection paper may be a ground for review L R. 4 A. 272

——a *commissioner for taking accounts* may re-open his inquiry before final report but after final report he cannot review his finding except under grounds mentioned in Or. 47, r 1 or general principle 47 B 593 25 Bom L R 280

——where an appellate court granted an application for review on the ground of discovery of a certain sale deed relating to the land in dispute but did not decide whether the sale deed exactly referred to the land in dispute and remanded the case for decision on merits after allowing rebutting evidence held that the order was right under the circumstances 47 A 881 . 88 I C. 653 1925 All 552 23 A. L J. 534

——when on a petition for review on the ground of the discovery of new and important matter the lower appellate court granted the review without calling for strict proof of the *allegation* that the new matter was not within the knowledge of the petitioner held that the order was a breach of Or. 47, R 2 (b) and was without jurisdiction. 87 I C 391 1925 Mad. 578

(5) Limitation

——limitation runs from the date on which decree is signed but its copy may be dispensed with 20 C. W. N 967: 24 *C L J* 235, 27 C. L J 540, 17 A 213 42 I C 504 (M).

——when the decree was passed on 23rd May 1923 and the decree was signed on *30th May 1923* but the *application was* made on the 18th December as the new evidence was not available till the 9th December 1923, it was not time-barred. 27 C L J. 540

——if court has jurisdiction to extend time upon an application for review there is no reason why his order should be disturbed [illegible] application for extension and [illegible] 79 · 1925 Pat 452

[illegible] layed to put in the appli- [illegible] an extension of period of [illegible] C. 225, 1928 Cal 654

(6) Notice.

——"opposite party" means the party who is interested in the review order; *when an appeal is summarily dismissed* the order of [illegible] may be set aside 43 C 178 42 C 433

[illegible] non-service of [illegible] 3: 75 *I. C.* 656, [illegible] 42 C. 433, 17

Or. 47, rr. 1—9. Notice—*contd.*

——opposite party in r. (2) means party interested to support the order or decree sought to be reviewed, he need not have appeared before. 1921 Pat. 337 63 I C. 99.

——a court is not entitled to review its order without notice to the other side. 1925 M W N 804 22 L W 582 : 92 I C. 800 1926 Mad 133, 50 M 67 1926 Mad 980 : 51 M. L J. 219 97 I. C 1008 : 1926 M. W. N 890.

(7) Revision and appeal.

——no revision lies from an order rejecting an application for review 88 I C. 582 . 1925 Oudh. 594 · 12 O. L. J 443.

43 r 1, (w) is only an appeal appeal from a decree passed 5 Pat L. T 52 3 Pat. 134 75

——the sufficiency or otherwise of the reason for granting a review is not a ground for appeal within r. 7 63 I. C. 171.

——the words "application was" in r. 7 (1) should be "order was' 31 M. L J 509 . 36 I C. 437

——when order granting review of judgment is confined to arrears of revenue only, the appellate court can re-open other questions. 29 C. W. N 1027 90 I C. 456 . 1926 Cal 243.

——right of appeal from an order of review is limited by Or. 47, r. 7, 42 All 626 18 A. L J. 838 . 60 I C 81.

——an appeal against an order granting a review can be allowed only on the grounds specified in Or. 47, R. 7 and if it is allowed on other grounds the court exceeds its jurisdiction and it can be interfered with in revision 86 I. C. 917 1925 All 395, 47 A. 361 : 23 A. L J. 56 86 I C 168 1925 All. 364 90 I C. 504 1927 Cal. 259, 83 I C. 548 1924 Mad 602, 112 I C. 46 : 1928 Lab. 755.

——an appeal again
only on one of the groun
1924 Mad 602 1924 M

——the fact that th
order granting review d
appeal from the ultimat
1927 M. W. N. 411

——Or. 47, r. 3 relates to the form of application and defines the method by which the form should be adopted and ascertained. It does not relate to the right of appeal 80 I. C. 649 · L R. 5 A 603.

——there is no appeal provided by the Code against an order granting a review on the ground that the lower court was incorrect in holding that there was a mistake or errror apparent on the face of the record 94 I C. 78, 1926 All. 492.

——an order refusing to restore to file an application for review which was dismissed for default is not appealable, but the H. C. can interfere in revision 81 I. C. 1017.

——a refusal to restore an application for review, when the application to restore has been heard on the merits, is not appealable. 47 A 1 1925 All. 57, 1925 Cal. 430.

Or. 47, rr. 1—9. Revision and appeal—*contd.*

——an appellate court can allow additional evidence even at ... t must be given opportunity to ... M. L. J. 32 ... granted the aggrieved party ... nd that the order is contrary to ... a party may appeal from the decree passed and therein raise objection to the grant of review. 30 C W. N. 584 1926 Cal. 217 87 I. C. 770.

(Appeal from original decree.)

——where subsequent to an appeal against the original decree a review application was also filed and the decree was varied, the appeal could not be heard. 30 C. W. N. 738 : 96 I C. 384 : 1926 Cal 943.

(B) Where to apply

——where a minor applies on the ground of suit being compromised without the leave of the court successor in office of the Judge may entertain the application 3 C. L. J 119.

——where a review upon a ground other than discovery of new ... nce of clerical or ... who decided it, it ... , 1924 Pat 809. ... " means the judge who has decided the case and not who has signed the decree 20 C. W. N 391, 17 C W. N. 403.

——a Presidency Small Cause Court has no power to review decisions passed in proceeding under Chapter VII of the Act, 23 Bom. L. R. 383

——it is not open to a Judge to grant an application for review of a decree made by his predecessor, upon grounds other than those mentioned in rr. 1 and 2, 75 I C 91 (Pat).

——primary intention of review is the re-consideration of the same subject by the same Judge. 17 C. W. N. 473, 3 W. R. 45 7 M. I A. 304 P C.

——where appeal was heard by two Judges and owing to the ... or review was heard by the ... s granted, the proceeding was ... 36 C. L. J 459 : 43 M. L. J. ... P L. R 1922 - 4 U P. L. R ... competent for ... R 371 ... ge who ... nsider- ... ice was ... reheard ... ge who ... by his successor was not illegal or improper. 26 Punj. L. R. 167 : 7 Lah. L. J. 192 : 88 I. C. 1019 : 1925 Lah. 377.

Or. 47, rr. 1—9. Where to apply—*contd.*

—Rule 2 declares that in case other than those excepted therein an application for review can only be made to the Judge who is not only sitting as the same court but is further the individual Judge who passed the decree 47 A. 751 23 A L J. 674 89 I C 295. 1925 All 804.

—where a proceeding under Or. 21 R. 90 was dismissed for default by the second Subordinate Judge who subsequently took charge of the business of the 1st Subordinate Judge of the District, a petition under Or 47 R 1 should be heard by the Subordinate Judge of the 1st Court who should not return the petition 54 C. 374 31 C. W. N. 332 45 C L J. 142 101 I. C. 133: 1227 Cal. 312

Adjournment, see "*C P. C. Or. 17 rr 1—2.*"

Affidavit, see '*C. P C. Or. 19, rr 1—7*"

APPEALS FROM ORIGINAL DECREES, OR. 41, RR. 1—37.

APPEALS FROM APPELLATE DECREES, OR. 42 R. 1.

APPEALS FROM ORDERS, OR. 43 RR. 1—2

PAUPER APPEALS, OR. 44, RR. 1—2.

APPEALS TO PRIVY COUNCIL, OR 45, R,R 1—16.

Sub-headings of Notes.

(1) Appeal against decree (S. 96 and Or. 41, rr 1—37.)
(2) Appeal against interlocutory orders,
(3) Appeals against order, SS. 104—106 Or. 43. rr. 1—2)
(4) Appeal against preliminary decree or order (S. 97)
(5) Appeal to Privy Council, Ss. 109—112 and (Or. 45 rr. 1—16)
(6) Cross objection or cross appeal (Or 41, r 22)
(7) Fresh evidence in appeal (Or. 41 rr. 27—29.)
(8) Jurisdiction and power of appellate court and its judgment (S 107 and Or. 41, rr. 31—33.)
(9) Limitation in appeal
(10) Parties in appeal, Law relating to.
(11) Pauper appeals, (Or. 44, rr. 1—2).
(12) Procedure in appeal.
(13) Re-admission of appeal (Or. 41 r. 1a.)
(14) Remand (Or 41 rr 23, 25)
(15) Second appeal. (Ss, 100—103 and Or, 42 r. 1.)
(16) Security in appeal. (Or. 41, r. 10.)
(17) Stay of proceeding or execution. (Or 41, rr. 5—7).
(18) When appeal is heard by two or more Judges. (S. 98, Or 41, R 34.
(19) When appellate court will not interfere. (S 99).

(1) Appeal against decree, (S. 96 and Or, 41, Rr. 1—37.)

—when reasonable doubt arises as to the competency of an appeal, the benefit of doubt should be given to the appellant. 31 C. W. N. 432; 101 I C. 9. 1927 Cal. 354

(1) Appeal against decree. (S. 96 and Or. 41, Rr. 1—37)—*contd*

——the appellate court has no jurisdiction to deal with that portion of the decree which is not the subject of appeal before it 1: A 35. But see 38 C. 721 below

——no court can entertain appeal which is not expressly authorised by law to hear, an appeal lies against decree passed without jurisdiction, 27 C L J 115, 16 C L. J 77 *Fol.*

——the court has inherent power to stop abuse of its records containing scandalous matter 22 M 155

——there can be no appeal unless there is a formal decree drawn up 69 I C 558

——the non-filing of an award along with a memorandum of appeal is fatal to an appeal 27 Punj L R 698 : 97 I C 167 : 8 Lah L J 352 : 1927 Lah 49

——no appeal lies from a rent decree of below Rs 50 passed by a court having special power and deciding the question of relationship of landlord and tenant, 23 C. L. J. 235, 20 C. W. N 967, 35 C. 547, and 12 C W N 835, *fol* 24 C. L. J 235, 7 C 330 8 C. W N 437, 24 C. W N. 46 n but if the first appellate court finds such appeal competent a second appeal lies. 24 C L J 235, 23 C L J 235 *reversed*, (12 C W. N. 835, 29 C. 6, *Expld* 27 C L J 115.

——under sec 153 B T Act rent includes damages, interest &c 23 C L J 557

——Or 41 has no application to appeals from original side of the H C 48 M. 631 1925 Mad 725 48 M L J. 384 : 1925 M W N 190

——the dismissal of an appeal under Or. 41, r. 11 is a decree and the expression of opinion dismissing the appeal is a judgment 30 C W N. 334

——when a decree purports to be passed by the Court with the consent of parties it is not appealable Aggrieved persons not parties to the suit must apply by way of review or institute a suit to get it set aside 91 I. C 620 1926 Cal. 512, 91 I. C. 294 1926 Bom. 39

——Or 41 R 4 does not authorise some of the plffs alone to file an appeal in a scheme suit 100 I C 838 : 1927 Lah. 382

(2) Appeal against interlocutory orders.

——right of appeal from interlocutory order ceases with the disposal of the suit. 32 C. 1023 12 C. W N. 590. 6 C L. J 547

——appeal lies from an order refusing or granting a temporary injunction. 17 C. W. N. 996, 35 A 425, 6 Pat L. T. 201 : 1924 Pat 713 83 I C 48

——an appeal lies from an order granting an injunction as well as from an order refusing an injunction 1924 P. 713 : 1924 P H C C. 169, 17 C. W. N. 996, 35 A. 425 *Ref.*

——there is no appeal against an order issuing notice on the application for temporary injunction under Or. 39, R 3 C P C, 1924 Mad 857 : 20 L W. 556.

(2) Appeal against interlocutory orders—*contd.*

——if in passing an intelocutory order cost is unconditionally paid to the other party the latter is not, by accepting the costs, precluded from questioning the order in appeal. 46 C L. J. 51: 1927 Cal. 733 · 101 I. C. 151

(3) Appeal against order (Ss. 104-106 and Or. 43, rr 1-2.)

——the words "any error, defect or irregularity in any order" in s. 105 (1) refer to an error, defect or irregularity in law or procedure [illegible] 1020

not an unlimited 47 A 881, 88 I C.

——failure to file a copy of the formal order did not affect the appeal. 1923 A 579

——appeal does not lie from an order of dismissal for default. 18 C L J 128, 39 C 341 *Fol* and from an order refusing to set aside a dismissal of a suit under Or 9 r 4 C P C 27 C L. J 117

——no appeal lies from an order refusing to set aside the dismissal for default of an execution application 45 C. L J 60 · 100 I. C 343, 1927 Cal 938, 31 C 207 *Rel on.*

——an order dismissing for default an application to set aside the dismissal of the suit for default under Or 9 R 9 is not appealable. 109 I. C 264 1928 Pat 335 9 Pat L T 669 7 Pat. 333

——order rejecting a petition for setting aside a sale on the ground of fraud is appealable as it is covered by sec 153 B T Act. 19 C W N 953, 32 C 957 9 C W N. 721, F B *fol*

——an appeal lies from an order dismissing application of a [illegible]

——order rejecting application for attachment before judgment is not appealable 23 C L J 392

——order dismissing execution proceeding is an order under sec. 47 C P C and is appealable. 26 C L J 12

——order granting review under Or 47 r 7 may be attached by way of appeal, on the ground of want of strict proof 26 C. L J. 187

——the right to appeal against an order passed in review is limited by Or 47 R 7 which controls the general provisions in Or. 43, R 1 (W), 32 C W. N 693, 9 Lah 298 1928 Lah. 608: 29 Punj L. R. 403

——no appeal lies from an order passed in execution of a decree made under sec 9, Sp R Act. 26 C L J. 325

——order accepting security offered by D Hr. and delivering possession to him is not an interlocutory order and is appealable. 22 C. W. N 657

——application to set aside a compromise decree by a person aginst whom it was passed *exparte*, comes under Or. 9. r. 13, and if rejected, is appealable 22 C. W N. 571.

(3) Appeal against order (Ss. 104-106 and Or. 43, rr. 1-2)—*contd.*

——in an appeal frc ... to set aside an *ex parte* decree provisions contained in decree, 48 A. 175: 24 A. (1922 A. 44, 43 M. 94) *fol* 44 C 929 *Dist.*

——an appeal lies from an order rejecting an application to set aside an *ex-parte* decree when the order is made because the deft. did not comply with the conditions lawfully imposed 51 B. 67. 28 Bom. L R. 1245: 99 I. C. 384: 1927 Bom. 1 F B, 36 A 77 *fol.* 28 Bom. L. R 578 *not fol.*

——an order dismissing for default an application to set aside an *ex-parte* decree is appealable and there is no difference between the dismissal on merits and the dismissal for default. *101 I. C 753:* 1927 Pat. 240: 6 Pat. 474. 8 Pat L T. 604, 21 C. L J. 628 *fol*

——an appeal against an order refusing to set aside an *ex-parte* decree passed in an application under Sch. 11 para 20 C. P. C. is maintainable. 1928 Mad 969, 55 M L J. 262

——no appeal lies against an order setting aside an *ex-parte* decree as against a deft upon certain conditions whatever they may be. 50 B. 326: 96 I C. 321: 1926 Bom 353 28 Bom. L. R 578, 51 B 495 103 I C. 262. 1927 Bom 455.

——order deciding the maintainability of a suit is not appealable 1918 Pat 81

——where an *exparte* decree is set aside erroneously, no appeal lies from such an order. 26 Punj L R 163.

——an order by the trial court wrongly assessing court fees is not appealable as s. 12 of the Court Fees Act lays down that no

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... of circumstances justifying
... 575.
... Judge only when an appli-
... first instance under Or. 9. r.

... tement and allowing substitu-
... from the decree, 40 C L. J

... ibatement is not appealable.

87 I. C. 173 (c).

——an order refusing to set aside an abatement of an appeal is appealable, 85 I C 1010: 1925 Pat 162.

——where in an *account suit after passing of the preliminary* decree by consent a reference was ... who submitted an award which was not acceptec ... to them again and the arbitra ... *it the court ordered the suit* ...

(3) Appeal against order (Ss. 104-106 and Or. 43, rr 1—2)— *contd.*

amount to an order refusing to record compromise and was not appealable 29 C W. N 795 : 1925 Cal. 924.

——an order on a prelimir

of suit is appealable. 52 C. 782

——an order refusing int

L T. 201 - 1924 Pat 713 83 I. (

——where the decree is

order recording the compromise, the order recordig the compromise is appealable 87 I C 124 48 M. L. J 249 1925 Mad 606

——an appeal lies against an order granting review on any ground and is not confined to the grounds mentioned in Or. 47 r. 7. 27 Bom. L R. 1246.

——a remand order passed by a Dt Judge in appeal, otherwise than from a decree, is not an order passed under Or. 47, r. 23 and is not appealable 89 I. C 384, 92 I C 600

——clause (u) of Or. 43 R. 1 contemplates an appeal only from an order of remand passed under Or 41. R 23 i.e from an order of remand in an appeal against a decree in a suit which has been disposed of on a preliminary point 97 I C 790 1926 Mad 900, 1926 M W N 613, 111 I C. 789

——where a suit was dismissed on a preliminary point and on remand of the case by the appellate court the case was decreed on rehearing and the deft subsequently appealed against the order of remand, held that the appeal was not maintainable 55 C 506 : 1928 Cal. 325 110 I C 347

——where an appellate court dismisses an appeal from an order of the lower court setting aside an execution sale, the dismissal is not open to revision, 85 I C 660, 1925 All. 264

——an order directing receiver to pay money into court is not appealable. 1921 M W N 806

——although Or. 43 r 1 (w) allows an appeal against an order granting a review that clause must be read with Or. 47 r 7 which limits the appeal against review 25 C W N. 884.

——there is no appeal from an order refusing to restore an application for execution which has been dismissed for non-prosecution. 45 A 148 : 21 A L. J 135.

——where a second application to set aside the dismissal of a prior application to set aside the dismissal of a suit for default, is itself dismissed, no appeal lies against the order of dismissal 36 C. L J 184, 19 C W N. 25 Ref.

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——an order under sec. 145 (enforcement against surety) is appealable 19 C. W. N. 1085, 38 C. 754 776.

——*an order under sec. 144 (restitution) is appealable.* 19 C. W. N. 1167.

(3) Appeal against order (Ss. 104–106 and Or. 43, rr. 1–2)— *contd*

——where after setting aside the auction-sale the court orders restitution under its inherent power under s 151, the order being in fact in the analogy of s. 144 appeal lies from such order. 31 C W. N. 290 · 1927 Cal 285 100 I C 735

——appeal lies from an order rejecting an application for transfer of a decree. 8 C. W N 575

——no appeal lies from an order returning memorandum of appeal to be presented to proper court. 31 C. 344.

——a decision that the plff is competent to maintain the suit is appealable. 19 C W N 755

——an appeal cannot be preferred against an order under which some advantage has been enjoyed 21 C W N. 232, 12 C L J 556 and 557 *fol.*

——appeal lies from an order dismissing for default an application for setting aside sale under Or 21 r. 90 25 C. L J. 163

——an appeal does not lie from an order amending a decree, 28 C 177 . 5 C W. N 192, 30 C 679, 14 A 226 *contra*, 24 M 646.

——order deciding sufficiency of security in execution case is not appealable 22 C W N 12 n

——an order under Or 38 R 6 is appealable. 31 C. W. N 432 . 1927 Cal 354 101 I. C. 9.

——order allowing delivery of possession to auction-purchaser is not appealable. 29 C L J 48, (20 C. L J. 433 . 19 C W. N. 835, 20 C W N 829 1 Pat L J 232), *fol*

——conditional order of injunction is appealable 1922 A. 441 66 I. C 509.

——no appeal lies from an order of the Dt. J. returning memorandum of appeal for presentation to a competent Revenue Court 19 A L. J 868 63 I C. 951

——an order refusing to set aside the abatement of an appeal is appealable under Or 43 R 1 (k), 2 P. L. R. 279

——if appeal lies from an order setting aside abatement 1926 Cal. 444.

——an order of appellate court returning a plaint for want of jurisdiction of the original court is appealable 19 A L. J 305 : 62 I. C. 399.

. . . . 1 review,

ed in the
. N. 943 :

——an order returning a plaint to be presented to proper court under Or 7. r. 10 is subject to an appeal under Or. 43, r. 1 (a) but no second appeal lies. 88 I. C. 752 : 1925 Bom. 431 : 27 Bom L R. 635

——an order in execution proceeding to be appealable must conclusively determine the rights of the parties and an *exparte*

(3) Appeal against order (Ss. 104-106 and Or 43, rr. 1—2)— *contd*

order for issue of sale proclamation is not such order 37 C L J. 170

——no appeal lies against an order refusing to extend the time fixed for payment of decretal amount under a decree for pre-emption 60 I C 496

——an order rejecting an appeal for failure to furnish security is not a decree and is not appealable 62 I C 751

——so also an order rejecting a memorandum of appeal for deficit court-fee is not appealable 63 I C 99

——an order under s 73 rejecting application is not a determination of the right of the parties 1921 Pat 204.

——a "rubakari" drawn up fixing the amount of the cost is not a decree under s 2 (2) C. P C but is an order within S 2 (4) C P C 59 I C 51

——if in passing an interlocutory order cost is unconditionally paid to the other party, the latter is not, by accepting the costs, precluded from questioning the order in appeal 46 C L. J 51 · 1927 Cal 733 104 I C 151

——order striking out the names of the detts is not appealable. 69 I C. 961

——order striking out names of defts on the ground of misjoinder is not appealable 1921 M W N 799 14 L W 642

——an order returning a memorandum of appeal for presentation to proper court is not appealable, although an order by an appellate court returning a plaint for presentation in proper court is appealable one 32 C W N 693

——an order rejecting a plaint for non-payment of entire court-fee amounts to a decree and the memorandum of appeal from that decree must bear *ad valorem* court-fee 3 Lah. L. J. 237

——an order staying or refusing to stay execution is not decree and is not appealable 25 C W N 555

——an order made under Or 21, r 60 is not a decree and is not appealable 1 Pat. L T 647 59 I. C. 282

——unless the finding operates in the eye of law as a decree, judge's using the printed form entirely inapplicable, will not make it a decree, conversely the absence of a formal decree will not make an adjudication any less a decree 62 I C. 467.

——an order rejecting the husband's claim to be the legal representative of the wife is not a decree and does not bar a regular suit for declaration 12 N. L. R. 45 : 62 I C. 303

——an order adjudicating that the interest of the plffs being common the appeal abated for the legal representatives of the deceased plff. not being made parties, is a decree. 2 Lah L J. 762 1 Lah 482 : 60 I C. 111

——order as to addition of parties after the devolution of interest during the pendency of suit is appealable. 54 C. 716 : 104 I. C. 842 : 1927 Cal 844.

——finding as to the status of agriculturist is a preliminary decree. 45 Bom. 627 : 60 I. C. 885.

(3) Appeal against order (Ss. 104-106 and Or. 43, rr. 1–2)— *contd.*

——an order rejecting an application for making a preliminary decree in a mortgage suit fina [illegible] owing to the death of the sol[illegible] appeal and second appeal. 33 [illegible] 59 I. C 177

——an order of dismissal of an appeal for default does not amount to a decree. 4 Pat L. T. 405: 2 Pat. 739 : 1923 P. 514 · 1923 Pat. 213, 76 I C 166

——an order deciding that a particular deft. was not liable for mesne profits is a decree and is appealable. 1923 Cal 308, 35 A. 159, 20 C. L. J 476, 480 *Ref*

——an order in a partnership suit referring the suit to the [illegible] taking accounts &c, is not [illegible] 73 I. C. 903.

[illegible] anding a suit for the disposal [illegible] ...ry decree and is appealable L R 4. A. 124.

——an order dismissing an application for execution for default of the D. Hr. is not appealable. 68 I. C 337.

——no appeal lies from an order declining to restore an application under Or. 21. R 90 which had been dismissed for default 97 I C. 704.

——an appeal lies from an order dismissing an application under Or. 21 R 90, for the non-appearance of the applicant when the opposite party was ready to contest. 104 I. C. 759 . 55 C. 616 ; 1928 Cal 25.

——an order setting the terms of the sale proclamation and directing its issue is not appealable. 35 C. L. J. 170 : 64 I C. 545, 16 C W. N. 124, 970.

——no appeal lies from an order refusing to stay execution by an appellate court, 68 I C 49, but a decision whether execution shall or shall not take place for the time, being is a question relating to execution and is appealable 68 I C. 751.

——an order refusing leave to a decree-holder to bid under Or 21 r 72, C. P C. is not appealable. 38 C 717 . 15 C. W. N. 862 : 14 C L J. 241 . 11 I. C. 545 ; 8 A. L J 1117 13 Bom L R. 694 P. C

——in an appeal from an order rejecting an application for setting aside an *exparte* order an appellate court can treat the appeal as one from the *exparte* decree itself and can decide the case finally instead of remanding it to the lower court for re-hearing. 1926 Cal 1232 : 97 I C 313

——an order refusing to appoint a Receiver is an order under Or 40, and hence is appealable. 95 I C 632 ; 1926 Cal 100, 17 C W N. 996 *Appl.* (31 C. 495, 17 C. 160) *Ref.*

——an order appointing a receiver subject to security being furnished is not apealable till the security is furnished and the appointment is finally approved. 31 C. W. N. 235 : 45 C. L J 63 100 I. C 140 : 1927 Cal 253, 13 C. L. J. 157, 14 C. L. J. 489, 13 A. L J 79, 17 Bom L R. 510, 42 A. 227 *Rel on.*, 40 M. 18, *not fol.*

(3) Appeal against order (Ss. 104-106 and Or. 43, rr. 1—2)—*contd.*

——an order removing a receiver is one falling under Or. 40 R. 1(a) and hence is appealable 53 C. 319 : 92 I. C 940 : 1926 Cal. 593.

——where no appeal lies from an order, the memorandum of appeal can be treated as an application for revision. 103 I. C, 864 : 1927 Cal 850.

——but an appeal cannot be converted into a revision on the application of a party. 102 I. C. 28 . 1927 M. W. N. 286, 52 M. L J. 90

(4) Appeal against preliminary decree or order. (S. 97)

——when some issues are decided, adjourning the case for the trial of other issues, the decision not being a decree, is not appealable. 18 C L J. 78

[illegible]

minary decree. 39 B 421

——no appeal lies against the finding that the deft is not an agriculturist, even though the finding is recorded in the form of a decree 94 I C 72 1926 Bom 237 ; 28 Bom L. R. 307, 23 Bom. L. R 826 *Expl*

——where no second appeal is preferred against a preliminary [illegible]

C. W N 868, *Dist*, 20 C W N. 1174

——an order deciding an issue remanding a suit for the disposal of another issue amounts to a preliminary decree and is appealable. L R 4 A 124

——a preliminary order appointing commissioner for assessing, is not appealable. 22 C. W N. 40 n.

——appeal against a preliminary decree is competent though filed after the passing of the final decree but before it was drawn up or signed. 22 C W N 831.

——after finding on a preliminary point, unless a formal decree is drawn up, there is no preliminary decree and no possibility of appeal, it is court's duty to draw up a decree 37 B. 480.

——where during the pendency of an appeal against preliminary decree in an account suit, the final decree is passed, but the preliminary decree is reversed in appeal, the final decree becomes inoperative. 18 C L J 214, 223, 40 C. L J 291

——an appeal only against the preliminary decree after the final decree has been passed is not maintainable but the court may allow the appellant to amend the memorandum of appeal at the hearing so as to turn the appeal against the preliminary decree into one against both the preliminary and final decrees. 25 C. W. N. 776, 36 C. 762 approved. 18 C. L J. 321 *Dist.*

(4) Appeal against preliminary decree or order (S 97)—*contd.*

——an appeal against the preliminary decree only presented after both the preliminary decree and final decree, is not maintainable. 107 I C. 610 1928 Lah 73, (36 C. 762, 1921 Lah 265, 32 All. 225, 18 C. L. J 321 1921 Cal 109) *fol* (37 Mad 455, 37 M. 29, 36 All 532 F. B, 1926 Lah 534) *Dist.*

——no appeal against a preliminary decree is maintainable when [illegible] has been passed

——time for the doing of anything runs from the date of the ultimate decree 75 I C 3, 34 C L J 415 p. 427 70 I. C. 64

——the right of appeal under s 97 C. P. C only arises when a preliminary decree is drawn up It is the duty of the court and that of the party to see that such decree is drawn up 25 Bom L. R. 826 1924 Bom 33

——when some issues are decided, adjourning the case for the trial of other issues, the decision not being a decree, is not appealable 18 C L J 78

——when appeal is preferred against a preliminary mortgage decree, right to apply for final decree accrues on the date of appellate order. 37 C L J 452, 39 A 641, 40 A. 203, 40 M 714, 1 Pat 444 3 Pat. L T. 329. 66 I. C 790, 71 I C 372 but if the appeal is dismissed for non-prosecution that does not extend time 3 Pat L T 565 : 66 I. C 97

——an order dismissing a suit for want of prosecution made after the passing of the preliminary decree is not appealable but is open to revision 6 Pat L T 152 : 86 I C 785 : 1925 Pat. 433.

——where no second appeal is preferred against a preliminary decree in a partition suit before the disposal of the final decree and no appeal is preferred against the final decree, the preliminary decree having been confirmed by the final decree, no second appeal lies from the preliminary decree. 20 C W. N. 231 : 18 C L. J 321. *fol* 17 C. W. N 868 · *Dist*, 20 C W N 1174

——a preliminary order appointing commissioner for assessing, is not appealable. 22 C. W. N 40 n

——appeal against preliminary decree is competent though filed after the passing of the final decree but before it was drawn up or signed. 22 C. W. N. 831

——an order deciding an issue remanding a suit for the disposal of another issue amounts to a preliminary decree and is appealable. L R 4 A 124.

——an appeal only against the preliminary decree after the final decree has been passed is not maintainable but the court may allow the appellant to amend the memorandum of appeal at the hearing so as to turn the appeal against the preliminary decree into

(4) Appeal against preliminary decree or order—*contd.*

one against both the preliminary and final decrees. 25 C. W. N. [illegible] L. J. 321 *Dist*

[illegible] gage suit is affirmed in [illegible] rs from the decree of the [illegible] C 2, 42 I. C. 93. 39 A. [illegible] 870. 16 A. L. J. 85, 44

[illegible] ins from the date of the [illegible] 427 · 70 I. C 64.

(5) Appeal to Privy Council (Ss. 109-112 and Or. 45, Rr. 1-16).

——s 110 C. P. C. should be construed with reference to the subject matters in dispute in appeal to the Privy Council Where the appellate Court modified the decree on share only but affirmed on other points leave to appeal to the Privy Council cannot be granted on those points, except on showing a substantial question of law, 31 C. W. N 572 ; 45 C L. J 426. 1927 Cal 543. 103 I. C 65, 8 C. W. N. 294, 23 C W. N. 582, 43 A 220 *Ref.* 51 C 969 P. C. *Expld.*

——when the appellate Court in an appeal from a preliminary decree in a mortgage suit dismissed the appeal but extended the period of grace, it is not reversing the decree of the lower Court within s 110. C. P. C. 103 I. C 703. 1927 Pat. 379.

——when the lower court's decision is reversed on some of the grounds only, it should not be deemed to be confirmed on the other grounds 53 C 533. 30 C W N. 745 1926 P. C. 41. 94 I. C. 974 · 29 A. L J. 761 P. C.

——the question whether a Hindu widow who is an executrix can enter into a compromise with the members of her husband's family for procuring peace, cannot be said a substantial question of law. 43 C L J 206 1926 Cal 711.

——the question whether the irregularities caused by the non-[illegible]

——where the question of law has been definitely settled by the Privy Co[illegible]

[illegible] 103 I. C 104.

——to entitle the appellant to appeal to the Privy Council there must be not merely a question of law but a substantial question to law. 106 I. C 362 (Pat.)

(5) Appeal to Privy Council (Ss. 109—112 and Or. 45, RR. 1—16)—*contd.*

——" Substantial question of law " in s. 110 means a substantial question of law as between the parties and not a question of general importance 31 C W. N. 495 ; 102 I. C 889 : 1927 M W N. 519 : 1927 P. C. 110.

——but a " substantial question of law " within the last clause of s 110 does not mean a substantial question of law as between parties in the case involved 55 C. 944 : 48 C. L J. 113 ; 32 C W. N 817 · 30 Bom L R 1384 ; 1928 M. W. N 917 29 Punj L R 429 : 26 A L. J. 1215 109 I C 723 : 1928 P. C 172.

——when the point of law on which the whole case turned was obviously untenable, it was not substantial question of law. 107 I. C. 643 . 1928 Mad. 233 ; 39 M L T. 655

——refusal to extend the time for the payment of Court-fees is not a substantial question of law as it is not a question between the parties. 110 I. C. 179 1228 Lah. 360, 1927 P. C 110 *fol* 5 Lah. 260, *not fol*

——the question as to the proper construction of entries in *jama wasil baki* papers is not a question of law. 111 I C 288 1928 P C. 243

——whether the mistakes in account are sufficient to entitle the court to reopen a settled account is a substantial question of law. 102 I C. 752 ; 1927 Pat 311

——whether a document executed by a Hindu widow is binding on the reversioner or not is not a substantial question of law 103 I. C 654

——where in a par [illegible] one joined [illegible] not [illegible] ere [illegible] 45

——construction of a difficult document is a mixed question of law and fact involving a substantial question of law forming a valid ground for leave to appeal to the Privy Council *103 I. C. 31 1927 M. W. N. 213 : 39 M L. T. 15 ; 53 M. L J. 375.*

——but when the construction of a document is of minor importance, it is not a substantial question of law. 23 N L. R 156.

——"immediately below" in sec. 110 do not necessarily mean "subordinate to" 109 I. C. 863 : 1928 Lah. 537, 33 C. 918 P. C. *fd* 43 C. 90. *Diss.*

——mode of valuation in a claim of injunction or irrigation, second paragraph of s. 110 applies, 106 I. C. 538 . 1928 Pat. 191.

——the value ought to be ascertained as on the date of the H. C. decree ; mesne profits subsequently awarded cannot be taken into consideration in making an estimate of the value of the subject-matter under s. 110 para. 2, 50 B. 160 : 28 Bom. L. R. 454 : 94 I. C. 755 ; 1926 Bom. 265.

(5) Appeal to Privy Council (Ss. 102—112 and Or. 45, RR. 1-16)—*contd.*

——for the purposes of s 110 not only the mesne profits claimed up to the date of suit should be taken in account but also the future mesne profits and at any rate up to the date of the decree of the court should be taken into account. 107 I C. 828 (P.)

——where a right of way is declared over land worth Rs. 150 forming part of land worth Rs 10000, the decision does not affect property worth Rs 10000. 1928 Mad 785 · 111 I. C. 795

——if a party takes advantage of the valuation put upon the subject-matter of the suit by the other party he cannot question the valuation as incorrect 1927 Mad. 862 . 104 I. C. 577, 45 C. L. J. 225; 101 I. C. 901 1927 Cal 418.

——but the plff. himself is not precluded from contending that his original valuation is wrong though the court treat his admission as a strong piece of evidence against him 1927 Mad. 862 ; 104 I C. 577, 1935 Mad. 1223 *Dist*

——the mere fact that low valuation is put on the plaint for the purpose of court fee and jurisdiction does not preclude the plff. to state the real value of the subject-matter for the purpose of appeal to the Privy Council. 44 C. L. J 572 . 31 C. W. N. 268 : 99 I. C 921 : 1927 Cal 225

——the costs of the suit are in no sense the subject-matter of the suit so as to add it in order to bring the valuation up to the appealable amount. 104 I C 267, 8 Pat L T 714 1927 Pat. 328 : 6 Pat. 444.

——the Privy Council will be very chary of entertaining an argument which has not deen sifted in the Courts below specially when the question to be decided concerns the diversified and complicated Indian Law as to tenure of land. 30 C. W. N. 745 . 53 C. 533 : 24 A. L. J 761 94 I C. 974 1926 P. C. 41

——a new case cannot be set up before the Privy Council for the first time 32 C W. N. 769; 47 C. L. J. 542 : 30 Bom. L R. 849 · 26 A L J 471 : 109 I. C. 52 : 1928 P. C 106.

——but a question of law can be raised for the first time in appeal before the Privy Council. 25 A. L. J. 78 : 31 C. W. N. 444 ;

· **(5) Appeal to Privy Council (Ss. 109-112 and Or. 45, RR. 1-16)**—*contd.*

45 C. L. J. 297; 1927 M W. N. 87 · 52 M. L. J. 366: 38 M. L. T. 46: 28 Punj L. R 782 · 8 Pat L T. 377 . 100 I. C. 22: 1927 P. C. 25

. ——an order of the H C refusing leave to appeal in *forma pauperis* is not a final order for the purposes of appeal to His Majesty in Council under s. 109 (a), 100 I C. 886: 1927 Pat 175: 6 Pat 67

——an order of remand to re-hear the case is not a "final order" within s 109 (a) C. P C 8 Pat. L. T. 615: 1927 Pat. 363. 6 Pat. 282.

——interlocutory orders come within the purview of cl (c) of s. 109 but the power to grant leave to appeal to the Privy Council on such matters should be rarely exercised and in exceptional cases of great public or private importance. 31 C W N. 540; 1927 Cal. 481 · 103 I C. 561, 21 C L. J. 281, 23 A 227, 49 C. 967, 44 M. 293 *Ref.*

——when the deft took ob[illegible] to the valuation and the juris diction of the Subordinate Juc[illegible] the same and obtained an a[illegible] Judge, he was bound by the [illegible] the Privy Council. 45 C L J [illegible]

——a deft who had consistently acquiesced in a finding as to valuation and court-fees cannot re-open it to enable him to prefer an appeal to his Majesty in Council 42 B. 609: 46 I C. 4. 20 Bom. L. R 418.

——the form of inquiry is in the discretion of the court. 1925 Cal. 414.

——where many important and wide reaching questions of law are involved in a decision sought to be appealed against the case is " otherwise a fit one for appeal to his Majesty in Council " within R. 3, 1914 M. W. N 162. 22 I C 390

——when there is already a decision of the Privy Council on the issue Involved in a case, there can be no substantial question of law to grant leave to appeal. 92 I C. 1013.

——but when the question involved in the appeals is the subject of much litigation and the law is not very clear, leave should be granted on the ground of the question being of general importance. 50 B 753

——judgment in R. 4 refers to the judgment appealed against, i. e. [illegible] e rule the judgment whic[illegible] ve to consider should be t[illegible] appeals and the rule does [illegible] same case or in the same appeal to consider the effect of several judgments of the H. C. 6 P. L. J. 97: 2 P. L. T. 157: 60 I. C 517: 1921 Pat 145.

——where a reference is made under Or. 45 to a court of first instance, the court must carry it out itself; it should not remit the investigation to some other officer. 43 C. 225: 34 I. C. 203.

(5) Appeal to Privy Council (Ss. 109-112 and Or. 45, RR. 1-16)—*contd.*

——a certificate issued under Or. 45 must clearly show whether it fulfils the condition of sec. 110 or is otherwise a case fit for appeal to the Privy Council under s. 109 (c), 44 M. 293 : 25 C. W. N. 630 . 40 M. L. J. 229 : 33 C. L. J. 277 P. C.

——the expression " granting the certificate " in the provision refers to
document
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——the omission to give notice to the respondents of the admission of an appeal to the Privy Council is no sufficient ground for reh
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ment. 69 I. C. 525 . 1923 Nag. 198

——under O 45, R 4, the case is only consolidated for the purpose of pecuniary value. It does not matter what the reason is why the appeals are consolidated Once they are consolidated for whatever reason they form in fact one appeal and the parties in that appeal must be treated just as the parties in one suit. 70 I C 782 · 1923 Pat 17 1923 P 215.

——O. 45, R. 4, C P. C, does not limit the inherent power of the High Court to consolidate appeals to the Privy Council for the purpose of security for costs and for saving expenses. 3 P. L. J. 446 : 45 I. C 551 1918 Pat. 259.

——when two appeals are consolidated for valuation, and a joint cert
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198 : 5

——an appeal to His Majesty in council from a decree passed before the coming into force of Act XXVI of 1920 is governed by O. 45, R. 7 as it existed before its amendment and the period for furnishing security is 6 months Where cash is offered as security before the expiry of 6 months but is accepted after that period owing to the Court's delay the deposit must be deemed duly made. 44 A. 242, 20 A L. J 51 . L R. 3. A. 91 64 I. C. 340 : 1922 All. 87.

——under O. 45 R 7 as amended by S. 3 of Act. XXVI of 1920 the High Court's discretion to extend the time for furnishing security and making a deposit for translation and printing and

(5) Appeal to Privy Council (Ss. 109-112 and Or. 45, RR 1-16)—*contd*

other charges has been curtailed and limited to the period mentione in the amendment The High Court has no power to extend th period beyond six weeks. 44 A. 216 · 20 A. L. J 13, 65 I. C 249 L. R 3 A. 634 · 1922 All 43.

——by virtue of R 9. of the Privy Council Rules, 1920 the H C has power to enlarge the time prescribed by Or. 45, R 7. as amended by Act. XXVI
51 B. 430 1927

——the per
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is not a cogent reason where ample legal advice would have been obtained. 71 P. W. R. 1913 18 I C. 489 : 105 P. L. R. 1913

——the High Court has no power to extend time or excu
delay
for the costs of the respon
dent
Council, beyond the period
given
8 L. W. 29 : (1923) M. W. N
510 : 7

——power is given to extend the first period of 90 days from the date of the decree up to a period of 60 days on cause shown but the court has no power to extend the period of 6 weeks from the date of the grant of the certificate for the filing of the security and necessary costs. 70 I. C. 937 · 25 O C. 254 ; 1923 O 50 (1)

——the
the time beyond the
period of six
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has discretion
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decree to a
I. C 585.

——where the maximum period of 60 days has expired and the appellant has not taken any steps to comply with the provisions of R 7 before the expiry of the time the H. C. cannot extend the time
from the
it may be
103 I C

tisfaction
urity and
0 A. L. J

13 *fol.*

——the H. C. has power to extend the time allowed for giving security under Or. 45 R. 7 provided there is cogent reason for such extension. 4 P. L. J. 521 : 49 I. C. 892, 10 C. 57 *fol.*

——when there is any conflict between Act XXVI of 1920 and Or. 45, R. 7 C. P. C. on the one hand and R. 9 of the Privy Council Rules on the other as regards the power of the H. C. to grant extension of time the Privy Council Rule must prevail by reason of s 112 C. P. C. 101 I. C. 555 : 1927 Bom. 217 : 51 B 430 : 29 Bom. L. R 352. F. B.

(5) Appeal to Privy Council (Ss. 109-112 and Or. 45, RR. 1-16)—*contd.*

—it is competent to the H. C to appoint a Receiver to an estate which is the subject-matter of an appeal for which special leave has been granted by the Privy Council 4 P L. J. 482 : 52 I C. 407, 38 C. 335 *fol* 10 C L J. 326, 27 C I *Ref*

—The H C. has inherent power to stay the execution in view of an intended appeal to Privy Council. 40 C 955 16 C. L. J. 508. 18 I. C 207

—the H C. has power to stay the execution of a decree although an appeal from such decree has been admitted by special leave of His Majesty in council. 38 C 335 · 13 C. L. J 529. 13 Bom L. R. 419 10 M L T 25. 1911 M W. N. 124 : 11 I. C. 384 P. C.

—when a decree of the High Court is executed before an appeal to the Privy Council is admitted the H C has got power to direct security from the respondent for the due performance of any order which may be made by His Majesty in council. 50 B. 453 : 28 Bom. L. R. 659 96 I. C. 245 1925 Bom. 425

—but it will not be stayed without sufficient cause being shown. 29 P. L R 1915. 27 I C. 572.

—where the defts. appealed to the Privy Council from a preliminary decree and appealed to the H C to stay the proceedings in the lower court for a final decree pending the decision of the Privy Council, held that further proceedings were proceedings in execution and the present application for stay was not justified by Or. 45 R. 13, 42 A 170 18 A L. J. 142 54 I. C. 561

—a subordinate judge has no jurisdiction to stay execution of a decree of the H. C. The only court that can stay execution is the H. C. 3 P L J. 40 42 I. C 835 ; 1917 Pat 285

—while directing stay of execution of a decree which is being appealed against to His Majesty in Council the court must specially define the time within which the security must be tendered and give such further direction as may be necessary to ensure the intention of the court being carried out to its satisfaction. 24 C. W. N. 265 : 57 I. C 382

—if in the event of the appeal to the P. C. being successful the restoration of property, as it was before execution of the decree, is impossible or would be with great difficulty, the execution should be stayed and not merely because the applicant will suffer much loss. 87 P. W. R. 1912, 15 I C. 187.

—a person seeking execution either by way of restitution or otherwise must apply first to the court indicated by R. 15 as the word "execution" means any kind of execution. 37 A 567: 30 I C. 77 : 13 A. L. J. 769

—under Or 21, R 15 some of the D. Hrs. who have obtained permission under Or 45 R 15 can execute the decree of the Privy Council on behalf of all the D. Hrs. though some were dead at the ime of the P. C. decree. 58 I. C. 212 : 1 P. L. T. 426.

(5) Appeal to Privy Council (Ss. 109-112 and Or. 45, RR 1-16)—*contd*

——it is inconvenient, if not impossible, to require that each person interested in the execution of a particular order shall obtain a separate transmission when the order has already been transmitted at the instance of another successful party. 32 M. L. T 249 : 75 I C. 219 : 1924 Mad 95.

——R 15 should not be construed as restricting the only possible evidence of an order in Council to the certified copy. It is intended to ensure that proper information on the subject of an order-in-Council should be supplied to the courts in India, 33 M. L. J. 300 : 41 I. C. 629 1917 M W. N 587.

——where a party with an order in Council refuses to lodge the order opponent can apply to the H C. with a certified copy thereof and ask for a summary order on the party to lodge the order so that execution might follow in terms of the judgment of the Board 30 C. W N 938 : 5 Pat. 461 : 51 M. L J. 586 : 1926 M. W. N. 492 94 I.C 813 : 28 Bom. L. R 1260 · 1926 P C. 31.

——the H C. at Patna has no jurisdiction to execute an order in Council passed in an appeal from the Calcutta H C on appeal from a subordinate court in Behar An application for execution of such an order should be to the H. C at Calcutta 2 P. L. J. 634 1918 Pat. 49 · 43 I. C 457 4 P L W 133.

(6) Cross-objection or cross appeal (Or. 41 R. 22)

——a respondent cannot be heard against the decree unless there be cross-objection filed, 23 C 922 : 1 C. W. N 12 P. C., 1927 Bom. 128 28 Bom L R 627, 50 M. 863 , 104 I C 472 : 1927 Mad 801 : 39 M. L. T. 234, nor can any point against him be reversed 22 C. W. N. 526, 1918 Pat. 26.

——when a suit is dismissed against A but decreed against B, by the trial Court and the plff does not appeal while A & B jointly appeal against the decree which is decreed against the plff and the plff appeals to the Privy Council held that Or. 41, R 33 is not intended to apply to such an appeal and accordingly the appeal so far as B. is concerned should be dismissed, 49 M. 435 · 44 C. L J. 67 : 31 C. W N. 1: 1926 P. C. 34.

——when the entire decree is in favour of respondent but a particular issue has been decided against him, he may object to the decision of that issue without cross-appeal 17 C. 809 · 17 I A. 57, P. C , 13 B 75.

——generally the right of the respondet to urge cross objection should be limited against the appellant, but where the appeal against some of the parties cannot be disposed of completely without matters being opened up as between co-respondents, cross-objection may be urged against them 26 C. 114, 121, 35 C 565, 33 C. 655, 16 C. W. N. 612, 15 C. L. J 61, 37 B 511, 28 A. 95, 66 I. C. 642 But cross-objection against co-respondent as to a side issue should not be allowed. 28 C.L.J. 123 *contra*. 29 C W. N. 784 : 88 I. C. 866.

(6) Cross-objection or cross appeal (Or. 41, R. 22)—*contd.*

——Or. 41, r. 22 should be confined to cases of cross-objection urged against the appellant, but Or. 41 r. 33 gives the court wide discretion and may occasionally arise where cross-objection against a co-respondent should be heard 66 I C. 642

——one respondent may urge cross objection against another respondent when the appeal against some of the parties opens out questions which cannot be disposed of completely without matters being allowed to be opened up as between co-respondents 2 Lah L. J. 747 : 56 I C. 469

——a respondent cannot have the right of filing cross-objections against a co-respondent when the latter is not an interested party at all and no relief is claimed against him in the appeal. 107 I. C 569.

——under r. 22 a respondent can file memorandum of cross-objections against a co-respondent, 5 Lah. L J 92 : 1923 Lah. 39, 69 I. C. 330, 38 M. 705 *fol*

——Or 41 R 22 does not contemplate the filing of a memorandum of cross objection against a person who is not a party to the appeal. 91 I. C 649 53 C 270 · 1926 Cal 533.

——the decision which says that in the case of a purely lateral objection the court will not as a rule permit it to be urged, will not apply to a case where the interest of the objection was really adverse to that of the appellant and the other co-respondents and though the appellant unnecessarily took the same objection in the ground of appeal. 29 C W. N. 784 ; 88 I C 866. 1925 Cal. 973.

——objection not put as cross-objection cannot be taken if it is not in support of the decree. 84 I C 124 · 1925 Cal. 94.

——a respondent is entitled to support the decree passed by the first Court under Or 41 R 22 on a point found against him by that court 41 C L J 31 · 1925 Cal. 518 86 I. C 6

——the provisions of Or. 41 C P. C apply to appeals from the original side of the H C. and in such appeals it is competent for a respondent to file memorandum of objection 50 M. L J 190 F. B.

——R 22 does not extend to civil revision petition. 112 I. C. 231. 1928 Mad 794.

——respondent can support the judgment and decree of the lower court by traversing any ground which court may have found against him without filing cross-appeal. 24 I. C. 68.

——a second appeal does not lie on the ground that the court [illegible] the meaning of a docu- [illegible] C. L. J. 198, 10 C L. J. [illegible] 7 I. A 122 P. C., 19 C. [illegible] C. 29 B. I: 31 I. A. 16 [illegible]

——cross objection in a second appeal must relate to something *decided by* particular decree of the *lower* appellate court against which the opposite party has appealed It cannot relate to something decided by another decree even though that other decree

(6) Cross-objection or cross appeal (Or. 41, R. 22)—*contd.*

and the decree appealed against arose out of a single decree of the trial court 96 I. C. 67 1926 All 582 · 24 A. L J. 694.

on a Letters Patent appeal.

L.

not be called cross objection.

1

——petition supporting decision is no cross-objection for which *ad valorem* court-fee is to be paid. 44 All. 577 : 1922 A. 280 : 68 I. C. 861

——time being expired appeal may be treated as a memorandum of cross-objections under Or. 41 r. 22, 44 P. L. R (Lah) 80 : 67 I. C 478 25 A 628.

to be paid J 443.

objection W N.

——cross-objections may be admitted on the expiry of 30 days from the service of notice of appeal and even during the argument of the appeal. 5 N L. J. 192 . 1922 Nag 213 . 66 I C. 217.

——the court may receive a memo of cross objection at any time. 15 C. W N. 205 · 12 C. L. J 173, 7 Pat. 827

——as the time of cross-appeal is one month from the date of service of notice the appeal cannot be disposed of before that period. 1917 Pat. 103.

——the respondent is entitled to a pariod of 30 days to file memorandum of objection from the date of service of notice fixing W. 792.

irected against the 1923 Oudh. 108 70

——Or. 41. r 22 is not applicable to an appeal under Cl. 15 of filed there- C 589. High file a L. J.

of cross- 635

objection ion

L. R. 4

furnish security for costs and while the respondent had filed memorandum of cross-objection of after notice to the parties 384 : 1925 M. W. N. 190.

(7) Fresh evidence in appeal (Or 41 RR. 27—29)

——it is always dangerous to allow parties to make a new case and call fresh evidence 31 A. 259, 779.

(7) Fresh evidence in Appeal (Or' 41 RR. 27—29)—*contd*

——power given to take additional evidence in appellate court should be strictly and sparingly exercised. 36 C L J 345, 50 C. 276 : 1923 Cal. 238 : 70 I C 510, 1923 S 42 11 M I A 28, 49 P. C, 1925 Cal 98, 39 C L J 261

——grounds of review under Or 47, r 1 are not sufficient cause for an appellate court to admit further evidence. 84 I C 74 · 1924 Bom. 227, 88 I C 586 · 1925 All 808

——the test as to admit additional evidence is whether the appellate court requires it to enable it to pronounce judgment, or for any other substantial cause 21 C 484, 36 M 477, 22 M L J. 15, 17 C W N 615, 19 C L J 165, 36 A 93 P C, 15 C. 765, 33 A. 379, 88 I C. 586 . 1925 All 808, 42 M 737, 23 A 121.

——when evidence is admitted with the consent of both parties, parties cannot take objection afterwards. 36 C. 833, 13 C. W. N 830 P. C.

——a local inquiry can be ordered 17 W. R. 300, 95 I C. 170: 1926 Cal 912, 94 I. C. 393 1926 Cal 897, so also a commission to examine accounts 3 Lah 382 1923 Lah 115,

——omission to record reasons for admitting evidence does not render the evidence inadmissible 12 C 37, 11 C 139, 13 W. R. 303, 85 I. C. 676 1925 All. 752, 39 C L J 261.

——a lower appellate court is bound to state reasons for the admission of additional evidence tendered before it. 41 C. L. J. 194 : 86 I. C 646 1925. Cal 671

——admission of additional evidence without recording reasons is not fatal, Or. 41 r. 27 being only directory and not mandatory. 64 I C 238, R, 4 A 187 but it is an irregularity for which fresh trial was ordered under the circumstances of the case. 1922 Cal. 148, reasons ought to be recorded. 68 I. C. 719 (C). 41 C. L J 194: 88 I. C. 646 1925 Cal. 671

——if a proper case is made out for the admitting of additional evidence and it does not prejudice the opposite party, the mere fact that reasons have not been recorded by the court will not amount to an illegality but would amount to an irregularity. 98 I C. 137 : 1927 Cal 126.

[illegible] evidence where the record [illegible] ment upon the matter in [illegible] C. W. N 401.

[illegible] itted the other side must have an opportunity to rebut it 68 I C. 293 (c), 24 C. L J. 457, 31 B 381, 98 I C. 129 · 1927 Cal. 140 : 1923 Cal. 300, 41 C. L. J. 194 : 86 [illegible]

[illegible] ional evidence only under [illegible] opportunity to rebut it. [illegible], 41 C L. J. 194 ; 86 I. C.

——the legitimate occasion for the admission of additional evidence by the appellate court under Or 41. r 27 is, when on examining the evidence as it stands some inherent *locuna* or defect

(7) Fresh evidence in appeal (Or. 41, RR. 27-29)—*contd.*

becomes apparent or where a discovery is made, outside the court,
it 66 I C
14 42 C 675.
it has been
mission of it
r to enable
the appellate court to decide the case in favour of one party. But where such evidence has been admitted in the first appellate court and the party objecting relies upon a portion of such evidence he cannot object to the remainder 1922 Nag 119 : 67 I. C. 237, 31 Bom. 381 · 1 Pat . L J 435 . 31 M 114 *Ref*

——party cannot claim to adduce fresh evidence as a matter of right. 67 I C 770, 26 O C 66 : 1923 Oudh. 109 : 75 I C. 331.

——ignorance of the existence of a document is no ground for admitting it in appeal. 1923 Cal 273, 68 I C. 334, (C) 42 C 675, 31 B. 381 *Ref.*

——both under the general law and under Or. 41, r. 27, an
litional evidence, but the
exercised only if sufficient
47 A. 412 : 86 I. C. 761.

——the power to admit additional evidence should be exercised with usual caution and only for the interests of justice. Such additional evidence must be of the nature that would have been admissible if produced at the trial. 49 M. 435 : 44 C. L. J. 67 31 C. W. N 1 94 I. C. 767 51 M. L J 570 : 1926 M. W. N. 495 : 1926 P C. 34.

——the jurisdiction of an appellate court to admit additional evidence is not confined to cases where the court itself discovers a *locuna*. The words "for any other substantial cause" give a discretion for the court even on the application of a party. 89 I. C. 721, 89 I C. 997, 85 I. C. 385 48 M L J 32 : 1925 Mad 181.

of the rule allow-
unless the
es appar-
C. 369.
C. W. N.

mutually exclusive and without resorting to an application for review in the trial court an appellant can apply for additional evidence being let in appeal. 48 M L. J 32 20 L W 840.

——where a point not having been disputed in the trial court a certified copy of the proceedings in a Small Cause Court was not filed therein, it should be admitted in the appellate court where that point is disputed 1928 Cal. 265.

——where pending an appeal in a rent suit the appellant obtains a decree in a title suit the decree should be received in evidence and given effect to 64 I. C. 721 (C), 31 B 381, 31 M 114, 36 A. 93.

(7) Fresh evidence in appeal (Or. 41, R. 27-29)—*contd.*

——subsequent discovery of evidence is no ground for admitting it in appeal, It is a ground for review under Or 47 r 1, 47 B. 674: 25 Bom. L. R. 310, 84 I. C 74 : 1924 Bom 227, 88 I. C. 586, 1925 All. 808, 1927 Lah 11, 97 I. C. 369, 34 I. C. 115, 103 I. C. 215, 1927 Cal. Lah. 574

——evidence tendered after the close of the case and rejected by the trial court should not be admitted in appeal 4 Lah L J. 371.

——evidence improperly rejected by the trial court should be admitted in appeal 7 Pat 90 : 1928 Pat. 113 9 Pat L. T. 180, 39 M. L T 399 · 1927 Mad. 1065 . 106 I. C 498

– —an appellate court cannot admit additional evidence after the close of the argument specially without recording reasons. 65 I. C. 504 (C), 1923 A 413, 71 I. C 289 and without giving the other side opportunity to raise objection. 73 I C 96 (C)

——where a document is admitted in evidence in appeal without any objection raised by the parties the mere fact that reasons were not recorded does not render it inadmissible when the parties are not prejudiced 90 I. C 756 (c).

——the appellate court can take evidence himself or direct the lower court to take the evidence and send it to the appellate [illegible]

raised in

meet the

——no evidence on new point raised by the appellant should be allowed I.. R. 4 All. 406

——if the court is satisfied that there has been failure of justice in the case by reason of absence of proof or a technical aspect of the case, it would consider an application to let in additional evidence 86 I. C. 576 : 1925 Mad 444 21 L. W. 210

——admission of certified copy of a deposition by the appellate court on the ground that copy filed in the trial court was incorrect, does not amount to taking additional evidence, and even if it does, the incorrectness of the copy filed in the trial court is a sufficient ground for admitting a fresh copy 105 I C. 83 : 9 Pat. L. T 215 : 1928 Pat 64

——under Or. 41 r. 27 (1) the appellate court is justified in sending for the original record and to examine it L. R. 4. A. 217.

——additional evidence may be received by the appellate court to correct the error that has crept in through the carelessness of the trial court in recording evidence L. R 4 A. 380

——"substantial cause" in Or. 41 r 27 is not *ejusdem generis* with the causes stated in the earlier part 1923 Lah 584.

——the negligence of a guardian is sufficient cause under Or. 41 R 27 to admit additional evidence. 110 I. C 447.

——when lower appellate court refuses to admit a certain material document under Or. 41 r. 27 the H. C. cannot interfere

(7) Fresh evidence in appeal (Or. 41, R 27-29)—*contd.*

in second appeal. 1923 Lah. 30 : 70 I. C. 830, 42 Mad. 737 F. B. 9 I. C. 265.

——Or 41 r. 27 authorises the court to afford opportunity to a party to adduce additional evidence if the appellate court requires a document to be produced or a witness to be examined to enable it to pronounce judgment or for any other substantial cause. 37 C L J. 607.

——where a commission to examine witness was refused by the lower court the appellate court has power to admit in evidence a statement purporting to be made by him. 90 I. C. 630.

——where an appeal was pending and another suit was filed between the same parties and the latter went to appellate stage where the prior appeal was decided and his decision had a material bearing on the decision in the pending appeal, it should be admitted in evidence in the latter appeal, 3 Pat L R. 174 · 88 I. C. 553. 1925 Pat, 612

——statements made by witnesses in a proceeding under the Lunacy Act commenced after the dismissal of the suit between the same parties may be admitted at the appellate stage 39 M. L T 155 : 31 C. W. N 1087. 101 I C 363 : 1927 M. W. N 456 : 1927 P. C. 123 P. C.

——where an appellate court is dissatisfied with the local investigation made by the commissioner or the way in which the trial court dealt with the matter of local investigation, it should either itself issue a commission or direct the lower court to take to appoint a commission for making a local investigation or to take evidence as provided by Rules 27 to 29 The appellate court should not reverse the decision and remand the case. 110 I C. 448 : 1928 Cal. 748, 110 I. C 427 1928 Cal. 749.

(8) Jurisdiction and power of the appellate court and its decision and judgment (S. 107 and Or. 41, RR. 31-33).

—— [illegible] is not questioned by th[illegible] the carelessness of the[illegible] [illegible]ind that finding 21 P. [illegible]

——dismissal of an appeal without fixing the hearing is without jurisdiction. 69 I. C 618.

——it is not only competent to the court of appeal, but it is its duty also, to take notice of events which have happened since the order challenging in appeal was made. 6 C. L. J. 662 (6 C. L J. 74, 92, 102), *Ref.*

——where the plff. definitely fixes the claims, (here the suit was for mesne profits) that will determine the forum of appeal, but wh[illegible] the amount found by the court to [illegible] 1133 : 6[illegible]

[illegible]ation [illegible], 677 : should not be carelessly overruled. [illegible] 15 W. R. P. C. 20 : 13 M. I. A. 607 P. C. 60 I. C. 434 *Fol.*

(8) Jurisdiction and power of the appellate court and its decision and judgment. (S. 107 and Or. 41, 12, 31-33)—*contd.*

——matters not opened by either party cannot be opened by the appellate court itself. 24 I. C. 68.

——the appellate court cannot dispose of the claim on an entirely new plea not raised in the trial court 3 Lah. L. J. 392, 9 Lah. L. J. 125 . 102 I. C 698 28 Punj L R 263, 9 Lah L J 165 104 I. C. 418 1927 Lah. 231, 46 C L J 253 104 I. C. 733 , 1927 Cal 855, 49 A. 162 1927 All 28, 49 A 55 1927 All 231, 44 C. L. J 263 : 1927 Cal. 56,

——to constitute appearance by a pleader it must be shown that the pleader was ready to place the materials before the court to enable it to apply its judicial mind. 1923 Pat 175 1923 P. 520, 34 C. 403 *Fol*

——an appellate court has power to enter into the merits of the case in which the appellant has failed to appear 2 Pat. L. T. 36 : 57 I. C. 75, 1923 Mad. 13, 69 I C. 513, 1923 Pat. 175 : 1923 P. 520

——the appellate court has power to dismiss the whole suit when the plff. appeals against a part of the decree and there is no cross appeal 62 I. C 623 (c), *contra* 3 Lah L. J. 231 60 I. C. 705, 72 I C 96

——the appellate court should exercise its power only in favour of parties to the appeal 13 Bur. L. T. 163.

——the appellate court can modify decree in favour of non-appealing deft. 43 A. 85 18 A. L J. 925 58 I. C 114 · L. R. 4 A. 70, 1923 Pat. 332 ; *contra* 43 A 320 : 19 A L. J 83 . 60 I. C. 817.

——an appellate court cannot frame new issue and try without remand. 25 C L J 547

——an appellate court should not lightly interfere with the finding of fact by the trial court which is in a better position to judge the truth and value of the oral evidence. 107 I. C. 349 : 47 C. L. J. 576 . 1927 P. C 266, 103 I. C. 708 1927 Cal 830.

——when a suit under sec. 106 B. T. Act is transferred to the civil court, appeal is to be heard not by the Special Judge but by civil court 27 C. L. J. 281.

——point raising questions of fact upon which the findings of appellate court must be taken to be conclusive, which has not been taken in memo cannot be allowed to be taken in special appeal 3 C. W N 627

——points not stated in memo. of appeal may be considered by the appellate court. 5 W. R. 61, 64, 17 A. 281, 13 A. 381, 3 C. 612, 3 A. 834 : but it cannot go beyond the relief asked. 24 W. R. 179 .

(8) Jurisdiction and power of the appellate court and its decision and judgment. (S. 107 and Or. 41, 12, 31-33)—*contd.*

matters not opened by either party cannot be re-opened by the appellate court. 24 I C. 68.

——lower appellate court cannot decide on a point on which no issue was raised although objection was taken in the W. S, 16 B 586

——all the objections taken to the decree should be considered by the appellate court in the same way as they were considered by the trial court When the preliminary objections have been rejected by the trial court and the same are again raised in appeal, they should be considered 55 C. 1216

——the appellate court has power to reverse a judgment in favour of a deceased deft 1922 M. W. N. 674 : 32 M L T. 124 : 1223 M. 58 : 70 I. C. 168 16 L. W. 330, 40 M 846, 848, 25 M. L. J. 248 *Fol.*

——an appellate Co ... although no cross-objection has bee

——the decision of

the subordinate court a

other, under the decree, must refund 21 C. W. N 304

——the dismissal of an appeal under Or. 41, R. 11 is a decree and the expression of opinion dismissing the appeal is a judgment 30 C. W N 334 1926 Cal 638 93 I. C 909, and the Judge in dismissing an appeal under this Rule is not relieved of the necessity of writing a judgment as prescribed by Rule. 31, 43 C. L J. 499 1926 Cal. 992 . 96 I C. 136, 95 I C 521 · 1926 Rang 129 ; 4 Rang. 18.

——when an appeal from a mortgage decree is summarily dismissed under Or. 41 r 11, the time for payment of the mortgage ... taken to have been

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d gone
uperior
th the
. C R
104 : 19
L. J
J. 624 :
J. 435 :

16 M. L. T. 44 P. C. *Dist.*

——unless an appeal is dismissed it stands till it is heard. 31 C. W N. 441 : 45 C. L. J. 297 ; 29 Bom L. R. 782 : 28 Punj L R. 117 : 25 A. L. J. 78 : 100 I. C. 22 : 1927 P. C 25 P. C.

——original court is the best judge of the witnesses examined before him, 28 C. L J. 306

—— ... does not depend upon th ... ox but on information ... e of fact as the trial cou

(8) Jurisdiction and power of the appellate court and its decision and judgment S. 107 and Or. 41, Rr. 12, 31-33—*contd.*

——the court of appeal should be slow to differ from the trial court on the credibility and veracity of witnesses. Non-application of wrong standards of probablity or improbablity is not merely a question of credibility. 47 C. 1079 · 24 C. W. N 803 : 58 I. C. 879, 34 C. L. J. 384 : 25 C. W. N 779

——in weighing the evidence, the appellate court should make due allowance to the fact that it has not seen or heard the witnesses. 25 C. W. N. 519 : 34 C L J. 178.

——the appellate court may allow to plead title by adverse possession for the first time in appeal if such a case arises on the facts stated in the plaint and the deft is not taken by surprise. 32 C. L. J 151 . 60 I C. 165

——power of an appellate court to add party is not circumscribed by any rule of limitation 76 I C 285.

——*Quaere* whether the court in a proper case, under Or, 41, R, 33, can add a deft as respondent for the purpose of passing a decree against him. 32 C. W N 281 . 47 C. L. J 136 : 30 Bom. L. R. 220 : 107 I C. 237 1928 M. W. N 20 : 26 A. L J 371 P C.

——[illegible]

court h[illegible]

the app[illegible]

8 C. W. [illegible]

——judgment affirming the decision of the court below which fully discussed all matters may be short 68 I C 467 (C), L R 3 A 454

[illegible]

1928 Lah 665

——a second appellate court dismissing an appeal must state points for decision and reasons for decision thereon 65 I C. 479 So also the first appellate court 27 C W. N. 501 : 1923 Cal. 558, 21 A. L. J 567 · 74 I. C 827

——an appellate court may alter the decree for the ends of justice. 4 U P L R 25 (A) : 68 I C 307

——the appellate court can exercise powers conferred by Or. 41 r. 33 in partition suits. 1922 Cal 398

——it can make orders as are necessary to terminate the controversies and to do justice between parties 1923 A. 235, thus to relief to respondents also although he has not filed an appeal or objection. 49 A. 224 1927 All 453 . 97 I. C 65, 34 A. 32 *fol*

——an appellate court can grant relief against deft. not impleaded as a party to the appeal. 64 I C. 178 (C).

——it is opposed to sound practice for an appellate court to substitute its discretion for that of the court from which an appeal is preferred 27 C. L. J. 623.

(8) Jurisdiction and power of the appellate court as decision and judgment. S. 107 and Or. 41, Rr. 12, 31-33

—an appellate court will not interfere as to the order which is discretionary with the lower court unless it has proc on a manifestly wrong ground 22 C W. N. 372, 100 I. C. 616 Mad 491 52 M L. J. 318

—if lower court has exercised discretion, appellate should not *interfere* unless discretion has been measured 22 N 169 P. C. and has prejudiced the party, 22 C. W. N. 204

—the appellate court can under s. 152 read with s 107 C correct any clerical or arithmetical mistake apparent on the f *the record* 111 I C 245 : 1928 All 458 ; 26 A L J. 1323

—an appeal against an order granting the applicatio review on a ground covered by Or 47 cannot be treated as re 32 C. W N. 693

—where a plea of abandonment by tenant was not plead was raised and decided in appeal the appellate court acted neously. 44 C L J 282 · 1927 Cal. 86

—appellate court is bound in the absence of evidence t contrary to *accept statement* in the judgment appealed from a point was not urged in the lower court. 22 C W N. 866.

—appellate court should not base its decision upon a *comparison* of handwriting without proper materials on the su 26 C L. J. 187

—the appellate court cannot by its judgment transp *respondent* as appellant 20 A. L. J. 980 · 1923 A 119 71 I C.

—where the court heard the counsel for one party afte close of the case, in the absence of the councel of the other p the judgment was invalid 63 I C 945.

—an appearance by a counsel or pleader who is instr only to apply for an adjournment which is refused is not appear 62 I C 57.

—an appellate court is not justified in taking additi evidence after a case has been argued, 19 A. L. J. 407 ; C 423.

—the omission of the appellate court to comply with amounts to no more than an irregularity which is cureable by C. P. C 59 I. C. 673.

—the omission in a judgment to make any special refer to any oral evidence is not itself sufficient to show that the c did not consider the evidence of the witnesses 59 I. C 963 (C I. C 436 (C).

—the first appellate court being the ultimate court in ques of fact, he should write a judgment from which it may be c that before finding of fact it did apply its mind to the mate upon the record. 108 I. C 1210 : 1926 All. 102 ; 25 A. L J. 1102

(8) Jurisdiction and power of the appellate court and its decision and judgment. S. 107 and Or. 41, Rr. 12, 31-33—*contd*

—an appellate judgment should contain findings on all important points. 1925 Cal 316

—the Judge is bound to write a judgment when dismissing an appeal under Or. 41 R. 11, 43 C L J 499 : 96 I C 136 1926 Cal. 992 : 95 I. C. 521 : 1926 Rang 129 5 Bur L J 60

—where a party to an appeal does not ask to be heard on a question of fact decided by the trial court and the legal question is argued in appeal the court is justified in disregarding the question of fact. 89 I C 374 . 1925 All. 585 : 23 A. L. J. 653.

—an appellate court need not examine trial courts finding as fact not objected to 47 A. 929 1925 All 585

—the appellate court cannot allow new plea of limitation depending on facts 108 I C 14 30 Bom. L R 765 . 26 A L J 505 : 1928 P. C. 47 **P C**

—a decision offering lower court's decision must give reasons thereof. 6 Lah L. J. 506 . 84 I C 946 1925 Lah. 246

—an appellate court can in appeal against portion of decree set aside the whole decree in the absence of cross-appeal or objection by respondents due to sufficient reason 85 I C 312 1925 Mad 266.

—where certain defts were not parties to the appeal, modification of the decree in their favour is not authorised by Or 41 R. 33, 88 I C. 803

—in case of
sentative of a res
the court cannot
90 I. C 986 1926 Ca

—the object of Or 41, R. 33 is, speaking generally, to enable the appellate court, where the decision interferes with or modifies or extends the decision of the lower court, to give effect to that decision by interfering, if necessary, even with the rights and liabilities of those who are not in fact appealing from the decision. 4 Pat 37 · 82 I C 984 1925 Pat. 385, 94 I C 315 : 1926 All 425, 45 C L J. 119 · 30 C W N 885 96 I C. 474 : 1926 Cal 1042, 48 A 551 1927 All. 37 94 I C 347 24 A. L. J. 586.

—the power conferred by Or 41, R 33 should be limited to those cases where as the re
with a decree in favour of
required in order to adjust
with justice, equity and go
be exercised in the interest of and for the furtherand of justice and not as a mode of evading other statutory rules and orders 45 C. L. J. 119 : 30 C W. N. 885 : 96 I. C. 474 . 1926 Cal 1042.

(8) Jurisdiction and power of the appellate court and its decision and judgment. S. 107, and Or. 41, Rr. 12, 31-33—*contd*

——under Or 41 r 33 (which is new) the appellate court has the fullest power to do complete justice between parties 38 C 721, 33 M 241, 34 A. 32.

——Rule 33 enables the court to take notice of subsequent events, for example the change in the law. 47 C L J. 530: 1928 Cal 436: 110 I. C. 715.

——but the appellate court cannot give the plff a decree upon a cause of action which arose only after the suit had been decided and was decided and was different from the original one. 44 C L J. 263 1927 Cal 56.

——rule 33 is not controlled by Or 14 r. 22, 62 I. C. 623(c)

——the powers of the court under Or. 41 R 33 should be exercised with care and discretion and only when party appealing to it can fairly be said to be entitled to the relief equitally. 9 Lah 291: 1928 Lah 599. 29 Punj L R 477.

——Rule 33 should not be construed too widdly lest it should lead to an abrogation of the rules of the C P. C. the Court Fees Act and the Limitation Act. It is only where, in granting relief to the appellant, it is essential to readjust the decree between the respondents that the court should act under this rule 50 M. 614: 52 M. L. J, 612: 1927 Mad. 620: 103 I. C. 394: 28 M L T. 323. 34 A. 32 *fol.*

——when the appellate court finds that the plff. is not entitled to the alternative prayer for compensation which was granted by the trial court, it is its duty, if the findings justly, to grant the other relief as to possession and mesne profits in order to adjust [illegible] -ity and good [illegible] 2 C. L J 300 [illegible] fullest power [illegible] the appellate court may in order to grant relief to the appellant, grant relief to [illegible] appeal or preferred [illegible] 77: 25 A. L J 1015.

——R. 33 enables the appellate court to grant such relief as the case may require and specially provides that such relief may be granted to respondents or parties who have not filed any appeal or objections, and Or. 42 applies this rule to second appeals. 1928 M. W N. 74

——R. 33 empower the appellate court to pass a decree in favour of persons who were parties to the suit but who have not appealed. 32 C. W. N. 1228: 48 C. L. J. 281.

——but relief cannot be granted to a person who is not before the court and whose rigts are not the subject-matter of enquiry in the appeal and whose presence is not necessary to dispose of the appeal 111 I. C. 751: 1928 All 746: 26 A. L J. 1139.

——where in a suit for contribution one of the defts. appealed but although the other defts. were not made parties the court

(8) Jurisdiction and power of the appellate court and its decision and judgment. S.137, and Or. 41, Rr. 12, 31-33—*contd.*

modified the decree so as to impose a liability on them held that the court had, under R 33, jurisdiction to pass the decree 33 C. W. N 221.

——although there is no appeal or cross objection by the respondent the appellate court can under R. 33 pass a decree which is proper under the circumstances of the case. 1929 Cal. 28

——where a decree was passed against several persons some of

376) *not approved*

——in a suit for accounts against a number of co-sharers a decree was passed against one only. He appealed and the court found the other co-sharers were also liable, a decree might be passed against them also provided they were parties to the appeal. 47 A. 597. 88 I. C. 438 · 1925 All. 555 : 23 A. L J. 501

——the appellate court may pass an order to amend the decree to make it agree with the judgment. 88 I. C. 828 1925 M. W. N. 209 : 49 M L. J. 385 1925 Mad. 785

(9) Limitation in appeal.

——time requisite to obtain copies are to be excluded 20 C W. N 1303, even if the copies of judgment and decree are taken separately. 21 C W N. 217

——but the time during which the party fails to supply folios should not be subtracted. 1917 Pat. 21,

——the court may excuse delay under s 5 L. Act for presenting the decree appealed against 44 M. L J 279 1923 M W N. 164 · 72 I. C. 308, 17 C L. J. 66

——*bona fide* prosecution of appeal in wrong court extends the period. 23 C. W. N 594, 23 C. W. N 753, P. C, 22 C. W. N. 169, 45 C. 94 44 I A 218, P. C. *Ref*

——an appellant is not entitled to exclude the time of review, he has to seek extension under sec. 5 L. Act 28 C L. J. 205, 33 C. 1323 *Ref.*

——application for restitution of appeal dismissed for not furnishing security is to be made within reasonable time. 21 C. L J. 163

——in an appeal to the special judge, limitation runs from the date of preparation of Schedule and not from the date of settlement of rent. 22 C. W. N 20 n.

——when a party is not timely joined as respondent owing to the mistake of the pleader's clerk, it will not be time barred. 13 C. W. N. 167. 8 C L. J 135.

——an *ex-parte* admission of appeal out of time should be considered : the question of limitation as to the admission of appeal

(9) Limitation in appeal—*contd.*

should be tried at the stage of admission after due notice to th parties and should not be left open. 27 C L J. 253 : 22 C W N 481 : 42 M 412 : 45 I. A. 25, **P C.**

——time of appeal against a party against whom certain judgment is passed does not run till the whole suit is disposed of and final decree is drawn up. 29 C. L J. 251, 9 C. W. N. 283, 32 C 125 14 I C. 1006, 1920 Pat 75. *Ref*

——when preliminary decree in a mortgage suit is affirmed in appeal an application made within three years from the decree o the appellate court is not within time. 75 I. C 2. 42 I. C. 93 39 A 641 15 A L. J 734, 40 A 203 : 43 I C. 870 : 16 A L. J 85, 41 M 714 · 41 M. L. J 117 · 64 I C 470 *fol*

——time for the doing of anything runs from the date of the ultimate decree 75 I C 3, 34 C L J, 415 p. 427 : 70 I. C, 64

——when a judgment is passed against some defts but the decree is not prepared until the disposal of the whole suit, time for appeal runs from the date of the drawing up of the decree 39 C L J 251, (32 C 175, 14 I C 1006, 1920 Pat, 75) *fol*

——the delay in filing the copies of the trial court judgment in second appeal, because copies were supplied only late, should be excused under s 5 L Act 8 Lah. L. J. 521 : 7 Lah 447 : 192 Lah. 458 · 27 Punj. L R 660.

udgment of the trial court was of second appeal as required vas no valid presentation of the . R 652 : 1926 Lah 626 : 97 I. C. 773.

——under the Rules and custom of the Calcutta H. C. the Registrar can admit an appeal out of time where the full court fees are not paid within the time of limitation 44 C. L. J. 557 . 9 I C. 901 . 1927 Cal 238.

(10) Parties in appeal, Law relating to.

——the respondant may attack any adverse finding of the lower court and the appellate court may consider the correctness of the finding adding party respondent whose interests are affected 44 M 605 : 41 M. L. J. 129 . 1921 M W. N. 316 ; 29 M L T. 356 · 63 I. C. 374.

——the power of the aapellate court to add party is not confined to Or. 41 r 20 but is also governed by Or 41 r. 10. *above case.*

——when one of several plffs prefers an appeal in which other plffs are interested, Or 41 r 4 does not authorise him to proceed without making other plffs. parties. 45 A. 286 ; 21 A. L J 91 · 71 I. C. 321 , 1923 A 211.

——but R. 4 authorises one of the plffs. to an action in which other co-plffs are also interested to appeal for the benefit of all if the lattrer are only made parties. 1928 Lah 43 : 106 I. C. 313, 1924 All. 873, 1922 Pat. 4, 1923 All. 211, 53 I. C, 543. *Rel. on.*

(10) Parties in appeal, Law relating to—*contd.*

R 166, 7 W. R. 49, 3 C 738, 8 B L R 130, 12 W R. 376, 21 W R 112.

——a person who is a necessary party to the suit is a necessary party to the appeal. 3 Pat L T 456 · 1922 P. 4 66 I C 780 6 C W N 196, 11 C W N. 504, 31 C 489 **P C.** 34 C 1020 *not fol*

——Or 41 R. 20 expressly deals with the case of addition of a respondent whom the appellant has not made party It empowers the court to make such party a respondent when it appears that " There words must be ...uld not be dis-regarded. . R 220 54 M. L J. 88 : I. C. 237 **P C.**

——a deft. against whom a suit has been dismissed cannot be deemed to be interested in the result of the appeal filed against other defts. and the burden as to what is the nature of the interest of such deft. is on the plff appellant who applies to the court to exercise such power. *Above* **P C** *ruling*

——a person as against whom a suit has been dismissed and who is not made a party to the appeal is not interested in the appeal for the purpose of Or 41 R 20 91 I C 649 : 53 C. 270 : 1926

——no limitat ... 33 C 390, 63 I C. 352. 76 I but the party so 26 C 114, 121, 2 F. B., 40 C. 233, 7

——when parties to original decree were not all impleaded in appeal there was no good appeal pending in court and the court cannot add ...

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(10) Parties in appeal, Law relating to—*contd*

——second appellate court may add parties-respondents who were not made parties in the first appeal, after the expiry of time for preferring second appeal. 59 I C 798.

——in exceptional circumstances the court has inherent power under s 151 C. P. C to implead parties. 73 I C. 136 ; 1923 Lah. 490. 3 Pat. L J. 409 *Dist*

——the decree that can be executed is that of the original court. 39 C. 925, 11 A 267, 11 B. 172 13 C. 13, 10 B. L R. 101, P. C 13 M. 214 F B. 19 B. 258

——where notice of appeal is served upon some of the respondents the appeal should be dismissed 19 C. W. N 290.

——in an appeal under sec. 105 B T. Act., all the landlords must be parties 28 C. L J. 201, 16 C. W. N. 196, 10 C W. N 931, 19 C W. N 290). *Fol*

——on the death of a respondent his heirs should be made parties 24 C W. N. 44, (16 C. W. N. 196, 10 C. W N. 981, 11 C W. N 504, 19 C. W N 290, 28 C L J 201, 29 C. L J. 461). 30 C. W. N 45 90 I C. 986 *Ref. contra.* 22 B 718, 34 C. 1020.

——pending an appeal against a decree for joint permission in favour of the plffs. one of the pllf respondents died and his legal representatives were not brought on the record *in time held* that the legal representative cannot be brought on the record as parties under Or 41 R 20, as that rule is ordinarily intended to apply to cases where the court finds that it cannot proceed without the presence of a party and as it is not intended to override the provisions of Or 22 C P. C nor can the powers under Or. 41, *R* 33 be exercised in such a case. 30 C W. N. 45 : 90 I. C. 986, 1926 Cal. 335.

——if one respondent in account suit dies, all his heirs should [illegible]

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——when appeal abates on the death of the appellant, cross appeal cannot be heard 44 M 828 : 41 M. L. J. 304 : 1921 M W. N 438, 62 I. C 757.

——where one of the appellants dies and in consequence of his legal representatives not being brought on the record the appeal abates the court can accept the appeal in favour of all the appellants including the legal representatives. 1926 Lah. 564 : 94 I C. 530

——where some of the Jt. Drs. appealed against an order allowing execution and succeeded, the benefit of the appellate order enures for those Jt. Drs. who did not appeal and who consented to the decree being executed in the lower Court 28 C W. N. 963 : 39 C. L. J. 590 : 1925 Cal. 23.

——appeal by deft. against whom decree is passed-validity of other deft. being added as party to the appeal after the period of limitation. 54 C. 430 : 31 C. W. N. 359 ; 100 I. C. 903 : 1927 Cal. 394

(11) Pauper appeals. Or 44 rr. 1—2.

——at the stage of the admission of an appeal in *formo pauperis* the respondent has no *locus standi* to appear and to be heard 87 I. C 960 : 1925 Mad. 1178 · 49 M L. J. 353.

——when an application for leave to appeal in *forma pauperis* is presented along with the memorandum of appeal and the former is rejected the proper order to pass is to give the appellant time to pay the court-fees on it 90 I C. 371

——an appellate court can under s. 149 grant time to the applicant to pay court-fees on dismissing the application for leave to appeal as a pauper. 38 I C 617 40 M. 687 31 M L. J. 269.

——when application to appeal in *forma pauperis* is rejected if the appellant makes the payment of court-fees it will have the same effect as if it had been made in the first instance. 9 Pat L T. 613.

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appeal the memorandum of appeal is a separate document, consequently the dismissal of the application for leave to appeal as a papuer does not involve the dismissal of the appeal 65 I. C. 741 : 3 Lah 35 26 P. W R 1922.

——assuming the court has jurisdiction to allow an apppellant to continue an appeal in *forma pauperia* it can be exercised only if on a perusal of the judgment and decree appealed from and the appeal memo the court is of opinion that the decree is contrary to law 38 M. L. J. 146 . 1920 M. W. N. 277 : 54 I. C. 761 : 10 L. W. 659

——an applicant applying for permission to appeal as a pauper is not entitled as of right to be heard either in person or by pleader

(11) Pauper appeals Or. 44 rr 1-2—*contd.*

before the court exercises its power to allow or reject the application. 22 I C 957.

——where the questions arising under Or. 44 R. 1 was discussed on the application for leave to appeal in *forma pauperis* and the Judge ordered notice to the opposite party and the Govt pleader the effect of the order was that an inquiry must be made into the pauperism of the applicant, the court being satisfied that it was a proper case to present an appeal 8 Pat L T 119 1927 Pat 791

——where an application for leave to appeal in *forma pauperis* was admitted and order to issue notice on the respondent and the Govt pleader was passed, the court could not subsequently consider whether the proviso to Rule 1 of Or 44 applied, 109 I C. 645 1928 Pat 118 6 Pat 687

——where notice is ordered to be issued it may be presumed that the court has been satisfied that the requirements of Or 44 R 1 were satisfied 7 Pat 825, 827

——the term "authorised agent" in Or. 33 R. does not mean "recognised" against as defined in Or 3 R 2 and the land the law does not require the authority to be written the husband may present an application for leave to appeal in *forma pauperis* on behalf of the pardanashin lady 7 Pat 825

(12) Procedure in appeal.

——appeal must be presented by suitor himself or by person duly qualified 22 A. 331, 24 A 172

——memorandum of appeal may be written by anybody. 1923 Lah 484.

——if the name of the *vakil* is not inserted in the *vakalatnama* by mistake, appeal is not duly presented 36 A. 47.

——presentation of appeal by pleader other than pleader duly authorised, is not valid presentation 62 I C. 259.

——but a pleader having a power of attorney expressly authorising a power to present appeal may present it. 7 Lah. L J. 29; 86 I C. 207. 1925 Lah. 331

——*vakalatnama* not containing pleader's name, acceptance of pleader at the foot is not sufficient L R 2 A 27.

——misdescription such as appeal from a decree being described as appeal from an order, does not matter 14 A. 22

——where required court-fee is not paid, it is not properly presented 19 C. 747, 18 C L J 133, 12 A 129, 2 A. 875, *contra* 27 B. 330, and see present sec-149

——copy of the decree should be filed with the memorandum of appeal against decree in suits or proceedings alike suits 6 C. W N 283, 16 C L. J. 116, 113, 15 C L. J 498, 17 C L J. 66, 26 A 537, 1925 Nag. 52, 553 · 1922 Lah. 170, 1921, 4 U. B. R. 75; 61 I. C 69, 4 Lah. L J 193, 1922 Lah. 191, presentation of appeal with a copy of translation of the decree is not valid. 4 Lah. L. J. 381 but in case of appeal against order under sec. 47, copy of order is sufficient even if there be a decree. 6 C. W. N. 283.

(12) Procedure in appeal—*contd.*

——copies of judgment being on the record of another appeal filed by opposite party does not dispense with the necessity of filing it with the memo. of appeal. 1927 Lah 721 : 104 I. C. 290, 28 P. L. R 272 *Ref.*

[illegible] ...tion [illegible] be [illegible] t. 1, 104 I. C. 545 1927 Lah 449 . 9 Lah L. J 237 28 Lah. L R. 407, (90 I C. 125, 8 Lah L J 361) *Ref*

——copy of interlocutory order need not be filed along with the memorandum when no ground is taken attaching the correctness of the interim order 4 Lah L. J. 20 1922 Lah 93, 103 I C. 224 . 1927 Lah. 629, 1928 Lah 601.

——but where grounds are taken against the findings of the preliminary issues copy of the order passed on the preliminary decree must accompany the memorandum. 1927 Lah. 451, 9 Lah. L. J. 502 . 109 I C. 399 1928 Lah. 46.

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validly presented 90 I C 153

——the admission of a defective memorandum may operate to bar a subsequent objection when the defect is quite obvious 109 I C 397 · 1927 Lah 451, 1923 All. 579 1926 Nag. 57 *Ref*.

——memorandum of appeal may be written by a petition writer and need not be written by the petitioner himself. 83 I C. 543 : 1923 *Lab.* 484

——the words "service of notice" on the respondent in person in Or 41, R 14 (2) does not mean that in a case where a minor is represented by a guardian *ad litem* notice should be given on the minor himself 30 C. W. N 949 97 I. C. 614 : 1926 Cal. 1106.

——it is very dangerous to adopt a conclusion in a court of appeal merely on the suggestion of a legal gentleman representing one of the parties 11 C W. N 130 P. C

——when the appellant does not appear and his vakil applies for adjournment the court cannot dismiss the appeal on merits 43 M L J. 317 1922 M. W. N 604 16 L. W. 434.

——where an appeal is dismissed for default of both parties and within a month both parties file a compromise petition the court should restore the appeal and pass a decree in terms of the compromise. 68 I C. 448 . 1923 Cal 319.

——an appeal dismissed on account of default to pay printing charges cannot be restored under r. 19. 1 Mys L J. 44.

——*a respondent not appearing on the date specified* in the notice to him can appear on the date notified for hearing. 96 I. C. 326 : 1926 Bom 424 . 28 Bom. L R 738

(12) Procedure in appeal—*contd.*

——an appeal cannot be dismissed under Or. 41 r. 18, on account of the failure of the appellant to provide a person to identify the respondent. 3 Pat. L T. 498 : 65 I C. 49 : 1923 P. 114.

——when a memorandum of appeal is insufficiently stamped and the deficiency is not made good within the time fixed, the court must reject the appeal and not dismiss it for default. 1921 Pat. 337 61 I. C. 99, 59 I. C 795.

——when no formal order is drawn the copy of judgment is sufficient 74 I C. 486

——in case of unintentional absence of the pleader the appeal which has been dismissed for default should be restored. 3 Lah. L. J 89, *contra* counsels are expected to be present with the court's compound if they have got any case, so in case of dismissal for default it should not be restored. 71 I C. 813

——when there is one judgment stating ground of decision and a separate order embodying the formal expression of decision, copies of both should be attached with memorandum. 15 C. L. J. 498.

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——memorandum of appeal may be rejected if not properly drawn up 15 A 367, 370, or if filed out of time though registered, 4 B L. R App. 103, or where there is fraud, misrepresention,
p. 84, or if it was
sufficient grounds,
exercise of perverse

is instructed only
not an appearance:
an appeal is dismissed the
C. P. C. 34 C. 403: 11 C.
4 16. B. 23. 22 A. 66. 20 A

——applicant for re-admission of appeal dismissed for default must be enabled to show sufficient cause for not being present 1925 Cal 269.

——where pleader on both sides are in attendance and heard there is no default in appearing. 24 C 350 : 1 C. W. N. 21 F. B. 21 C. 339, *overruled.*

——the appellant should show the cause for disturbing the judgment appealed from 25 C W. N. 866.

——document admitted in evidence without any objection by the other party cannot be rejected in appeal. 25 C. W. N 881.

——the parties are entitled as well on question of fact as on question of law to demand the decision of court of appeal. 25 C. W. N 519.

——an order dismissing an appeal for default does not operate as *res judicata* 75 I. C. 284 (Pat.), 23 I. C. 649 : 36 A. 350 : 12 A. L.

(12) Procedure in appeal—*contd.*

J. 624 : 16 Bom. L. R 395 . 18 C W. N. 963 : 19 C L J. 626 : 27 M. L. J. 17: 1914 M. W. N. 485 : 16 M. L T. 44 P C , 59 I. C. 894 : 6 P. L. J. 27 : 2 P. L T. 28, 192, 1 Pat. 34, 59 I. C. 760 . 48 C 157 : 24 C. W. N. 1020 · 33 C. L. J. 304 *Dist.*

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(13) Re-admission of appeal. (Or. 41 R 19.)

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——engagement of counsel in another court is not sufficient ground for re-admitting an appeal 68 I. C 785, 1923 Lah 97.

——the court has inherent power to re-admit an appeal dismissed for default 45 B 648 60 I C. 919.

——applicant for re-admission of appeal dismissed for default must be enabled to show sufficient cause for not being present. 1925 Cal. 269, 79 I C. 319.

——late appearance of appellant's pleader owing to rain is not sufficient excuse for restoration of an appeal. 96 I. C. 377 : 1926 Cal. 1152

——when the pleader for the appellant could not appear as he was arguing a case in another court and the appeal was dismissed for default it was a sufficient ground for restoration 44 C. L. J. 165 : 97 I C 573 : 1926 Cal. 1231.

(13) Re-admission of appeal. (Or. 41 R. 19)—*contd.*

—where the appeal was transferred to the ... Judge to the ... they ... issed ... 9

——the court should allow the party an opportunity to substantiate his plea of illness. 105 I. C: 851 : 1928 Cal 102

——when an appeal is dismissed for default under S 17 the appellant should be given an opportunity as required by R. 19, to prove that he was prevented by sufficient reason from appearing when the appeal was called on for hearing. 1927 Cal 888 : 104 I C. 347.

——omission to apply for re-admission does not take away other remedy that may be available 2 Pat. 739 4 Pat L T. 405 : 1923 Pat 213 1923 P. 514 . 75 I C. 284

(14) Remand. (Or 41, RR. 23, 25)

Power of the appellate Court to remand is inherent and is not restricted by R. 23

——the powers of an appellate court as regards remand are not restricted to the case specified in Or 41, R. 23 but by virtue of its inherent power it may remand the case not covered by Or. 41 r. 23, if it is necessary for the ends of justice. 87 I C. 575 : 1923 Cal. 1157 82 I C 663 (c), 80 I. C 172 (c)

——the power of appellate court to order a remand is wider ... appellate court has inherent ... justice. The policy of the ... is in favour of ... I C. 542 : 1923 5 Lah. L J 289.

14 I C 45 ... it thinks proper C. L J. 419, 73 37 M. L. J. 536, '53 : 43 I C 959, . 596, or if there has been a defective trial i e a refusal to grant an adjournment 23 Bom L R, 769 ; 63 I C. 478, 30 M 54 **F. B.** *fol.* 39 A. 143 *Dist* 37. B 289 *Ref*

——where the Code contains specific provisions which would meet the necessities of a case an order of remand under the inherent powers under s. 151 should not be made. 82 I C 663 (c) 80 I C 172, 1928 Mad. 991, 112 I. C. 1; 1928 M. W N. 164

... to order a retrial but that ... exceptional circumstan ... of the case demands it

——where the remand of the appellate court does not state the provision of law it should be deemed to have been made under Or. 41 R. 23 and not under s. 151. 106 I C. 842 : 9 Lah L. J. 543 : 1928 Lah. 116.

(14) Remand. (Or. 41, RR. 23, 25)—*contd.*

——an order of remand under the inherent power of an appellate [illegible] Or [illegible] 3 P. [illegible] 514 [illegible] 1926 [illegible] L J. [illegible] *ontra.* [illegible]

——a remand order after amending the plaint is not under Or 41 r 23 but under s. 151 and is not appealable. 73 I. C 915, 48 M 713, 103 I C 670 : 1927 Mad. 859 *contra* 100 I C. 49 1927 Lah 196.

——there is no appeal against an order of remand made under the inherent power under s. 151 C P. C 6 Lah. L. J. 153 78 I. C. 466.

Appeal is a allowed when the case is remanded under Or 41 R. 23 i e. when it is decided on a preliminary point only

——the power of the appellate court to remand a case under Or. 41 R. 23 applies only to cases where the whole suit has been determined upon a preliminary point and not where portion of the suit has been so decided and reversed on appeal 97 I C 1: 1926 Pat 514: 1926 P H C C 279, 8 Pat. L I. 9, 96 I C 44, 101 I C 89, 103 I C. 537 1927 Lah. 618

——R. 23 applies only when one of the preliminary issues is tried by the trial court which disposes of the case on that ground and says that it is not going to try the suit on any other issue. 6 Pat 381 : 1927 Pat 296 103 I. C 722.

——where a case is decided on a preliminary point within the meaning of R. 41 R. 23 an appeal is allowed under Or. 43 R. I. 51 B. 43 100 I C 1004 29 Bom. L R 97 1927 Bom 129, 32 B. 449 *fol.* 1928 Lah 774

——no appeal lies against an order passed by an appellate court remanding a case otherwise than under Or. 41, r. 23, 31 C. L. J 357

——no order of remand can be regarded as made under Or. 41 r. 23 unless the case has been disposed of without entering into the full merits by reason of a decision on law or fact which has prevented the case being tried to the end. Apart from Or. 41 r. 23 an appellate court has power of remand conferred by s 107 and also implied by s 100 sub sec. (2) and s. 105 (1) 1923 Oudh 177 · 2 O C 10 73 I C 591. 19 A L. J. 971, 20 A. L. J. 321, 30 M. 54 *Ref.*

——where the reversal of the judgment of the lower court is on a preliminary point the order of remand is appealable under Or. 41, r. 23, the expression preliminary point is not confined to such legal points only as may be pleaded in bar of suit but comprehend all such points either of law or fact as may prevent the court disposing of the case on the merits 43 M. L. J. 354 : 31 M. L. T. 208 : 1922 M. W. N. 588 F. B. 1922 Cal. 279, 37 M. L. J. 536 22 M. L. J 409, 44 C. 929, 3 P. L. J. 253, 60, I. C. 909 : 12 L. W. 667.

(14) Remand. (Or. 41, RR. 33, 25)—*contd.*

——where the trial disposed of the case on three preliminary ... the dismissal of the ... the there points ... ded the case, the ... ng on preliminary ... 92.

... ays been to allow ... Or. 44 r. 23, 41 A

... the view of the ... barred by reason of ... mands the suit for ... court falls within ... 925 M. W. N. 82.

——where the trial court has disposed of all the issues and ... i does not come ... from that order ... N. 48, 91 I. C

... or not depends not on the fact whether the appellate court purported to make ... the conditions of ... t with- ... se back ... d by it ... under ... is the ... matters in controversy. 103 I. C. 664 1927 Cal. 800.

——where the decision of the trial court is not based on a preliminary point an order of remand cannot properly be made under Or. 41 R. 23. Where all the materials are before the appellate court it should deal with the case or merits and if it finds that any particular issue has not been decided by the trial court or that further evidence is necessary on the point it may act under R 25 100 I C. 578 ; 29 Bom L. R 56 . 1927 Bom. 111.

——where the first appellate court without retaining the case ... and by the trial ... ase to ... liction ... order was not purported to be passed under R 23 no appeal lay therefrom 55 C 219 31 C W. N 878 : 104 I. C 422 : 1927 Cal. 642 47 C L J. 63.

——an appeal lies from an order of remand only when the first court has decided the suit on a preliminary point. But when the first court decides the suit on all the issues and the appellate court reverses the decision and remands the case no appeal lies. 7 Pat. L. T. 535 : 1926 Pat. 457 : 97 I. C 105.

(14) Remand. (Or. 41, RR. 23, 25)—*contd.*

——where the trial court decides the suit on all the issues the appellate court cannot remand the case under Or. 41 r 23 as though it had been decided on preliminary point 66 I. C 622 (C).

[illegible] issues and [illegible] appellate [illegible] no appeal lies from that order under Or 43 R 1, 1926 M. W. N. 48, 91 I C 351.

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——an appeal lies against an order of remand made by an appellate court on the ground that a decree was without jurisdiction which is in form and substance an order under Or. 41 R. 23 C P. C. whether regularly or irregularly made. 30 C W N 41 : 42 C. L. J. 23 : 89 I. C. 744 . 1925 Cal. 1258

——in case of remand under Or 41 r. 23 points decided by the order of remand are final subject to appeal and cannot be re-opened at a later stage 1923 Oudh, 50 : 70 I C 983, 48 C. 499, 43 A. 379 *Ref*

What is preliminary point

——a preliminary point means some point either collateral to the merits or some particular questions which precluded determination altogether. 29 M. L T. 56 61 I. C 829, 16 M 207. 37 M. L J. 536

——a preliminary point is a point which when decided in the way in which it is in fact decided, determines the result of the suit. 99 I C. 974 . 1927 Mad 1159

——the preliminary point means any point the decision of which makes the full hearing of the suit unnecessary 112 I C. 1 . 1928 M. W. N. 164 · 1928 Mad 991

When a case should be remanded.

——there is no provision for an order of remand where all the issues have been settled and tried 27 C W. N. 1025, 32 C. W. N. 867 : 1928 Cal 546

——where the first court has considered the whole matter and disposed of the suit on merit, the appellate court cannot remand and must itself finally determine the appeal 1 C. W. N. 29 n, 19 M 479, 17 B. 733, 3 C W. N. 305, 28 M. 444, 10 C. W. N. 422, 15 C L J 310, 20 A. [illegible] 314, 16 L. W 593, 979 [illegible] that determination [illegible] issue and send it to [illegible] W N. 325, 66 I. C. 833

(14) Remand. (Or. 41, RR. 23, 25) - *contd.*

——if all the points are covered by the issue and there is evidence to decide them, there cannot be remand. 13 A. 53. 17 I A 150, P C.

——where the trial court has decided all the issues but the appellate court differs in its conclusion, it cannot remand the case after recording its finding 1923 M. 113. 70 I. C. 655, 1923 M. W. N 11 1923 Mad 227, 1923 Cal 223

——an appellate court cannot raise new points involving fresh evidence and remand the case for the trial of questions which never occurred to the parties previously 31 C. L J 354.

——remand should not be made where necessities of case are specifically provided for by the Code. 1925 Cal. 274.

——where the trial court decides three points and dismisses the suit, the appellate court cannot decide on only one point and remand [illegible] 1925 C. l. 716

372 : 1922 M W N. 269 68 I. C 869.

——where the lower court has disposed of all the issues the appellate court has no jurisdiction to remand the whole case for retrial. The proper course is to call for a finding on the issues upon which the court desires for the evidence to be taken. 1926 M W. N 48. 92 I. C 1045.

——when the appellate court finds that the trial court has failed to decide any issue or to draw up an issue which was necessary, it should itself frame the issue and send it down, if necessary, to the trial court for taking evidences and to return the evidence together with its finding. The whole case should not be remanded, 1926 Cal 954 95 I. C 123, 44 C L J. 101 95 I. C 203; 1926 Cal. 976, and it is not proper for the appellate court to set aside the judgment and send back the case to the trial court for deciding it by framing an issue which the appellate court considers necessary for the decision of the case 44 C. L. J. 101. 95 I. C. 203 1926 Cal 976.

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——where the appellate court considers it necessary that a [illegible] he should order it himself or [illegible] investigation [illegible] investigation 95

——even if an appellate court be deemed competent to remand a case on an issue not raised or suggested before, it ought only to be done in exceptional cases, for good cause shown, and on payment of all costs thrown away. 34 C L J. 319, 43 C. 1101 P C. Ref

——where an issue though necessary was not framed the court should not remand the case but should refer the issue for taking

(14) Remand. (Or. 41, RR. 22, 25)—*contd.*

additional evidence and for returning the case to it with its findings 1925 Mad. 169, 1925 Mad. 171, 88 I C. 1021 · 23 A L J. 880 1925 All. 65

——a case should be remanded where the lower court fails to discuss evidence 1923 Pat. 174

——when there is no finding of the trial court on an issue the appellate court should not remand the whole case but should remit the particular issue 45 A 565. 21 A. L. J 538 1923 A. 603 74 I. C. 822

——an appellate court cannot frame new issue and try without remand 25 C L J. 547, *Contra*, it can, power to remand is merely discretionary. L. R. 4 A. 34.

——where the first appellate court reversed the decree of the trial court, modified one of the issues and remanded the case for *denovo* trial, the procedure was wrong 35 C L J 345; 1922 Cal. 156.

——where the lower court has based its judgment on inadmissible evidence but there is sufficient evidence on the record to support the finding the case should not be remanded. 71 I C 300.

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——where no specific issue is framed but evidence is given on the point, no remand is necessary. 1924 B 113

——an appellate court can remand a case for the trial of a court other than the original court. 1922 Lah. 239 66 I C 113

——an order for remand in an appeal against execution proceeding and an order for refund of court-fee is illegal An order for refund of court-fee can only be made when demand is made under Or 41 r 23, 1923 Lah 171. 70 I C 1008.

Order of remand under Rule 25

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. L. R.
147.

——where the record was sent down for recording clearer findings and submission thereof, the order was an anomalous one and did not fall under R. 25 nor was it in the exercise of inherent power under s 151, as there was a specific provision for such order, consequently it could not be the subject of second appeal but could be the subject matter of revision, 45 C. L J. 57 1927 Cal. 657: 104 I. C. 183.

——an order of remand under R 25 decides nothing and the reasons given or the findings arrived at by the appellate court in support of its order are not conclusive between the parties

(14) Remand (Or. 41, RR 22, 25)—*contd.*

as the entire case re-opens on the final determination of the case. 39 C W. N. 1233 · 47 C. L. J. 112 107 I. C. 730 : 1928 Cal 186.

——where the trial court did not come to a finding on a point taking it to be unnecessary, the appellate court is not bound to remand the case but can come to a finding of fact by itself on the point 1928 Mad 635 : 110 I C. 548.

Distinction between an order of remand under R. 23 and under R 25

——there is a distinction between an order under Or. 41 r. 23 and an order under Or 41, r. 25 which only demands specific issues for decision. 25 O C 189 1922 Oudh 236.

——in case of order of remand under or. 41, R. 23 the whole case goes for decision to the court of first instance whereas in the case of an order for remand under Or 41, R. 25 the case is retained in the file of the court which passed the order of remand 45 C L.J 194 : 1927 Cal 401 . 102 I C 384.

——when a case is dismissed by the trial Court and the appellate court decided the issue in favour of the plff. and remanded the case to the trial court for determining the amount of compensation, held on appeal that the appellate court ought to have made an order under R 25 keeping the appeals in his own file and sending down the issue as regards compensation. 110 I. C 444.

——Scope of Or 41 rr 23, 25 and 26 discussed. 37 C. L J 121 1923 Cal 521 . 74 I. C. 392.

——an order remanding an issue under Or. 41 r 25 is not final order and no appeal lies against it, but an order of remand under Or. 41 r 23 is otherwise, 1923 A. 384 : 74 I. C. 1014

——a partial remand order under Or. 41 r. 25 is not appealable. 3 Bur. L. J. 216.

[illegible] assess an order of remand with- [illegible] the order is made, it must be [illegible] 23, 44 A. 492, 20 A. L. J 321:

——where the award of arbitrators in a suit was set aside by the court as unreasonable and in appeal it was reversed and a remand was ordered under Or. 41 r. 23, it was not a decision on preliminary point and the court should have acted under, Or 41, r. 25, 75 I. C 198

Effect of remand.

——a complete remand reverses the first judgment 6 C. W. N 326, 7 W. R 326, 8 W. R. 302, 11 B. 663, and re opens the whole case to be decided by the lower court. 12 W. R 112, 21 W. R 7, 19 B 3·3

——in case of partial remand the case remains undisposed of on the file of the appellate court, the lower court being directed to try a particular issue. 12 B. L. R. 136, 1. C. W. N. 340, 3 C W. N. 325

——an appellate court cannot re-open the question of law already decided by the order of remand. 40 M. L. J. 529 : 14 L W. 236 : 62 I. C. 703, 32 M. 318, 32 M. L. J. 271 *Ref.*

(14) Remand. (Or. 41, RR 22, 25)—contd.

Effect of improper order of remand

——in case of unnecessary remand under Or 41 r. 25, it is competent to the Judge before whom the appeal subsequently comes to disregard the finding of the order of remand. 17 C. W. N 462, 16 A. 306

——a remand order passed by an appellate court which it was not competent to pass is liable to be set aside in revision. 1925 Mad. 171.

——an improper order of remand is not necessarily void but only illegal or irregular 11 C. W. N 386 28 C 324 5 C. W. N. 509, 12 C. W. N. 590 6 C L J 547 and subsequent proceedings are not to be set aside on that ground 5 C. L. J. 71.

Procedure in lower Court after remand

——in dealing with a case of remand the lower court is not entitled to take a view inconsistent with that followed in the order of remand. 28 C W. N. 318, 29 Bom. L. R. 1336 : 105 I C. 87 . 1927 Bom. 594

——where the appellate court remands a case for the finding of the lower court and the latter gives his finding on some of the issues and does not do so on the other issues taking a different view of the law, it was wrong on the part of the trial court as the law was to be decided by the appellate court. 105 I. C 871 . 1927 Bom. 594 29 Bom. L. R. 1336

——when a case is remanded to a District Judge, he should not transfer it to another officer 15 W R 574, 21 A. 230.

——wh [illegible]
evidence o [illegible]
of taking [illegible]
non-attend. [illegible]
62 I. C. 447, lower appellate court directed to take further evidence cannot dismiss the case for default L R 4 A. 62.

——the remarks made by the appellate court in a judgment of remand are not conclusive regarding a matter about which there was no evidence and which the lower court was specifically asked to consider 111 I C 278 · 1928 Bom 201 · 30 Bom. L. R 570.

——point abandoned in second appeal or decided by order of remand cannot be re-opened by the lower appellate court. 61 I. C 575.

——on remand no fresh *vakalatnama* is necessary. 1. W R. 275.

Remand with the consent of parties and waiver.

——an order of remand made with the consent of the parties will bind the parties though contrary to Or. 41 r 23, 12 C. W. N. 590 : 6 C L J 547, 91 I C 287 . 1926 Cal. 509.

——a party who waives a remand is estopped to question the decision on the point. 3 W. R 5.

Appeal from an order of remand

——orders of remand are exactly on the same footing as appellate decree and they are appealable on precisely the same ground. 1922 Lah. 178

(14) Remand. (Or. 41, RR 22, 25)—*contd.*

——in an appeal against an order of remand the only grounds available to the appellant are those which are available in second appeal, so the finding of facts cannot be attacked. 91 I. C. 462 1926 Mad. 475.

——the test is, if a second appeal would lie from the decree, the order of remand is appealable, otherwise not 3 Lah 218 : 4 Lah. L. J 359 : 1922 Lah. 178 68 I. C 849, 37 C. L J. 491 1923 Cal 606 . 71 I C. 453

——when the trial court has disposed of all the issues and the appellate court frames additional issues and remands the case, the order of remand is not appealable 1928 Mad. 984, 48 M. 713, 1926 M. W. N 48 *fol*

——an appeal from an order of remand cannot be entertained, if presented after the final disposal of the suit 32 C. 1023 9 C 975, *Contra.*, 30 A 479, F. B

——even a wrong order of the appellate court cannot be questioned by the lower court who is to carry out the order. Remedy lies in appeal or review as is allowed by law. 110 I C 529 (c).

——if the remand order is finally set aside and is such an order as ought not to have been passed at all in any case, it may be that the proceedings in the court below fail with it. 44 A 211 1922 A. 35 66 I C. 317

——a remand order of a single Judge of the H. C cannot be questioned in second appeal from the revised decision of the lower court 3 Pat L T. 343 1 Pat 246 . 65 I C 175.

——no appeal lies against an order of remand passed by a Special Judge under the B. T. Act 37 C L J. 314 : 1923 Cal 333 72 I C 1013.

Remand by second appellate court.

— ... case for findings

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express any opinion. 71 I C 896

——where the H C in second appeal differs from the lower court on an issue of law and remands the case the order is binding ... 1923 P 226

... state-

... ppeal

... ment

... his case in the court below. 71 I C 254.

——where an issue has been determined on evidence by the first and the appellate court, the H. C cannot remand the case for re-hearing upon that issue 67 I. C 494 (C)

——when the finding and evidence upon issues remanded under Or. 41 r. 25 are returned to the H C. the finding is conclusive and cannot be challenged. 6 Lah. L J. 145.

——where judgment was based on unrecorded evidence the case was remanded in second appeal 19 C. L. J. 541.

(15) Second appeal. (Ss 100—103 and Or. 42 R. 1)

—a memorandum of second appeal must be accompanied by a copy of the judgment of the court of first instance within time 3 P. L. J 255, 105 I C 639 · 1927 Lah. 747, *contra* trial court's judgment is not necessary. 1923 Pat 19 : 74 I C. 330

—a second appeal is not entertainable without a copy of judgment of the first court on the preliminary issues filed along with the memorandum of appeal 105 I C. 593. 28 Punj L R 537, 97 I C. 780. 27 Punj L. R 701. 1926 Lah 638, *contra* copy of the final judgment is sufficient 103 I C. 73 1927 Lah 640.

—when two case are decided by a common judgment and a brief order is passed in the connected matter a copy of brief order will not do, the appellant must file the copy of judgment 111 I. C. 384 : 29 Punj L R 269, (101 I C 776, 1014 I C 290) *fol*

—a second appeal without a copy of the decree appealed aginst is not a valid presentation 44 M L J. 279 1923 M. W. N. 164. 72 I. C 308, 16 C L J 77, 138, 174, 100 I C 810

—where a point (here of limitation) appears on the face of the pleadings and no fact need be proved it may be decided in second appeal if it was never raised before 11 C W. N 959, 34 C. 941 Sp B

—there is no second appeal against an order granting a review 64 I C 568 (C)

—a second appeal lies in respect of the part of the claim on which plff has been unsuccessful. 3 Lah. L. J 426 · 63 I C. 776.

—the H. C has power on second appeal to remand a case for findings even on the points not taken in the ground of appeal The finding of the lower appellate court on a question of fact which has not been put in issue can be contested in second appeal. 85 I C 92

—the H C. can remit a case for rehearing an issue not raised in the pleadings only in exceptional cases for good cause shown and on payment of costs 28 Bom L. R 1090 · 98 I. C 297 : 1926 Bom 577

—the H C will not accept a review of a judgment in a second appeal dismissed under Or 41 r 11, on the ground that new evidence to prove a fact has been discovered. 36 C. L J 76 : 1922 Cal. 165.

—the H C. in second appeal will not require any document to be produced or any witness to be examined to enable it to pronounce judgment on a question of fact 1926 Cal. 941 · 95 I C. 300.

—in a rent suit when the deft sets up tenancy direct under the superior landlord, decision on that point allows second appeal as it decides a conflicting claim of title. 20 C W. N. 1352

—the rejection of an appeal on the ground of limitation amounts to dismissal and such order is appealable 60 I. C. 493.

—power of second appellate court to decide issues of fact, (dissentient opinions) 3 Pat L T. 303 · 1922 P. 417 · 65 I. C. 536

—the H C should not interfere in second appeal with the finding of fact so long as there is some evidence to support it. 94 I. C. 929 1926 Pat 187. 7 Pat. L T. 547

(15) Second appeal. (Ss. 100—103 and Or. 42 R. 1)—*contd.*

——the H. C. will not allow a new issue of fact to be raised before it for the first time in second appeal. 1927 Mad. 83 : 1926 31 W. N. 921

——the question of adverse possession is a mixed question of law and fact. The appellate court is to consider the findings of fact arrived at by the lower appellate court and then to see whether the inference drawn by that court from those facts was proper or not 1926 Cal. 881 : 94 I. C 38.

——no second appeal lies on facts and the appellant in an appeal from an order of remand is not entitled to question findings of facts recorded by the appellate court. 2 Lah. 25 : 59 I C. 715

——a second appeal does not lie in an execution mattter relating to a suit if second appeal does not lie in the suit itself. 43 A. 403 19 A. L. J. 72 . 60 I. C. 831

——a second appeal on the merits against a decree in a S C suit of the value less than Rs. 500 cannot be allowed simply because the decree has been passed on review. 3 Lah. L. J. 166 : 60 I C 259.

——when the factum of adoption is not questioned in the grounds of second appeal it cannot be urged at a further proceeding 1933 Mad. 11 : 70 I C. 653

——memorandum of cross-objection as to cost cannot be heard in second appeal. 5 Lah. L J 108.

——awarding cost being in the discretion of the court under s. 35 no second appeal lies from the question of cost. 93 I. C 1003: 1926 All 419.

——no second appeal from an order passed in appeal against an order setting aside an execution sale under Or. 21 r. 92. 75 I. C. 103.

... and deft. appealed, plff's appeal
filed a second
all that was
, held he was

——where the deft. pleaded certain defences in bar of the suit and they were disallowed by the first court on appeal by the plff. no cross-objection was filed, held that it was not open to the defendant as respondent to raise the same contentions on second ...

with due deligence have
hearing of the appeal by
the higher court in second
n evidence and remand the
case ... 24 Cal. 1071.

——second appellate court can go into the question of admissibility of a piece of evidence but not of its value. 92 I. C. 104 : 1926 Cal. 727.

——a finding of fact arrived at after ignoring a piece of evidence legally admissible can be attacked in second appeal. 91 I. C. 1026 : 1926 Cal. 603.

(15) Second appeal (Ss. 100—103 and Or. 42 R. 1)—*contd.*

——when a question as to the construction of a title deed arises, second appeal lies. 21 C L J 42, 45.

——when the words of a will are clear and the only dispute is as to what properties were referred to in the will there could be no question of construction of a document for the purposes of second appeal. 91 I C 423

——when two inferences can be drawn in the construction of a document, the one drawn by the lower appellate court should be upheld by the second appellate court 97 I C 293 1926 Lah. 672. 27 Punj L R. 693.

——when the question of fact concerns the construction of a document the finding can be interfered with in second appeal. 48 A 588 : 1926 All. 542 . 95 I C 582 24 A L J 700, 1923 P C. 187 *fol*, because it is a question of law 95 I C 81 ; 1926 Bom 493 28 Bom. L R 467.

——the second appellate court should not reject a document admitted by lower appellate court in consequence of error in form rather than in substance. 43 C L. J. 479, 97 I C. 200 . 1926 Cal. 988

——when the H C. in second appeal transposes party no question *of limitation arises. 1927 Mad. 204 52 M. L J 33 99 I. C 687 :* 24 L. W 826

——the decision of the lower court that a particular question was not in question cannot be attacked in second appeal 95 I. C. 300 : 1926 Cal. 941.

——when the correctness of a conclusion drawn from a finding [illegible] question of law which may be inter[illegible] C 645 · 1928 Lah. 722.

[illegible] cannot go behind a finding of [illegible] on which a court could reasonably act in coming to a conclusion. 50 A 754 1928 All. 289 : 26 A. L J 696.

——the second appellate court may interfere when the lower appellate court exercises its discretion to excuse delay under s 5 Limitation Act 1926 Lah. 445 : 94 I C. 396

——a second appellate court can interfere with the finding of fact of the lower appellate court based partly on evidence legally inadmissible 108 I C 264

——where the lower court exercises its discretion improperly under Or 13 R 1 the second appellate court can interfere. 110 I. C 821 : 1928 Pat. 537

——where both the parties agreed to proceed on the evidence taken by the Munsiff as well as the evidence recorded by the Commissioner but the appellate Court directed the appellant to proceed entirely on the evidence recorded by the court only there was defect of procedure which should be interfered with in second appeal. 46 C. L J. 558 . 106 I. C. 841 : 1928 Cal. 136.

——failure to draw an inference of permanent tenancy is not an error of law. 92 I. C. 899 : 1926 Cal. 592.

(15) Second appeal (Ss. 100—103 and Or. 42 R. 1)—*contd.*

——the question of recognition of tenancy can be dealt with i second appeal 1926 Cal. 264

——the question of representation of tenancy is primarily question of fact. 1926 Cal. 517 · 91 I. C 748, 97 I. C. 489 (c).

——the question whether a tenancy is permanent or not depend upon the inference to be drawn from facts and hence is not a pu question of fact. 55 C 355 : 32 C W. N. 184 : 107 I. C. 81 : 19 Cal. 315

——the second appellate Court can set aside the finding of th lower appellate court as to the ancestral nature of certain propert based upon mere conjecture and presumption. 97 I. C 241 : 1926 Lal 659 : 27 Punj L. R 721

——a second appellate court cannot question the conclusion c facts arrived at by both the lower courts based on legal evidenc unless question of misdirection of law arises 109 I. C. 771 : 19 Mad. 377

——finding of fact based an erroneous view of the lower appellat court as to the burden of proof may be interfered with in secon appeal. 94 I. C. 944 1926 All 453 24 A. L. J. 513

——when the finding of fact as to the attestor's actually seein the document signed becomes irrelevant by change in the law th H. C. can in second appeal consider the altered aspect of the findin as to attestation. 1926 All 725 96 I C. 775.

——the legal effect of proved facts is a question of law. 19 Lah. 774, 46 C. 189 P C, *fol.*

——a second appellate court cannot interfere with the findin of fact granting an injunction 91 I C. 480 : 1926 Cal. 536.

——the findings of fact of the first appeallate court are bindin on the second appellate court unless it can be said that there wa no evidence to support it. 32 C W. N. 3 : 53 M. L. J. 700 P. C

——whether certain person acted as heirs or administrator in contracting a debt is a question of fact and cannot be interfere with in second appeal 97 I C 570

——a question as to ownership is a question of fact. 96 I. C. 915 1926 Mad. 1052

——where the lower appellate court decided a question of fac not upon the evidence but holding itself bound by a previou decision of the superior court upon similar facts between differen parties, the court committed a substantial error or defect i procedure and a second appeal was maintainable 105 I. C 633, 19 Pat. 209 6 Pat 698 F. B.

——a pure question of law may be for the first time raise in appeal. 51 B 37, 100 I. C. 582 1927 Bom 93 : 29 Bom L R 60.

... allowe 1035

——an inference from proved fact is a question of ... for the purpose of appeal. 1927 All. 601, 31 C. W. N. 677 : 39 M. L. T

(15) Second appeal (Ss. 100—103 and Or. 42 R. 1)—*contd.*

161 : 25 A.L J. 959 : 28 Punj. L R. 658 : 29 Bom. L. R. 870 25 A L. J. 959 : 101 I C 355 1927 P. C. 102

——the H C may under s. 103 of the C P C as amended by the Act of 1926, determine any issue of fact necessary for the [illegible] ot been determined by [illegible] by that court. 51 B [illegible] C. 416, 102 I. C 391 : [illegible]

——when reference to Full Bench is made in second appeal, [illegible] Bench [illegible] that [illegible] o the [illegible] : 100 I. C. 289 F. B

——where the lower appellate court has admitted additional evidence improperly, the second appellate court disposes of the case if independenly of such evidence the lower court has apparently arrived at its conclusion upon other grounds 98 I. C 129 : 1297 Cal. 140, 1924 Cal. 1042, 35 C 701, 23 C 179 *Rel on.*

——the question as to what land were included in the permanent settlement is a question of fact and cannot be interfered with in second appeal 1927 Cal 457 : 100 I C 507

——matters of procedure which are dependent on facts cannot be raised in second appeal for the first time. 94 I. C. 417 (C).

——the plff. should not be allowed to set up a new case in second appeal which was not adequately investigated in the lower court 96 I C 304, 100 I C 566 1927 All. 344

——question of misjoinder of parties cannot be raised for the first time in second appeal 1928 Mad 635 110 I C 548.

——wilful neglect is a pure queestion of law and can be questioned in second appeal. 96 I C 1046 1926 All 394 : 24 A L J 125

——question of limitation cannot be gone into in second appeal unless from the plff's own case or from his pleadings or from the admitted or proved facts it could be seen that the plff's suit was time barred 32 C W N. 778 1928 Cal 870

——where the lower court refused to set any value to the revenue papers because they were not corroborated or because they were prepared in the landlord's office in the absence of the tenants, there was a misdirection on the question of fact which could be interfered with by the appellate court without further interference by the second appellate court. 47 C L J. 457 . 1928 Cal. 408 . 110 I C 338

——whether a particular document has been executed on account of natural love and affection or not is a question of fact and not of law 110 I C. 408

——inference from admitted or proved facts is a question of law. 1928 All. 381 26 A L J 887, 25 A L J. 959 P. C. *fol* also, 50 A 180 : 108 I C. 721 1928 All. 39 · 25 A.L J 1014, 31 C.W.N 677 P C *Rel. on*

(15) Second appeal. (Ss. 100—103 and Or. 42 R 1)—*contd.*

——inference from proved facts such as, whether a plea of permanent tenancy has been made out is a question of law. 55 C. 355 : 32 C. W. N 184 : 107 I. C. 81 : 1928 Cal. 315, 31 C. W. N. 677 **P. C.** *fol.*

the heirs of a deceased the determination of 98 I. C 206 : 1926 Cal.

peration of a provision of law is a mixed question of law and fact. 101 I. C. 674 : 1927 Pat. 256 : 8 Pat L. T 561.

——a Small Cause Court can decide a question of title incidentally but when the pleadings show that the issue to be fought out and decided is one of title, it cannot be considered as one of small cause nature 92 I C 899 : 1926 Mad. 656 : 1926 M. W. N. 538.

——a suit relating to the price of paddy alleged to have been cut and misappropriated without making out a criminal offence is a suit of small cause nature and cannot be the subject of second appeal. 44 C L. J 190 , 97 I C. 556 . 1926 Cal. 1230.

——where a suit was filed by the Jt Dr. for the recovery of excess of the decretal amount taken by the decree-holder under all cause nature and a second

ent and if second appeal lies. al 709.

——the alteration effected by s 2 of Act VI of 1926 in s. 103 empowers the H. C sitting in second appeal to decide finally any question which was not decided by the lower court or was decided by that court in a manifestly wrong manner. 31 C. W. N 32.

——whether a transaction is a fraudulent preference or not is a question of fact and not of law. 107 I. C. 490.

——the question as to whether a gift is bad for offending against the doctrine of *musha* is a mixed question of law and fact and may be interfered in second appeal. 104 I. C. 126 (C).

(16) Security in appeal (Or 41 R. 10.)

——Or. 41, r 10 does not apply to pauper appeals. 3 Lah. 30 : 1922 Lab 87 : 67 I. C. 256.

——Or. 41, R 2 expressly concerns with the costs up to the appellate court and has no concern with the costs which may be dependent upon something occurring in the Privy Council 1927 All 522 . 101 I. C. 551

——it is discretionary with the appellate court to demand security for cost of the appeal or of original suit or of both. 25 Bom. L R 195 . 1923 Bom 264 : 72 I. C. 285.

——both under the provision of Or. 41 r. 10 and apart from it there is ample jurisdiction for the H. C. to demand security for costs in an appeal under cl. 15 of the Letters Patent from the

(16) Security in appeal (Or. 41 R. 10.)—*contd.*

decision of the single judge of the H. C. on the Original Side. 28 C. W. N. 676 : 51 C 695 . 80 I C 295 : 1924 Cal. 781, 20 C W. N 49 : 48 C. 481, *Ref* 27 M. 121 *not fol.*

——the provision of Or. 41 R. 10 to reject an appeal where the security is not furnished is mandatory. 48 C. 481 : 33 C L. J. 307, 23 Bom L. R 681 40 M L J. 308 14 L W 362 1921 M W. N. 159 : 60 I.C 274 P C and the court cannot extend time 1923 Cal. 317

. ... failure to furnish security ... court cannot thereafter ... 883. Or 41 r. 10 (2) is ...

——but where the security is furnished but the bond is not properly executed the appeal should not be dismissed but should be adjourned for a proper bond 47 C L. J 328 . 1927 P C. 264 . 107 I. C 349 P. C.

——when security for costs is ordered and furnished the surety ceases to be liable after the appeal is allowed and the fact of the respondent being able to get the appellate order reversed does not make the security liable 33 C L J 190

——*the true rule is that poverty of an appellant, standing by itself and without reference to the general facts of the case under appeal ought not to be considered sufficient to warrant his being required to furnish security* 1922 M.W N 801, 8 A 203, 1921 Pat 359.

——poverty of the appellant by itself is not sufficient ground ...

Rs 100, requires registration. 31 M 330.

——the relationship between D H. and J Dr who has executed a security bond mortgaging property is not that of mortgagor and mortgagee and a suit is not necessary to realise the amount. 30 C. 1060 · 7 C W N. 914 But in case of third party, according to Calcutta High Court, suit is necessary, 23 C. 22, 22 C. 25 and according to Bombay High Cqurt, suit is not necessary, 25 B. 409, which view has been adopted in sec 145

——no appeal lies against an order of rejection of an appeal for not furnishing security for cost of appeal and the original suit under Or. 41 r 10, 35 C. L. J 131

——an order rejecting an appeal under r. 10 for failure to furnish security for costs, is not appealable 62 I C. 751.

——no appeal lies against an order dismissing an appeal for ... in revision ... A. L. J. 838 :

... C. restore an ... ure to furnish ... 55 M. L J.

(16) Security in appeal (Or. 41 R. 10.)—*contd*

——when an execution sale is stayed on security bond being executed by J Dr and the decision is upheld, sale can be carried out under the previous subsisting attachment. 17 C. L. J. 267.

(17) Stay of proceeding or execution, Or. 41, RR 5-7.

——the principle which underlies stay of execution pending appeal is that the successful party may reap the fruits of the litigation and not obtain merely a barren success. 5 C. W N. 781: 27 C. 1. P C

——an order for stay is made on the day it is pronounced and not on that on which it is drawn up or communicated 33 C. 927: 3 C L J. 67, 1. C W. N 226, *expl and Dist.*

——the order of stay becomes operative the moment it is made and suspends the power of the subordinate court. 96 I C. 137 1926 All. 457 24 A L J. 519

——application for stay of execution in the Original Side of the H C. pending an intended appeal must be made in the trial court without unreasonable delay 25 C W N 928.

——the court which dismisses a suit becomes *functus officio*, save that it may stay execution of its own decree or order for cost. 21 C. 561, but when appeal is filed the appellate court has seisin of the case to stay execution 25 C 893, 76 I. C. 174

——the application for stay should be supported by an affidavit. 15 B 536, 15 C. W N 432

——what is sufficient cause must be determined in each case 20 W. R 393, 13 W R 281, 17 W R. 160, 9 W. R 448.

——execution may be partly stayed. 35 B 243

——execution should not be stayed unless sufficient cause is shown. 15 C. W. N 475, 2 Pat 61 61 I. C. 77, 61 I C. 827 but when there is sufficient security it should be stayed. 1923 Lah 445.

——application for stay should be made as soon as possible after filing the appeal. 82 I C. 435

——power to stay proceedings is ancillary to the power of the appellate court as the appellate authority, to reverse the order of the inferior court 3 C. L. J 29, 5 C W. N. 781: 31 C 722 *Ref.*

——an appeal does not by itself operate as a stay of execution, application should be made for desired extention of time of payment, 63 I. C. 799.

... 59 I. C. 523. ...cretionary the ...licial discretion

is used. 82 I. C. 435.

——a sale held in ignorance of an interim order of stay of the sale passed by the appellate court is not a nullity 50 A. 41: 102 I. C. 665: 25 A. L J. 530: 39 M. L. T. 85: 1927 All. 401, F. B.

(17) Stay of proceeding or execution, Or. 21. RR. 5-7—*contd.*

24 A. L. J. 519 *overruled* similar case, 52 Bom. 290 110 I. C 710: 1928 Bom. 189 30 Bom L R. 465

——when the respondent is an insolvent and an application for [illegible] ...rect the appellant ... the understanding ... V 975 ... execution of the ... stayed without

——Or. 41 r. 6. applies only to cases where the appeal is against the decree which is to be executed. The plff. appellant in a title suit against the order in a claim case cannot obtain an order of stay of sale. 4 Lah L J 188 1929 Lab. 58.

——R. 6 applies also to a case where a sale has been held but not confirmed. 108 I C 605.

——*under R 6 (2) the court is bound to stay the sale on terms of* security or otherwise as it thinks fit 108 I C. 272, 108 I C 605.

——appointment of Receiver in execution is not effective as a stay of execution. 2 Pat L T 628

——where no appeal is preferred the court which passed the decree can alone grant a stay, on sufficient cause being shown during the time provided by law for presenting an appeal. 43 A. 198: 18 A. L. J 1121 60 I C 131, 43 A 513 19 A. L. J 462 63 I C. 837.

——proceedings held in pursuance of a preliminary decree are proceedings in the suit and not in execution. The appellate court has inherent power to direct stay of such proceeding pending an appeal. 2 *Pat L T 70: 59 I C 883*

—— [illegible] ...ed unless su...

st... ... order for ... r. 6 (2) on such term as to giving of security or otherwise as the court thinks fit. 75 I C 615, 789, 1001.

——before a final order ... under Or. ...
R...
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——where the stay petition was dismissed on the ground that it was premature as the respondent did not take any step to execute the decree but thereafter the respondent executed the decree and obtained delivery of possession the court could cancel the delivery of possession and restore the property to the appellant. 8 P. L. T. 712 · 106 I. C. 194 1928 Pat 49.

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t... ... 91 C 1010.

(2) Award, validity and scope of—*contd.*

aside by the Board without allowing the parties to adduce fresh evidence, held that the Board was not a court of appeal but was one entitled to deal with the case *de novo* taking evidence if necessary 31 C W. N. 686 : 1927 Cal. 601 : 103 I. C. 634.

——an award is not in general set aside unless it is shown to have based on some erroneous view of law or that there was no evidence to base it Wrongful admission or rejection of evidence may sometimes vitiate an award but as a general rule the court does not set aside an award merely on the ground that it is against the weight of evidence. An award may also be set aside on the ground of misconduct in the popular sense of the word, but an award will not be set aside where it does not ,on the face of it, disclose a manifest error of fact or law, 110 I. C. 251 : 1928 P. C 267

——an award cannot be modified unless imperfect in form or for obvious error it can be amended without affecting arbitration decision 1925 Cal 332.

——an obvious slip on the part of the arbitrator is no ground for setting aside or remitting an award, 52 C. 100 ; 88 I. C. 89 1925 Cal. 599

——an error in law on the face of the award means some error of legal proposition which is the basis of the award. 52 C. 100 : 88 I. C 49 1925 Cal. 599

——parties are bound by the conclusion of the arbitration in point of law or of fact An arbitrator is guilty of judicial misconduct if he makes a mistake of law visible on the face of the award but the error of law must be distinctly collected from the face of the award or from some document incorporated in the award. 31 C W. N 1027 46 C L. J. 9 . 39 M. L T 61 : 29 Bom L. R. 1150 : 104 I. C 476 : 1927 P. C. 164 : 55 C. 126 P. C.

——the decision of the arbitrator is final but it may be sent to them for correction in case of an arithmetical or such other mistakes, but they cannot be corrected in execution proceedings. 45 A. 628 : 21 A. L. J. 541 : 74 I. C. 817.

——an award not in terms of agreement but incorporated in a decree is binding. 59 I C 89.

——when a court is asked to enforce an award, it must satisfy that the award is enforcible in the same way as a decree 42 A 525 : 18 A. L. J. 652 . 59 I. C. 75.

——although a minor is a party to reference an award cannot be set aside without any procedure mentioned in C. P. C. 45 A. 263 1923 A. 267 : 21 A. L. J. 81 . 74 I. C. 133.

——if separable portion of an award is bad or excessive the remainder if good can be maintained 18 C. W. N. 755 P. C. 1923 Rang. 130 ; 1 Bur. L. J. 265 . 72 I. C. 193, 2 Pat. 777 : 1923 Pat 225.

——if the bad portion is not separable from the good the whole is bad. 34 C. L. J. 253.

(2) Award, validity and scope of—*contd.*

——where the award is partly bad it is wholly invalid even if the bad part is separable 4 Pat. L. T. 669 . 1923 P 470 : 74 I C 649, 19 C. W. N. 476, 4 P. L. J. 394. *fol.*

——same award cannot relate to matters within and without jurisdiction, between parties and non parties and partly under agreement and partly upon order of reference. 43 C L J. 14 : 24 A. L. J. 13 : 92 I. C. 633 49 M. L J. 812 1925 P C. 293, 83 I C. 300 . 28 C. W N. 424 1924 Cal. 567, 51 C 361 · 28 C. W N. 977 · 40 M. L J. 628 22 A. L. J. 386 P C.

——when all the parties to the reference represent to the arbitrator that whole of the properties in dispute belonged to them ... such properties, the arbitrator ... such properties as belonging ... 70 . 1925 Pat. 810.

... the parties will be at liberty ... remedy of the parties was an administration suit and not an application for execution of award. 45 C L. J 597 : 31 C W. N. 517 : 1927 Cal. 562 : 102 I C. 108.

(3) Irregularities in proceedings and misconduct of Arbitrators

——the court cannot set aside an award simply because the arbitrators admitted a document which under the terms of the reference was not to be considered 38 B. 60.

——witnesses must be examined in presence of both the parties 13 C L J 399, 34 C L J 39, but the witnesses must be distinctly tendered to the arbitrators 15 C L J 360

——award must decide all the matters referred to 13 C. L. J 399, 28 C L. J 275; but to invalidate an award it must be established that the point was specifically stated and brought to the notice of the arbitrator 15 C. L J. 360, 14 C. L. J. 188, 43 A. 108 : 18 A. L. J. 960.

... not disposing ... there was an ... that the award ... waived by the ... 56

——award on private information is bad, 34 C. L. J. 39, 13 C. L. J. 99, 20 O. C 401 · 74 I C. 401 ; but it is not bad when the reference contains agreement authorising the arbitrators to decide from their own knowledge or without evidence. 44 M. L. J. 263 : 32 M L. T 32 1923 Mad. 301 : 73 I. C 470.

——arbitration based on private inquiries is not bad. L. R. 3 A. 106 · 64 I C 934, 67 I. C. 866, 20 A. L. J. 125, but the terms of

(3) Irregularities in proceedings and misconduct of Arbitrators—*contd.*

the reference must authorise such inquiry. 20 A L. J. 117 : 1922 A. [illegible]34.

[illegible] aterial irregularity by reason [illegible] used his private knowledge provided he communicated that to the other arbitrators in the presence of the parties 41 M. L J 276 : 1921 M. W. N. 509 14 L. W. 394.

——arbitrators are not bound to hear oral evidence on the points which are within their own knowledge and within the special experience for which they are selected. 44 C. L. J. 422 : 1927 Cal 227 . 100 I. C 299.

——if an arbitrator makes an enquiry in the absence of one of the parties he is guilty of misconduct. 101 I. C 153 : 1927 Lah. 425 28 Punj L. R. 425 9 L L J 218.

——when one of the arbitrators has interest in one of the parties which is not known to the other party the award is vitiated for misconduct 63 I C 1007, L R 3 A 84.

[illegible] agreement that the parties will not object to the award [illegible] of misconduct [illegible] filed. 27 C W.

——if the parties are not given notice of any meeting, that would in ordinary case clearly amount to misconduct on the part of the arbitrators 25 Bom L R 392, 27 C W. N. 933.

——irregularities may be waived by the parties subsequently joining the arbitration proceeding. 2 Bur. L J. 30 74 I C 6, [illegible] A. 661 · 18 A. L J 644 59 I. C 801.

——all the arbitrators must be present during the whole of the [illegible] the absence of [illegible]

——even where a court thinks that an arbitrator has taken a wrong view of the evidence and that such wrong view was palpable or apparent on the face of the evidence, the court cannot rectify or correct the award unless the award was imperfect in form or the obvious error was of such a character that it could be amended [illegible] I C. 10.

[illegible] may otherwise

[illegible] ators an umpire is appointed he is bound to rehear the evidence if an application is made to that effect, but the parties may waive that right. 63 I. C. 141.

(3) Irregularities in proceedings and misconduct of Arbitrators—*contd.*

——mistake of law on a legal point specifically referred to does not vitiate award; but a decision on a matter not referred to is bad. 19 C. W. N. 476, 3 Pat. 443 81 I. C. 994.

——all the arbitrators must be present in all consultations. 25 C. L. J. 396, 22 C. W. N 301, and award made by majority without consulting all is invalid even if the reference provides this. 22 C. W N. 301, 1928 Mad 983, 12 M. 113, 1918 M. W. N 477, 52 M. L. J. 357, 1924 Rang. 153.

——the holding of confidential inquiries behind the back of either party has been consistently condemned as misconduct in the legal sense. 3 Pat. L R 59 . 6 P L. T 544 · 1925 Pat 465, 39 C. L. J. 309 : 14 Bom. L. R. 1007 *fol*

——the word "misconduct" used with reference to arbitration does not necessarily or at all imply anything in the nature of fraud. 52 B. 116 107 I C 707 : 1928 Bom 49 30 Bom. L R. 92.

——award beyond the terms of reference is to that extent *ultra vires.* 5

394, P. (

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248, *Dist.*

——decision against personal law is not invalid. 2 Lah. 114 : 61 I. C. 628.

——if irregularities in procedure can be proved, which would amount to no proper hearing, that is sufficient misconduct. 18 C, W. N. 755 P C., 34 C. L. J. 39

——failure to do essential duties is misconduct. Delay of five years in making an award amounts to a misconduct. 52 B. 116 : 30 Bom. L. R. 92 1928 Bom 49 107 I. C. 707.

——the burden of proving that there had been no proper inquiry is on the person who alleges it. 18 C. W. N. 755, P. C

——arbitrator should retain notes of proceedings for subsequent use, if necessary, but want of that does not vitiate the proceeding when t

P. C., 6

——

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error o

81 I. C. 994 : 1924 Pat 448.

——when the arbitration agreed to by the parties proves abortive the court cannot send the case to another arbitrator without the consent of *all parties.* 1921 Pat. 170 : 2 Pat. L. T. 277 : 61 I. C. 390.

(3) Irregularities in proceedings and misconduct of Arbitrators—*contd.*

——arbitrators selected by the parties are bound to give evidence, but their evidence cannot be used to scrutinize the decision on matters within their jurisdiction 18 C. W. N. 755, **P. C**

——arbitrators have power to do singly acts of ministerial nature, a mere reception of written statement is not judicial act 15 C. L J. 360.

——arbitrators need not sign the award at a time 15 C. L. J. 360.

——failure of the arbitrators to sign the award is a legal flaw. 20 A. L. J. 392. 1922 All 233, 66 I. C 499.

——all the defts. whether appearing or not must submit, otherwise the arbitration is bad. 27 C. L J. 339 : 21 C W. N. 387, 25 C L. J. 339, 9 C. W. N. 873, *Fol*, 11 C. W. N. 1152, *Diss*, 6 C. W. N. 226 *Ref.*

——it is discretionary to the arbitrator to hear evidence under the circumstances of each case 13 C. W. N. 63.

——when arbitrator improperly admits evidence but the same has not any material bearing, the award is not vitiated. 33 M. L T. 246, **P. C,**

——perusal of inadmissible evidence does not vitiate the award 108 I. C 18, 30 Bom. L. R. 90, 1928 Bom 55

——misconduct may be waived. 14 C. L. J. 188, 15 C. L ... 12 M. L. T. 133 : 16 I. C. 478, 2 C. L. J. 61.

——unless there is provision for majority in the reference an award not unanimous is not valid 49 I. C. 522 (Pat).

(4) Power of the arbitrators and effect of arbitration.

——the power of the arbitrators comes to an end by the publication of the award. 14 C. L. J. 188, 108 I. C. 186 : 1928 Lah 170, 33 A. 83, 1921 Pat. 161, and the arbitrator's authority cannot be revived by the award being set aside. 108 I. C 186 ; 1928 Lah. 170, 35 P. R 1884, 67 P. R. 1886 *Dist.*

(4) Power of the arbitrators and effect of arbitration —*contd.*

should be decided by arbitration in which case he must obtain a stay of the suit. 26 C. W. N. 967 35 C. L. J. 482, 38 C. L. J 67, 111 I. C. 555 : 1928 Mad. 371, 41 M. 115. 1922 Lah. 369.

——where there has been an agreement to refer to arbitration the suit instituted by the party should be stayed unless sufficient *reason* be shown why it should not be referred to arbitration 2 Lah. 19, 46 C. 1041 *fol.* 72 P. R 1917 and 54 P W. R. 1913 *Dist* 26 C. W. N 967 : 35 C. L. J. 482, 47 C. 752, 38 C L. J 67

——arbitrators are not bound by mere rules of practice which courts have adopted for general convenience, and they have greater latitude than courts of law 15 C. L. J. 110.

——an arbitrator or umpire cannot decide whether there has been a proper reference to arbitration Only the Civil Court can decide that question. 107 I C 793 1928 M W. N 132 · 1928 Mad. 107.

——if there is any difficulty in point of law as to which the opinion of the court should be taken, provision is made in cl. 11 of the 2nd schedule of the C. P. C. for making the award in the form of a special case with the leave of the court 52 C 100 88 I. C. 49 1925 Cal 599.

——the arbitrators may delegate to a third person the performance of acts of a ministerial character but this doctrine cannot be invoked to cover a case where evidence was taken in the absence of one or more of the arbitrators 9 O. L. J 410 : 1922 Oudh 276

——parties may waive the objection as to the absence of an arbitrator. 1922 Cal 181

——there is no authority in support of the proposition that an award made after the commencement of an action must be treated as invalid even though the award deals with a question which is not in controversy in the action 3 Lah. 296, 47 C. 752, 47 C. 849, 41 M 115, 56 I. C 150 *Dist.*

——as a general principle a person who is not a party to or properly [illegible] represented in any proceedings should not

There is no rule of procedure by which the arbitrators can substitute the legal representative of a deceased party or appoint *guardian ad litem* for infants. 26 C. W N. 804 : 1922 Cal. 226, 31 A. 572, 15 C. L. J. 360 *Dist.*

——a compromise which all the parties joined can be the basis of a valid award by the court if that party's rights were in no way prejudiced. 45 C. L J. 458 : 103 I C. 625 : 1927 Cal. 619

——whether the arbitrators act within jurisdiction or not depends upon the clause of reference. The arbitrators are sole judges of law and fact referred to them and the only exceptions are cases where there is corruption, fraud, or an error of law apparent on the face of the award. In the latter case the award must have been based upon some erroneous legal proposition 38 C L. J. 100 : 47 B.

(4) Power of the arbitrators and effect of arbitration—*contd*

578 : 44 M. L. J. 706 : 25 Bom. L. R. 588 : 1923 M. W. N. 595 33 M. L. T. 419 : 73 I. C. 436 P. C

——arbitrators do not exceed their authority when they allow interest or damages as might have been assessed by the court, 27 C W. N. 933

——pending of probate proceeding in court does not invalidate an award as to the division of the property of the deceased. 25 Bom L. R. 437 . 1923 Bom 365 73 I C 415

——arbitrators cannot create jurisdiction by their decision 44 A. 481 20 A L. J 385 66 I C 691

——arbitrators are not bound to give reasons. 12 M. L. T. 133, 16 I. C. 478.

——power of the umpire discussed. 31 M. L. T. 238 P. C.

(5) Procedure in arbitration.

——in case of private reference written notice to party is not necessary 27 C. L J 104 21 C L J. 248, *Dist.*

——arbitrators must give notice to the parties before proceeding *exparte* 27 C W N 933, L R 3 A 81 65 I. C. 577, 47 C. 29.

——notice to pleader is sufficient compliance with the requirements of para, 10, Sch 11 C P C, 103 I C. 625 : 45 C. L. J 458 1927 Cal, 619

——arbitrators who refuse need not accept office before refusing 15 C W. N 1005 14 C L J 313 38 I A. 181 P C.

——in case of reference to arbitration without the intervention of court, if during the course of arbitration proceedings one of the arbitrators refuses to take any further part, any of the parties may thereupon apply to file the agreement or submission to arbitrator under para 17 of Sch 11 C P C When an order of reference is made by the court under p. 17 the court can take action under p 5 and appoint a new arbitrator 19 A. L J. 823.

——after award is made the court cannot allow the suit to be withdrawn. 7 C. W N. 186

——where the plff. and one of the defts enterin to an agreement to refer to arbitration the suit cannot be stayed at the request of the deft 38 B. 687

——when one of two arbitrators reports that his colleague is fabricating false records the court cannot revoke the arbitration at that stage 39 M L. T 195 105 I. C 92 : 1927 Mad. 910, 33 A 743 P. C., *Ref.*

——a court has no power to supersede an arbitration in anticipation that the award will not be filed before the due date. 1923 P 115.

——it does not necessarily follow that when a case referred to arbitration appears in the special list the order for arbitration cannot be superseded by the court for proper reason and necessary order passed for trial of the suit. 28 C. W. N. 755 : 1925 Cal 845.

——under para. 12 (b) and (c) the only power the court has is either to amend without affecting the decision, or to rectify a clerical

(5) Procedure of arbitration—*contd*

mistake or an error arising from an accidental slip or omission. 45 B. 572 22 Bom. L. R 1416 · 59 I. C. 785.

——time to file objection to award runs from the time the arbitrators have completed their duty 5 C. W. N 813

——the agreement to refer to arbitration not having provided for reconstitution of the committee of arbitrators, if one of them dies, the award must be rejected as made without jurisdiction 1923 Cal 135 · 69 I. C. 863, but where there is provision for appointing fresh arbitrator, arbitration does not become void. 3 Lah L J. 276.

——the words "or being otherwise invalid" in para 15 (1) (c) does not include the question whether there was a valid reference to arbitration 110 I C 881 1928 All 740 : 26 A L J 1009.

——an application under Sch. II, para 17 (1) C. P C. is not application in a suit and no preliminary decree can be passed upon such application under Cl. (4) of para. 17. 2 Pat. L. T. 277. 1921 Pat. 170 : 61 I C. 390.

——the provisions of the C. P. C apply to proceedings under Sch. II. So a decree passed under para. 21 (2) of ch. II is a decree in a suit and Or 9 r 13 applies to such a decree. 62 I. C. 927·

——the institution of a suit has not *ipso facto* the effect of superseding a previous reference to arbitration, but if neither party applies for stay of the hearing of the suit the arbitration is superseded and the result of the suit is binding. 35 O. C. 63 · 1922 Oudh. 158 : 68 I C 235.

——where the arbitration was to take place in London in the usual manner the English Law was to govern the case ; that law discussed 26 C W. N. 642 36 C. L J. 444 : 45 M 496 1922 M. W. N 396 . 24 Bom L R 1245 : 4 U P. L. R. 36 P. C.

——an award is not bad because some of the arbitrators gave evidence before others or because one of the parties deliberately absented himself from hearing. 21 C W. N. 895 : 40 I. C. 646.

——a judgment and decree upon award cannot be *set aside* in a subsequent suit to set aside the award. 26 C W. N. 946.

——when the court refuses to file an award the unsuccessful party may institute a regular suit to enforce the award. 45 B. 329 : 22 Bom. L. R. 1377 · 59 I C 755.

——"arbitrators have not submitted award, issue *Takid* at once" this order was held to extend time. 1925 Cal. 475.

——an enlargement of time for the award is equivalent to a fresh submission to arbitration. 3 Pat. 443 : 81 I C. 994 : 1924 Pat. 488

——whe[illegible]

change in [illegible]

of both the [illegible]

cannot be [illegible]

arbitration.

(6) Reference to Arbitration.

——a submission to arbitration is chargeable with eight-annas stamp. 13 C W. N. 63.

——want of stamp in the document of submission does not invalidate the award 27 C. W. N. 513.

——agreement to refer may be inferred from document. 42 A. 525 : 18 A. L. J. 652, 59 I C 75.

——the agreement in writing substituting the name of the arbitrator for another already appointed by a reference duly stamped did not require any stamp duty 28 C. W N. 871.

——verbal reference is good, it need not be in writing and signed. 23 C. L. J 130 : 43 C. 290 30 M L. J. 67 : 20 C. W. N 137 **P. C**, 30 A. 32, 14 C. L. J. 188, 4 C W. N 92, but see 7 C. W. N. 180.

——the provision in Sch II para 1 C. P. C that an application for reference to arbitration shall be in writing is not mandatory but directory only 105 I. C 105

——a record taken down of an oral statement made by the parties or pleaders is as much an agreement in writing as a written application made by the parties or their pleaders themselves. 46 A 208 : 79 I. C. 816 . 1924 All. 540, *contra*. 39 A. 489.

——in making a reference the provisions of para 1 of Sch II of the C P C. should be strictly complied with. 25 C. W. N. 832, 29 A. 429, 9 C W. N 873, 27 C. L. J 339 *Ref.*

——if all parties, whether contesting or not, be not parties to ... 8 Cal 249, 21 C. W. N. 387 : 27 C. L. ... 1923 M. W. N. 296 : 31 M. L T. ... 24 Cal 353, 9 O. A. L. R. 773, 49 A. ... 54 I C 221, 9 C. W. N. 873, *Fol.* II ... 6, *Ref.* 27 C L J. 339, 50 M L J. ... person not a party to reference ... W N. 423, but it is binding against ... ially when it is acted upon 71 ... 74 I C. 834 : 21 A. L. J 326, 107 I.

——*pro forma* defts and persons having no interests in the ... J. 235 ... parties interested ... the reference to ... 3, 71 I. C. 326 (Cl. ... R. 530

——"parties interested in the suit" in Sch. II para 1 should not be restricted to those persons against whom relief is claimed. A person against whom no relief is claimed may be interested in the result of the suit in as much as his liability to the plff may ultimately arise by reason of any decision that may be given in that suit 86 I C 839 ; 1925 M. W. N. 97 : 1925 Mad. 621 ; 48 M. L J 142

——a person who is stranger to the reference and under no obligation to abide by the award cannot be said to be a person interested in the award 9 O. L. J. 410 : 1922 Oudh 276.

(6) Reference to Arbitration—*contd.*

——in order to bind a Panchayat by an award all the members

be a judgment in accordance with the award of the arbitrators, the reference by the court was invalid 46 C L. J. 353

——a compromise decree in a partition suit provided for the details being worked out by arbitration, held it must be construed to mean arbitration without the intervention of court and hence the provisions of the second schedule applied, 90 I C. 624 (c)

——it is quite impossible that one and the same arbitration should be held as to matters within the jurisdiction of the court, between the parties to the suit and between them and other persons: under the Code provided by the Indian Arbitration Act and under the Code provided by the Second Schedule under the superintendence and control of the Judge who has seizin of the suit and of the Judge disposing of business under the Indian arbitration Act; partly upon an order of reference and parly under an agreement. 28 C W. N 424 1924 Cal. 567, 49 M. L J. 812: 1925 P. C. 293.

——under the terms of the reference the arbitrators were empowered to decide as to the terms of contract 24 C. W. N. 567: 59 I. C. 439.

——all the matters in dispute between the parties need not be referred and parties to the reference may be interested in different matters. 2 Pat. 777 · 1923 Pat. 225

——the parties to a suit may refer the subject matter of the suit to arbitration without the intervention of the court 45 B. 245: 22 Bom. L R. 1048, 59 I. C. 53

——where the parties to a pending suit refers the matter to

he award cannot be
the provisions of the
I. 59 . 1927 Cal. 887, 25
. R. 1048 : 59 I. C. 53,
16 : 1927 Bom. 565 ; 29

agreement agreeing
le after the inspection
of the locality, the procedure, though novel, was binding on the parties 1928 All. 497 : 26 A. L. J. 804.

——reference is not bad because no provision is made therein for appointment of umpire in case of difference. 15 C L. J. 360, 8 C. L. J. 475.

(6) **Reference to Arbitration**—*contd.*

... to arbi-

ed by C.

——a refernce to arbitration under the provisions of the Second Schedule of the C. P. C is entirely distinct from the procedure contemplated by rule 20 of the Rules of the U. P. Govt. 47 A. 374 : 23 A. L. J. 129 : 86 I. C 585 1925 All 356.

——where in execution proceedings arising out of money decree the Jt Dr. pleaded satisfaction out of court and thereupon both parties referred the matter to arbitration and the award was filed in court, the procedure is who'' ... unenforcible. 52 C. 559 : 87 I C. 633

——disputes in execution ...
tion. 3 P L W. 146 . 42 I. C. ...

——a dispute as to the user of a mosque can be referred to arbitration 98 I C. 998 1927 All 128.

... of a suit

——a pleader cannot refer unless specially authorised 23 C. W. N. 200 (n)

——a pleader can appoint an arbitrator but he cannot substitute an arbitrator appointed by his client. 1922 Nag. 39 : 5 N. L. J. 229 : 65 I. C. 879.

——the existence of a "dispute" is essential to the validity of a reference. 64 I C. 798 (c).

——agreement not to object is of no avail 107 P. W. R. 1916 : 34 I. C. 192, 6 M. 368.

——in principle there is no difference between private reference and reference filed in court. 15 C. L. J. 360, 37 C. 63. but see 29 C 167 : 6 C. W. N 226 : 29 I A. 51, P. C. which explains the difference.

——the provisions of Sch. 11 para 1. C P. C. are not applicable *to a reference made outside court. 71 I C. 860.*

——a party may for just cause rescind from contract of reference. 22 C. W. N. 535, 39 I. C, 349 : 12 P. R. 1917, 14 C L. J. 188, 17 C. W. N. 351.

——parties cannot resile from reference without good and sufficient reason. 17 C. W. N, 351, 36 A. 354, 14 C. L. J. 188.

——the court has inherent power to cancel a reference to arbitration. 6 Pat. L. T. 488 : 86 I. C 540 : 1925 Pat. 720.

——where there is a reference to arbitration and nothing has been done by the arbitrators for 5 years it is desirable that the reference to arbitration should be superseded and the case be dealt with by the court itself. 26 Punj. L. R. 476 : 7 Lah. L. J. 163 : 83 I. C. 975.

(6) Reference to Arbitration—*contd.*

——plff. cannot withdraw any portion of claim after reference. 28 C. L. J. 275

[illegible]

——reference containing provision as to the prevailing of the opinion of the majority is valid. 21 C W N. 895

——the mere fact that leave of the court has not been obtained for reference on behalf of a minor does not vitiate the reference if the minor has not been prejudiced. 71 I C 7.

——reference to arbitration made by certain members of a community describing themselves as the representative of the community is not binding on the community unless the authority of the signatories to bind the community is proved 1927 All 128 98 I 998.

——an infant cannot refer. 14 C L. J. 188, but in case of pending suit the court may authorise submission to arbitration which will bind the infant 14 C. L. J 188, 39 M. 853, and the court must ascertain if the reference is for the benefit of the minors. 15 S L. R 165 1923 S 1 65 I C. 50.

——a guardian may submit to arbitration on behalf of infant 14 C L. J 188, 36 A. 69, F. B but not a Mahamedan mother. 26 C. W. N 246

——reference by the father of the Hindu joint family is binding on the sons unless the father's act is proved to be tainted with fraud. 104 I C 202 · 1927 Lah. 362

——the legal guardian's assent subsequently given to the agreement to refer (by Mahomedan mother) and his participation in assent to the application under para 17 cannot validate the agreement which formed the basis. 26 C W. N 246

——when a redemption suit is referred to arbitration an insolvent mortgagor should give consent although the official assignee is party 47 C. 555

——matters outside the suit cannot be referred under Sch. II p 1 C P. C., 1921 M. W. N. 756 14 L W. 666

——in case of private reference when the arbitrators decide a matter not strictly covered by the reference but the parties acquiesce [illegible] 860

[illegible] is that their repre- [illegible] -hen the representa- [illegible] the record. 15 C. L. [illegible]

——reference to arbitration provided in a contract,—party impeaching the contract on the ground of fraud may sue for stay of the arbitration. 22 C W. N. 535.

(6) Reference to Arbitration—*contd.*

[illegible] ... n instituted ... an stay the ... ion why the ... C. L. J. 482, ... 61, 2 Lab. ... 61 I. C. 322, but where the arbitrators are unwilling to act the court should remove the stay and try the suit 45 B 1181 : 23 Bom L. R 511.

——but if the deft. refrains from applying for stay of the suit he must be deemed to have waived his right. 44 A. 292 · 20 A. L. J 128 : 65 I. C. 795 : 1923 Cal. 135 69 I. C 863, 47 C. 752, 41 M. 115 *not fol.* and the award will be of no effect. 38 C. L. J. 67.

——s. 21 Sp R Act. is not a bar to a suit brought by a person who is a party to a reference to arbitration : the court can stay the suit under para 17 (1) and (4), Sch. 11 of the C. P. C., 23 C. L. J 399, (5 C. 498, 23 C 956, 17 C. W. N. 351) *Diss.* 64 I. C. 240.

——admission of liability in deed of reference saves limitation 23 C. W. N. 100.

——where the reference falls within the exemption to s 28 of the contract Act no question of petition can ever arise, 107 I. C. 435

——an agreement to abide by the statement of one is not reference to arbitration 1923 A. 65

——when the matter in claim case is referred to arbitration the Jt. Dr. is necessary party to the reference 64 I C. 469

——the court cannot compel a private arbitrator to arbitrate against his own will. 43 A 101 · 18 A. L. J 952 : 59 I. C. 667.

——agreement to refer to arbitration does not become void on the resignation of one of the arbitrators where there is provision of appointment of another arbitrator 3 Lah. L J. 276.

——when on a reference to arbitration without the intervention of court one of the arbitrators declined to act, it was competent to the court to make an order of reference under para 17 Sch II. on the application of one of the parties. 44 A. 525 . 20 A L. J. 327 : 67 I. C 739

——a party who entered into an agreement to refer, under [illegible] nedan mother, may after [illegible] '46.

[illegible] through court under para [illegible] 1922 A. 133 : 67 I. C 739.

(7) Revision and appeal

[illegible] decree be in accordance with the award, it is final if [illegible] nes inoperative. 18 C W N [illegible] P C [illegible] W. N. 226 : 29 I. A. 51. [illegible] 7 : 10 C. W. N. 609 : 3 C L J [illegible] : 1922 S. 65 : 65 I. C. 59

——there is no appeal on the ground of misconduct, 8 C W N. 916.

(7) Revision and appeal—*contd.*

——a decree passed in terms of an award after hearing and disposing of objections to the same is not appealable. 86 I. C. 942 : 1925 All. 541 : L. R. 6 A. 156. 1925 P H. C. C. 324

——but a decree passed on an award made in pursuance to a reference to which all the parties are not parties is liable to appeal and second appeal 9 C. W. N. 873 Contra 33 C. 900

a decree in
is of or not in
he appellant

——appeal lies from an order directing award to be filed. 33 A. 757, and order refusing to file award is a decree 2 C L. J 88.

——no appeal lies against an order filing an award made in pursuance of an order of reference of the court and filed under para 17 of Sch 11 60 I. C. 590.

——when in a suit for partition one of the defts was not a party to arbitration and the plff. raised objection to the award but a decree was passed thereon, there was no appeal 45 A 441 21 A L. J. 326 : 74 I C 834.

——an appeal lies against an order filing or refusing to file an award although a decree has been prepared 19 C. W N. 948. 42 A. 185, 38 A 380.

——an appeal lies under s. 104 C P. C. 14 C. L. J 143, 21 C. L. J. 273 : 19 C. W. N. 948 : 38 C. 143. 18 C. W. N. 696 18 C. L. J 35, 38
914 (Pat).
the Court passed
the award, and
t being amended
r s 104 (1) (f) the
n order directing
the award to be filed and hence there was no right of second appeal. 47 A. 743. 88 I C 76 . 1925 All. 404.

——an objection to an award on the ground that it is not an

material irregularity. 1925 Cal. 475.

(7) Revision and appeal—*contd*

——an order of revocation is not appealable but is revisable 89 I. C 404 : 23 A. L. J. 891

——no revision lies against an order superseding award in pending case and directing suit to proceed 47 C. 916

(8) Submission and filing and enforcement of award.

——award made within time but filed after the lapse of time fixed by the court, is a good award, 18 C. W. N. 1325, 38 C 522, and 13 A. 300 **P. C.** *Considered*

——the provisions in cl 3 of sec. 11 of the C. P. C is mandatory and an unlimited authority to extend the time cannot be given to the arbitrators, 27 C W N. 420 : 1923 Cal 410, 30 A. 169, 36 A. 354 *fol.* 19 C. W. N. 165 *Dist*

——when the court has fixed time, the arbitrators cannot extend time even with the consent of the parties 19 C. W. N. 165

——the court cannot pass a decree in term of an award before the expiry of 10 days allowed for filing objection under Art. 158 L Act. 1921 M W. N. 793

——para 21 does not contemplate an application to set aside an award within ten days of getting notice of filing the award 111 I C 555 · 1928 Mad. 371.

——when an award not being filed within time fixed, the Court fixes a day for the hearing of the suit and within that time the award is filed, the order may be taken to be an order extending the time of filing the award 78 I C 335

——a suit cannot be dismissed for default on the date fixed for filing of the award even though the award was not filed on that date 1923 P. 115

——the exercise of the court's jurisdiction to extend the time [illegible] al irregularity. 43 A.

[illegible] ot sitting as a court

——where the filing of an award is refused by the court a subsequent suit to enforce the award is not barred by *res judicata* 45 B 329 : 22 Bom L. R 1377 59 I. C. 755, 43 A 108.

——separate suit lies to enforce the declaration made in the award filed in court. 17 C. W N. 124, 89 I. C. 68 : 27 Bom. L R. 652 : 1925 Bom. 418.

[illegible] nizable by the Court

[illegible] filed in a court which [illegible] of liability which the [illegible] W. 399 : 75 I. C 115

——an application to file an award does not become a suit by the provisions of para (2) Sch. 11 C. P. C. and hence the applicant cannot claim the benefit of sec. 6 L. Act. 1923 Rang. 225 : 1 Rang 256.

(8) Submission and filing and enforcement of award—*contd.*

award the parties can compromise ing to the award, 2 Lah. 114: 219 · 1922 Oudh 189 68 I. C. A. 526, 29 M. 303, 4 Pat. L. J.

——the appropriate time for entertaining charges of misconduct against an arbitrator is when the award has been filed. 27 C. W. N 420: 1923 Cal. 410.

——a decree based on award stands precisely on the same position with regard to execution as any other decree of court. 1923 Cal 73, 21 W R 248 *fol*

——an assignee of an award can execute it and the provisions of the C P C applicable to execution of decree should apply to the award filed 27 C W N 666, 47 C. 29 P 33 *Ref.* 43 C. 219 · 17 C. W. N 395, 50 C. 1 : 27 C W. N. 660 *Considered*

ATTACHMENT.

——property attached must be in existence 25 C L J 595

——there can be only one attachment. 44 C. 662, P. C.

——an order of attachment by the original court in ignorance of the appellate court's order for stay of execution is valid. 41 M. 151 F. B, 33 M 74 and 1 C W N 226 *Fol*, 33 C. 927 not *Fol*, 38 M. 166 *overruled*

——attachment creates a charge or lien upon the property attached 15 C. 202. 32 M. 429, 26 M. 673, 678 and it prevents alienation 5 C L J 80, but does not create incumbrance under Act XI of 1859. 11 C. L. J 528.

——it does not confer any title 25 C. 179 · 24 I. A. 170, 42 C 72: 20 C L. J. 555, 41 I. A. 251, P. C., 25 C. L. J. 695, 29 C. 482, F. B

——intending attaching creditor must apply to the court where the money is deposited. 19 C. W N. 345

——debts payable outside jurisdiction cannot be attached, 24 C. L. J. 533.

——where a fund in court is attached by several decree-holders, they are entitled to share rateably. 38 M 221, 44 M. 1072, 41 M. 616, *contra*, they are to be paid in order of attachments. 26 M. L. J. 364, 42 M 692

——a private transfer of property by a J Dr. made pursuant to the provision of Or. 21 r. 83 is absolute even against claims enforcible under the attachmet. 30 B 537.

——the renewal of an existing obligation is not a transfer and does not prejudice the J. Dr., 4 M. 417, 29 C 15 n.

——an alienation by which the decree in execution by which [illegible] be regarded as an [illegible] A 421, 14 M. I. A. [illegible] have applied

Attachment—*contd.*

——alienation during the attachment of one decree cannot be questioned by the auction purchaser under subsequent attachment of another decree 44 C. 662, 44 I. A. 72 **P. C.**, 16 B 9.

——to make the alienation void it must be contrary to the attachment. 29 C. 154 : 29 I A. 9 **P. C**, 4 A. 219, 225

——the D Hr. claiming rateable distribution is not entitled to question the private alienation (1) unless the assets are held by the court under sec. 73, 37 B 138, 41 M 265 **F. B** and (2) the claim is one enforceable under the attachment under which the sale was made. 44 C. 662 · 44 I. A. 72 **P. C.**

——attachment creates no charge or lien upon the attached property. 15 C. 202, 32 M. 429, 29 C 428, 26 M. 673 and does not confer any title on the attaching creditor. 25 C. 179 : 24 I A. 170 **P C.**, 42 C 72 · 41 I A 251 **P. C.**, but the attaching creditor has the right to have the attached property kept in *custodia legis* and an unlawful interference constitutes an actionable wrong 30 M 413

——if after claim is allowed under Or. 21 r. 58 the D. Hr brings a case under Or 21 r 63 to establish his right to attach the property and a decree is passed, the effect is to set aside the order of release and to maintain uninterrupted the original attachment and any private transfer by the claimant, though made after the release of the property would be void, under s 64 25 C W. N. 544, 15 I A 123 15 C. 521 **P. C**, 35 C. 262 : 12 C. W. N 101 **P. C.**, 21 W. R 435, 23 C 829, 10 B. 400 *Ref.*

——the revival of the execution proceeding does not operate to a revival of the attachment so as to prejudice the rights of the strangers who have in the interval acquired a title to the property. 25 C. W. N. 544, 14 C. L. J 476, 1918 Pat 343 · 3 P L. J. 310 *Ref*

——an attachment does not create any title in the attaching creditor. 3 Lah. 414, 25 C 179 **P. C.** and 42 C. 72 **P. C.** *fol*

——attachment prevents private alienation but does not prevent alienation by law 24 I C 304 · 18 C. W. N. 1056 **P. C.**

——when attachment is dismissed and the J Dr sells the property before re-attachment purchaser is not affected. 16 C W. N. 332.

——policy of insurance for the benefit of another is attachable 37 B. 471.

——annuity given by a will is attachable 10 C. W. N 1102

——when a property is attached by the same D. Hr successively and is sold under the second attachment and purchased by him a private purchaser between the two dates of attachment acquires better title. 21 C. W. N. 585, **P.C.**

——if attached crops are carried away, an executing court has no inherent power to commit for contempt. 30 M. 413 : 17 M L. J. 334

——where property is attached by several courts rateable distribution must be made by the superior court. 29 C. 773.

Attachment—*contd.*

——whether the attachment is one before judgment or in execution of a decree, the attaching creditor has no priority over the official assignee, and the latter is entitled to claim the attached property for the benefit of the attaching and other creditors of the insolvent 26 M. 673, 29 C. 428, 29 B. 405, 34 A. 628, 41 I. A. 251 P. C., 41 A 274

——an attachment made on the property of the company cannot be released at the instance of the liquidator. 43 C 586

——Or 21 r. 46 and not Or 21 rr 44 or 45 applies to the attachment of agricultural produce in the hands of third person. 15 S. L R 128 : 64 I C 1007

——the house of an agriculturist appertaining to his holding cannot be attached or sold even in case of mortgage. 34 A. 25 11 I. C 646, 51 I C 553 (A)

——provident fund cannot be attached. 24 C. W. N. 288 : 46 C. 962

——money due for maintenance can be attached. 27 C 38.

——mesne profits to be ascertained may be attached. 16 I. C. 708 (C).

——a debt cannot be attached if the debtor and his debtor live beyond jurisdiction 24 C. L J 533 22 C W. N. 160, 39 C 104. 16 C. W. N 402

——property not voluntarily alienable may be attachable and saleable in execution of decree 19 C W. N 1182 : 23 C L. J. 428.

——acknowledgment of lien by Jt. Dr after the attachment, is of no avail against auction-purchaser. 22 C W N. 278

——order of attachment takes effect from the date of promulgation and not from the date of order. 42 M. 844 F B., 32 I C. 276 (c), 42 M. 565

——attaching creditor of a judgment debt is liable for damages to the Jt. Dr. if he allows the latter's decree to be time-barred as he cannot execute his decre after attachment. 35 M. 622, 17 A. 198 P. C *Contra*. 10 I C. (C).

——absence of attachment is mere irregularity and does not vitiate sale 13 C. L. J. 243, 36 I. C. 292, 21 A. 311, 1917 M. W. N. 89 : 37 I C 964.

——property not attached cannot be sold. 36 B. 156, 42 I. C. 259 (c).

——payment into court causes the cessation of interest on the attaching decree as well as on the decree attached. 35 C. L J. 409 : 64 I C 780.

——in case of decree for money when it is provided that in case of default of payment within certain date specific immovable property should be sold no attachment under Or. 21 r 30 is necessary. 2 Pat. 768 · 73 I. C. 598.

For other cases see, "Or 21 rr. 53, 57"

Arrest and Attachment before Judgment. Or. 38 RR. 1—12.

——the power to attach before judgment should be exercised only on clear proof of the existence of the mischief made. 73 I C. 721, 44 I. C. 240 (Pat), 15 I C. 604 (C).

[illegible] but where

[illegible]

——attachment before judgment does not bar any other decree-holder from executing his decree and as soon as the attached property is sold in execution of such decree the attachment ceases to be operative. The remedy of the different D. Hrs is by an application for rateable distribution. 2 P. L. T 240 : 1921 Pat. 215 : 61 I. C. 922

——where perishable property was attached before judgment and sold and the sale proceeds were paid into court to the credit of the suit but it was paid to another D. Hr for his decree and the attaching D. Hr brought a suit for rateable distribution, held that his suit was rightly dismissed as he should have at once applied for execution of his decree 45 B. 360 : 22 Bom. L. R 1417 59 I. C. 713.

——merely because the dft attempts to sell some of his immovable property whilst proceedings against him are pending it does not follow that he is disposing of property with intent to obstruct or delay the execution of any decree that might be passed against him 23 Bom. L R 550 : 63 I C. 958, 73 I. C 721.

[illegible] made by [illegible] t to dispose [illegible] execution of [illegible] and attach [illegible] W. N. 432 : 1927 Cal. [illegible]

——to justify attachment before judgment the court must be satisfied that the deft. has a present intention to dispose off the property with a view to obstruct or delay the execution The fact that he disposed off property in the past is not sufficient 91 I C. 880 : 1926 Cal. 855.

——Or. 38 r. 11 gives the same operation to an attachment before judgment, after a decree is passed as to an attachment after judgment. 2 Pat. L. T. 719 : 6 Pat. L J. 332 : 62 I C 33, 44 C. L J. 553 : 99 I. C. 895 : 1927 Cal. 240

——an attachment before judgment can be of property outside the jurisdiction of the court. 27 Punj L. R. 144. 94 I. C. 115 : 28 Bom. L. R. 380 : 1926 Bom. 278

——attachment before judgment does not rank in the same position as an attachment after judgment. Or. 38, r. 10 makes it clear and therefore an attachment before judgment will not defeat

Arrest and Attachment before Judgment. Or. 38, RR.1—12— *contd.*

the right of a co-parcener by survivorship in a joint Hindu family. 3 Pat. 250 : 5 Pat. L. T. 135 · 1924 Pat. 465.

——a Small Cause Court can attach immovable property before judgment. 20 C. W. N. 178 n., 43 I. C. 123 : 14 N. L. R. 1, 49 C. 904 : 1923 Cal. 176 ; 70 I C. 841, 1 Mys L. J. 58, so also the moveables, *31 C. L. J. 179 and can dispose of all claims relating thereto.* 1 Mys. L. J 58. But see *contra*, below.

——a Small [illegible] execution of its c[illegible] decree is formall[illegible] 11 M. 130 but [illegible] judgment, 20 C [illegible] 70 I. C. 841, 48 [illegible] moveable. 31 C. [illegible]

——but the point has been set at rest by a Full Bench ruling which enunciates that Small Cause Court has jurisdiction *to order an attachment* (but not to make attachment) of any property [illegible] it practi[illegible] and 28 C. [illegible] Cal 1 · 40 [illegible]

——the *court cannot* pass an order of attachment before judgment without the essential elements mentioned in Or. 38, r 5 and without giving the deft. opportunity to furnish security. 15 I C 604 (C), 57 I. C. 907 (C) [illegible]

——money deposited by sureties for release of property from attachment before judgment, rateable distribution of such money. 26 C. W. N 169 1922 Cal. 19.

——*where a person is to leave his place of residence for* attendance in a criminal court, his departure does not justify an attachment before judgment 4 Lah L. J. 423.

Arrest and Attachment before Judgment. Or. 38, RR. 1—12— *contd*

——attachment is not valid with respect to money payable out of jurisdiction and with respect to person living beyond jurisdiction. 22 C. W N 160, 24 C L. J. 533.

——attachment before judgment in mortgage suit 46 C 245, 15 I C. 604

——an attachment before judgment does not rank in the same position as an attachment after judgment. Or. 38 r. 10 makes it clear. 5 Pat. L T. 135.

——an attachment before judgment does not confer any right on the party who obtains the order of attachment. 37 A. 578. 29 I C. 622. 13 A L J. 732, 21 C L J 614 30 I. C. 38.

——the court may direct attachment before judgment conditional *on failure to give security*. 50 C 215 1923 Cal. 639.

——a mortgagee may after preliminary decree attach under Or 38 r 5 other properties of the mortgagor, if the hypothecation is insufficient and the mortgagor intends to dispose of his other properties fraudulently. 46 C 245. 50 I C. 924

——in a proper case a mortgagee can attach other properties of the deft. before judgment. 3 Pat. 966 : 6 Pat. L T. 823. 1925 Pat 291

——an attachment before judgment cannot be granted before the decision of the question of pauperism. 42 P. W. R 1917. 38 I. C. 620.

——there is [illegible] to sue in *forma paup*[illegible] jurisdiction to [illegible] 159 : 21 C. W. [illegible]

——an order directing the deft not to part in any way with the property sought to be attached before judgment concurrently with the issue of notice to the deft. to show cause why an attachment should not issue before judgment, cannot be construed as an order of conditional attachment under Or 38 r. 5 (3). 23 C L J 392. 33 I C. 689, 50 C 215 : 1923 Cal 639

——it continues after decree, and re-attachment after decree being superfluous, is not the proof of abandonment of attachment by the piff 16 I. C. 387.

——an attachment applied for before judgment but actually effected after decree has still the force of the attachment before judgment under Or. 38 42 M 1, 24 M. L. T. 345. 48 I C 232.

——an alienation made after an order for attachment before judgment, is void even though the property is not actually attached until after the passing of the decree 42 M. 1.

[illegible] ·chment before judg-

[illegible] before judgment is [illegible] against that order

Arrest and Attachment before Judgment. Or. 38, RR. 1—12—. *contd.*

——the court ought to withdraw attachment before judgment on the dismissal of the suit. Such an attachment is not revived by the reversal of the dismissal on appeal. 13 C. L. J. 243 : 9 I C. 918, 1925 Cal. 1147 : 87 I. C. 756.

——on the dismissal of a suit an attachment before judgment *ipso facto* comes to an end and does not revive by the lodging of appeal, 45 C. 780 ; 22 C. W. N. 927 . 44 I C. 229 or by the reversal of the decree in appeal. 1925 Cal. 1147 · 87 I C. 756.

——it subsists after the dismissal of the execution case. 16 C. W. N. 1097, 16 C L J. 86, 42 M. 1, 1 L W. 932 . 26 I. C. 81, 46 M L J. 415, 16 I. C. 387 (c), *Contra* 1922 Nag 81 · 66 I. C. 850, 17 N. L. R. 121

——attachment before judgment made—court dismissing suit but making no order of withdrawal of attachment—appellate court decreeing suit, attachment does not subsist. 22 C. W. N. 927, 13 C L. J. 243, 45 C 780, 53 P. W. R. 1915 · 29 I. C. 271, 33 C. L. J 201. *Contra* an attachment before judgment subsists till it is withdrawn and the mere dismissal of the suit does not necessarily entail the withdrawal without a specific order of the court to that effect. 111 I C. 887 . 1928 Mad. 940 1928 M. W. N. 466

——attachment before judgment revives after setting aside of sale. 13 C. L J. 242.

AUCTION SALE AND AUCTION-PURCHASE (*General*).

——an executing court can for good reason restrict the bidder at an auction sale to a certain class or classes , thus it can prevent the decree-holder or mortgagee from bidding. 100 I. C. 1008 : 1927 Bom 143 . 29 Bom L. R 102

——the court cannot sell more than what law allows 37 B. 631.

——D. Hr. bidder cannot withdraw from bid, nazir or court can decline to accept bid. 19 C W. N. 633

——s 43 of the Tr P. Act does not apply to execution sale, and D. Hr cannot enforce any incumbrance which he has not stated in the sale proclamation 17 C. W. N 137.

——purchase by D Hr. without leave to bid is a mere irregularity of practice and does not nullify sale 41 B. 357

——priority between successive purchasers of the same mortgaged property in execution of mortgage-decrees against the same mortgagor is determined by the dates of purchases and not of mortgages 32 M 485, 5 C. 265

——where J. Dr. dies after attachment and sale takes place without making legal representative party it is voidable either under Or. 21 r. 90 or by regular suit, but this right may be waived. 23 C. W. N 608, and it cannot be set up in defence, after limitation period. 18 C. W. N. 766.

——absence of attachment only does not vitiate an auction-sale 1927 Cal. 847 . 103 I. C. 698, 13 C. L. J. 243 *fol.*

Auction Sale and Auction-purchase *(General)—contd.*

——purchaser at private sale is entitled to compensation for deficiency in area as it is besed on contract but the purchaser at auction sale is not so entitled as the price is settled by competition. 29 C. 370.

——honest combination amongst bidders is not bad but dishonest combination vitiates sale. 6 C. L J. 111, 13 C. W. N. 87. 36 C. 134.

——an auction sale held not *bona fide* but giving advantage to a particular bidder is to be set aside. 11 C. W. N. 1109 : 6 C. L. J. 674. 4 A. L. J. 950 31 B. 566 P. C.

——a *bona fide* auction purchaser who is a stranger to the suit is not bound to look behind the decree and he acquires an indefeasible right to the property purchased. 104 I. C. 222 : 1927 Lah. 685.

——interim stay order of the H. C. even does not affect the *bona fide* purchaser in ignorance of the stay order. 25 A. L J 530 : 102 I. C. 665 . 1927 All. 401 F. B.

[illegible] money in [illegible] romulga- [illegible] that the

——there is no provision of law compelling the decree holder to bid up to any sum that may be fixed by the court. The valuation in the sale proclamation is intended primarily for the protection of the Jt. Dr. and for giving information to the bidders at the auction-sale It is in no sense an exact estimate of the value of the property 6 Pat. L. T. 859, 860.

——auction-purchaser takes subject to judgment debtor's equities. 1925 Cal. 485.

——after [illegible] should be gi[illegible] be advised. 1[illegible]

——the expenses of the court sale cannot be deducted from the poundage as no deduction can be made from the poundage except as provided by the rules. 96 I. C. 363 : 1927 Bom. 335 : 28 Bom. L. R. 590

——where a minor was properly represented till the passing of the decree an execution sale should not be set aside on the ground that the minor was not so represented in execution proceeding 104 Or. 32 should not be strictly applied to execution proceeding. I. C. 357 : 1927 Cal. 830, 35 C L. J. 9 and 1924 Cal. 847, *fol.*

——similarly it was held that the non-representation of a minor by a guardian in execution proceeding is not in itself sufficient ground for setting aside a sale. 104 I. C 196 : 1927 Cal. 873.

——a court sale should not, on principle, be interfered with on grounds not strong enough. 32 C. W. N. 309 : 1928 Cal. 328.

——a single sale under two decrees is not bad. 105 I C. 123.

Auction Sale and Auction-purchase *(General)—contd.*

——mistake in the sale proclamation in inserting the amount due to the decree-holder does not deprive the decree-holder to recover the correct amount when it has been correctly stated in the petition of execution 111 I C. 698 (c).

——the decree-holder is bound by the description given by him in the sale proclamation but the purchaser who has purchased the property described in a particular way in the sale proclamation can claim a higher or different right which the Jt-debtor had and the purchaser has really purchased. 32 C. W. N. 587 : 1928 Cal. 880.

EXECUTION.

(1) Application for execution.
(2) Jurisdiction of executing court.
(3) Limitation period.
(4) Limitation, step in aid of execution.
(5) Objection of limitation
(6) Mode of execution.
(7) Procedure in execution proceeding.
(8) Properties against which execution may be allowed.
(9) Simultaneous and repeated application for execution.
(10) Stay of execution.
(11) What decrees may be executed ?
(12) Where the application is to be made ?

(1) Application for execution.

——an execution petition signed and verified by a person other than the decree-holder but who is acquainted well with the facts of the case is valid. It is not necessary that the verification should be made in open court or after obtaining the permission of the court thereon 28 C. W. N. 687. 80 I C. 313 : 1924 Cal. 811.

——application for execution, particulars to be stated. 2 Pat. 809 : 4 Pat. L. T. 513 1 Pat. L. R. 453 : 1924 P. 23 : 74 I. C. 174.

——concurrent execution is not barred. 4 Pat. L. T. 99 : 1923 Pat 61 : 2 Pat. 318 : 71 I C. 74

——authority of pleader does not terminate with the decree, but it extends to execution proceedings, and fresh *vakalatnama* is not necessary. 16 C W. N. 736.

——in a second execution petition same *vakalatnama* will do. 1917 Pat. 100

——in case of joint decree verification by some is sufficient. 4 Pat. L. T. 513 : 2 Pat 809 : 1923 Pat. 229.

——the fact that J. Dr.'s whereabouts are not known cannot deprive the D Hr. to execute the decree. 36 A. 482.

——where the execution petition was filed within 12 years but it was amended after 12 years s. 49 did not bar the application. 45 M. L J. 651. 33 M. L. T 125 : 18 L. W. 739.

(I) **Application for execution**—*contd.*

for execution

he purpose of date of filing

d to execute a

——execution petition can be amended and fresh Schedule of property can be inserted 22 C W. N. 540: 27 C. L J. 398 4 Pat L. J. 99. 1923 Pat. 61: 2 Pat. 338, 71 I. C. 741, 55 I C. 16

——execution petition may be amended by the addition of other properties. 4 Pat. L. T 99. 1923 Pat. 61; 2 Pat. 338 71 I C. 741 22 C. W. N 540 27 C L. J. 398, 55 I. C. 16, 34 B 142, 26 C W. N. 338; 35 C. L. J 84

——order of review re-opens execution 21 C. W. N. 571.

——the omission to mention the existence of cross-decrees may be material defect vitiating the execution petition 71 I. C. 1054.

Continuous application

——an application for execution can be construed to be a continuation of a prior one only if its scope is the same as that of the prior one. 89 I. C. 886.

——it is well established that an application for execution can be considered as a continuation of the previous application only when it is similar in scope and character 4 Pat L. T. 293: 1923 P. 159; 71 I. C. 332.

——where on an execution petition being put in, the *Jt. Dr* filed an objection which was dismissed so also the execution application, though it was not for any default of the decree-holder but for the convenience of the court as the case was old, and more than three years after a fresh execution petition was put in, held it was not time-barred being one merely in continuation of or revival of the prior application. 1925 Cal. 1185. 87 I. C. 561.

——an application for execution of a decree may be treated as one in continuation or revival of a previous application similar in ... been interrupted ... reason ... 84, 15 ... N 501:

... on the ... hed for ... of the

——where there has been no dismissal of the original application for execution no special application for its revival is necessary. 94 I C 80 (C), 22 C. W. N. 766 *Dist.*

——it is well established that an application for execution can be considered as a continuation of the previous application only

(1) Application for execution—*contd.*

when it is similar in scope and character, 4 Pat L. T. 295 : 1923 Pat. 159 : 71 I. C. 332

——but when the previous application is dismissed for default and it is not an order striking a case off the file merely for the convenience of the court, it cannot be treated as continuing. 22 C. W. N. 766.

Succession certificate

——succession certificate need not accompany the application for execution. Only [illegible] can be granted until the succession certificate is granted. [illegible] 324 · 6 Pat. 440.

——failure [illegible] along with the execution petition [illegible] application is not a step in aid of execution [illegible] 218 · 1927 Pat. 324 : 6 Pat 440, 20 C 755, *Rel on*

(2) Jurisdiction and power of executing court.

——when a court, after decree, ceases to have jurisdiction, both this court and the court to which jurisdiction is transferred can execute the decree 17 C. 999 F B, 28 C 238, 25 C. 315, 28 C 238, 240, 35 C 974 12 C W N 859, 6 C 513 *contra*. 37 M. 462, 471.

——territorial jurisdiction is a condition precedent to a court executing a decree, 17 C 699, 703.

——an executing court which passed a mortagage-decree may order the sale of the properties some of which are outside jurisdiction. 14 C 661, 15 C. 667, 19 C 13 21 C 689, 22 C. 871

——where there is no adjudication as to the order of sale of the mortgaged property in the trial of the suit, the executing court may declare the order of sale 97 I C. 586 ; 1926 Mad 1031 . 24 L W. 257

——when same property is attached in execution of two decrees, the sale should be held by court of superior grade ; but if the sale is held by a munsiff, subordinate judge cannot direct the munsiff to transmit the proceeds to him, the latter is to move the Dt. Judge 27 C L J 145.

——when a court has no jurisdiction over immovable property it cannot validly sell such property in execution. 27 C. W. N 542 : 1923 C 619, 18 L. W 747.

——if a court to which a decree is transferred for execution has not the pecuniary jurisdiction, it cannot execute the decree. 16 C. 457, 465, 37 C. 574, 12 B 155.

——a court which passes a decree can execute it, although amount of rent or mesne profits subsequently ascertained exceeds its pecuniary jurisdiction 10 B 200, 21 C. 550, 40 C. 56.

——a decree cannot be questioned in execution proceedings. 24 C. W. N 1070, 20 C. L. J 512, 24 C L. J 375, 10 M. 283 11 B. 537, 4 Pat. L T 311 1 P L R 217 : 1923 Pat 184 · 72 I. C. 1049, 24 M 665, 25 M. 537, 6 C. W N. 796. 27 C. 951, 967, 27 I. A 110 P. C., 19 M 249 ; 23 I. A. 35 P. C., 28 C. 353 ; 28 I. A. 57 P. C , 63 I. C. 975, 13 L. W. 143, 45 B. 503, 23 Bom. L R. 1072. 8 C. 432 :

(2) Jurisdiction and power of executing court—*contd.*

2. I. A. 1. **P. C.**, 13 B. 100, 15 B. 644, 26 B. 707, 2 Pat. L. T. 665 ; 63 I. C. 552, 28 C. L. J. 188. **P. C**, 33 C. 1212, 34 Bom. 17, 35 C. L. 339, 26 C. W. N. 708, 1922 Cal 136, 44 C L. J. 559 ; 99 I. C. 923.

—but an executing court can refuse to execute a decree passed ... ral ... ree ... ıld ... he ...

... hind the decree and shall ... fied in the decree. 2 P L. ... **C.**, 33 Cal. 1212, 5 C 198, ... J. 143, 45 B. 503 : 22 Bom.

——an executing court can examine the record where the decree varies with the plaint. 2 Pat. L. T. 7 ; 5 Pat. L. J. 402 . 59 I. C. 25, *contra*. 60 I. C. 345.

——the mere fact that a decree is in some respects difficult to execute does not render it incapable of execution 63 I C 975.

... *execut-* ... passed in ...

——an executing court cannot go behind the decree 20 C. L J. 512, 24 C. L. J. 375, and see other cases noted above

——an executing court cannot question the validity of the decree contravening some provisions of law even 24 C. W N. 1070

——a final decree in a mortgage suit without a preliminary decree is not without jurisdiction and cannot be questioned by the executing court. 96 I C. 686 1926 Cal 1179.

——but where the decree differs from the nature of the claim in the plaint the executing court may examine the record to determine the actual state of things. 5 Pat. L. J. 402 : 2 Pat. L. T. 7: 59 I. C. 25

——an executing court cannot go behind the decree and decide any question of minority of the judgment-debtor. The court which passed the decree is the proper court for the purpose. 95 I. C. 629 (c).

——an executing court cannot amend a decree to bring it in conformity with judgment 63 I. C. 345.

——an executing court cannot quetion the validity of an award which is the basis of a decree 23 Bom. L. R. 306 ; 45 B 946 ; 62 I. C. 96.

——an executing court cannot question the decree even if it be erroneous. 3 L. L. J. 263.

——but an executing court can construe a decree 16 C. 173. 183 : 15 I. A. 186 **P. C.**, 19 C. 159 : 18 I. A. 165, **P. C.**, 18 A. 344, 18 Bom. 542, 19 A. 174, 21 A. 361, 23 A. 220, 226 : 28 I. A. 28 **P. C**

(2) **Jurisdiction and power of executing court**—*contd.*

——an executing court can interpret the decree and for that purpose it ought to refer to the pleadings in the case and to the judgment. 1927 Pat. 141.

——an executing court can construe a decree in accordance with law. 2 Pat. L. T. 396.

——but cannot change the construction at different times. 19 M. 54.

——an executing court can see that the correct description of the properties and everything material for the purchaser to know in order to judge the nature and value of the properties are given [illegible] 819.

[illegible] execution proceeding [illegible] one of the Jt Drs, [illegible] I. C 848 · 1928 Pat 272 : 7 Pat. 331.

[illegible]

——the court is to see substance of proceeding and not the form. 25 C W. N. 279 : 33 C. L J. 198

——a civil court which passes a decree and has territorial *jurisdiction over property has jurisdiction to order execution of* the decree, though it be assigned by the District Judge under s. 13 (2) C. P. C, 41 C L. J 166.

——an agreement arrived by the parties to an execution proceeding with the sanction of the court cannot be altered by the court. 36 C 422.

——a court can send its decree to more than one court for concurrent execution 14 M L. J. 529 P. C, 8 C 687, 1 C. L. J. 815.

——the court executing a transferred decree cannot question the execution order of the transferring court nor can refuse execution on the ground of limitation. 21 B 456, 7 A 330, 5 C. 736, 15 B. 28 ; but it is otherwise when the transferring court merely transfers the decree and does not make any order for execution. 23 C. 39, 13 C. 257.

[illegible] to exe[illegible] 23 A. [illegible] the pr[illegible] passed without [illegible]

[illegible] rred decree con- [illegible] C. 504, or pro- [illegible] it. 37 M. 231, or [illegible] 211 n. [illegible] his debtor live [illegible] W. N. 160, 39 C. [illegible]

(2) Jurisdiction and power of executing court—*contd*

——an executing court can decide the objection as to whether the appellant having died during the pendency of appeal his legal representative was not brought on the record. 43 A 328. 19 A. L. J. 95.

——an executing court cannot set aside a sale which has once been confirmed 100 I. C 800 1927 Lah 337.

——it is incumbent upon the court to look to the substance of the proceedings and not to confine its attention to the mere form In this case the Jt. Dr. was not described as executrix. 25 C. W. N. 279 : 33 C. L. J. 198, 42 C 55 *Ref*

——there is fundamental distinction between existence of jurisdiction and exercise of jurisdiction. The circumstance that jurisdiction had been exercised in an irregular manner does not destroy jurisdiction. 25 C W N 585 : 33 C. L. J 421, 24 C. W. N 723, 5 C W. N, 10 *Ref.*

——a court has no jurisdiction to sell the property of persons who are not parties to proceedings before it or properly represented on the record A decree or sale against such persons is nullity 61 I. C. 291 (c)

—where the deft does not ask for stay of execution and his not affected even the law in case 9 I C. 118

——where in execution of a decree the property of a stranger is sold and possession is given to the auction-purchaser the former is entitled to be replaced in the possession and the mere fact that in the meantime the auction purchaser's remedy has become barred makes no difference 60 I C 120

——where the decree-holder is absent and the objector is present and the court passes the following order,—"The petitioner's pleader is present The execution case is hereby dismissed for default and the petitioner's objection is allowed," held that the order allowing the objection was wrong as there was no decision on the merits of the objection. 46 C. L. J. 116 : 104 I. C. 571.

(3) Limitation period. (*General*)

——time begins to run from the date of final decree. 23 C L. J. 573, 21 C 818, 18 C. W N. 422. *Dist.* 25 C 594, F. B., 23 M. 60, 34 C 874 : 7 C. L. J. 305.

——time begins to run from the disposal of appeal when some appeal and some do not 20 C. W. N 178, 19 C. W. N. 287, 15 C. W. N. 370, P.C, 18 C. W. N. 740. P. C., 36 A. 350, 25 C. 594 F. B.

——but when decree is passed against some who appeal and dismissed with cost against others—limitation as to the latter's recovery of cost runs from the date of decree. 19 C. W. N. 287.

——when the decree is passed against one of two defts. and appeal is preferred against that part of the order which relates to dismissal and it is confirmed, application for execution is not barred

(3) Limitation period. *(General)—contd.*

if made within 3 years from the date of the appellate decree finally deciding the suit 47 C 813 60 I C. 915

——where the L. Act. prescribes three years from the date of a decree or order as the period within which it must be enforced, this refers only to an order or decree made in such a form as to render it capable in the circumstances, of being enforced. 25 C. W N 337 : 33 C L. J 109 · 6 Pat L. J 132 : 40 M. L J. 1 1921 M. W. N. 21 : 23 Bom L. R 721 P. C.

——S 48 (limit of time *for execution*) is wider than sec 230 (old) 39 B. 256

——when the proceeding in an execution case is suspended by the court, limitation does not run 1923 A. 471 71 I. C. 963, 74 I. C. 279 (C), 26 C W N 338 35 C L. J. 84.

——limitation does not run when the execution proceeding is suspended at the instance of a stranger having filed a suit in respect of the property 1923 A. 600, 27 A 337, 26 C W. N 338 35 C. L. J. 84 68 I. C. 207.

——striking off decree as satisfied is no suspension of proceedings 40 C. L. J 246 ; 1925 Cal 207.

——there is essential difference between an application for execution and an application asking simply to revive a previous application for execution. S 15 of the L. Act applies only to the application of the former class 49 A. 276 . 100 I. C. 692 · 1927 All. 16 : 25 A L J. 201 F. B.

——an pplication for execution of a decree may be treated as one in continuation or revival of a previons application similar in ... een interrupted ...d by reason of ... C. L. J. 84, 37

——it is well established that an application for execution can be considered as a continuation of the previous application only when it is similar in scope and character 4 Pat. L. T. 295 : 1923 P. 159 . 71 I C. 332.

——time-barred decree cannot be executed by way of set-off. 21 C W. N 1147.

——*when a preliminary mortgage decree is appealed against*, the period of limitation for an application for final decree runs from the date of the decree of the H. C 21 A L. J. 526 : L. R. 4 A. 278 : 74 I. C. 372

—— ... fresh starting ... Mad. 327 : 30 ... W. N. 518 : 31 ...

... on of property in case ... possession more than ... as the D Hr. has the

(4) Limitation, step in aid of execution —*contd*

——mere mistake in calculating more interest than was due ... in accordance with law. 43 A.

time but proceedings in execution provides new starting points

45 B. 403 : 22 Bom. L. R. 553.

Step in aid of execution.

——it is asking the court to take some step in furtherance of the execution of the decree 1927 M. 792 : 53 M. L. J 766 : 26 L. W. 725.

——limitation runs from the date the application to take some ... -hen the court

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——application for summons ...

objection is a step, 19 A. L J, 843

——effect of an application for execution of a decree against some Jt Dr. against whom it is suspended is to keep alive the decree against the rest. 29 M. L T. 57. 1921 M. W. N. 188 : 61 I C. 901.

——when a decree is transferred to several persons in parts, an application for execution by one transferee saves the whole decree 41 M. L. J. 312.

——when the decree has not been transferred to the court where application for execution is made it is not a step. 55 C 608 : 32 C W. N. 192 : 47 C. L. J 38 : 104 I. C. 668 : 1927 Cal 952.

... by D. Hr. controverting the objection of the

A. L. J. 641

against a discharged

dance with law and

L. R 1237.

(4) Limitation, step in aid of execution.—*contd.*

——second appeal to H. C. is not a step in aid of execution. 74 I. C. 279 (c).

——order for attachment is not a step in aid of execution. 45 M. [illegible] here order for attachment is [illegible] er Or. 21 R 22, it is a step in [illegible] 39. 1927 Pat. 218

[illegible] State to transmit its decree [illegible] a step in aid 43 M. L. J. [illegible] st.

——an oral application by the decree-holder to record a payment made to him out of court is a step. 67 I. C 899.

——an application to the court to receive railway charges for taking the Jt. Dr. to the civil prison and subsistence-money for his maintenance while in prison, is a step. 1922 Mad 30 · 15 L. W. 14

——an application for execution against two Jt Drs one of [illegible]

——where a decree has been transferred, a subsequent application for transfer made to the court which passed the decree is not a step. 24 Bom L. R 798 68 I. C 506

——on an execution court finding that the original records of the case were necessary for disposing of the case the decree-holder applied for the records being sent for, it was a step in aid of execution. 47 A. 667. 88 I C. 271 : 1925 All 394 : 23 A. L. J. 422.

[illegible] y in [illegible] 745 [illegible]

——[illegible] indicating the mode [illegible] nce of the court to [illegible] and is not a step in [illegible]

[illegible] espective of whether the decree-holder does or does not apply, is not a step in aid. 27 C. W N. 505

——when a Jt. Dr files an objection to the execution of a decree and the D Hr examines certain witnesses to meet the objection, this action is a step-in-aid of execution. 4 Pat. 202 : 6 P. L. T. 777 · 88 I C. 807 1925 Pat. 459, 21 C W. N 868, 22 C. W. N. 1027, 2 Pat L T. 5

——causing the court to take some step is. 17 C L J. 422, [illegible] 5 M. 141. [illegible] 75, 2 C. W. N. [illegible] t. 188 : 67 I. C [illegible] C. L. J. 619, 47 B. 56.

(4) Limitation, step in aid of execution.—*contd.*

execution to a court
ep in aid of execution.
67 I C 538.
State to transmit its
72 : 69 I C. 932, 40

M 1069 *Dist*

——application for substitution is. 24 I. C. 200, 36 A 431, 29 A 301, 81 M 234.

——application certifying payment is. 20 C. W N 615, 12 C. 608, 12 A 399, 20 C 696, 10 C L. J. 467, 470, *Ref*, 18 N. L. R. 62: 1922 Nag. 166 65 I C. 681, 67 I C. 899

——an uncertified payment towards a decree is not a step in aid of execution 44 C L J. 248 : 1927 Cal. 29.

——amended petition filed after expiry of time allowed by court and accepted, is a step in aid of execution, although no order of enlargement of time is made upon the petition relating thereto 20 C. W N 615, 13 C. L J 78, *Dist*, 14 C. W. N. 481

——a prayer for superfluous relief in a petition of execution is a step in aid of execution and the time spent in prosecuting it is to be deducted 75 I C 312 (Pat.), 25 C. 594, 2 C. W. N 556, 17 I. C. 210 ; 37 B 42 14 Bom L R 861, 31 M. 68, 3 M. L. T. 254, 17 M L J 596 *fol.* 67 I C 538 3 P. L. T. 422 : 1922 Pat. 223, 1 Pat. 651. *Dist*

——oral application of D. Hr 's pleader, for the settlement of the term of the proclamation is, 1917 Pat 54, 3 A. 139, 38 M 655, *appl* or for a fresh proclamation is, 10 C. 851, or for sale is, 17 C. 53, 15 B 405.

——notice under R 66 given to the Jt. Dr. to be present in drawing up the sale-proclamation is not taking step in aid of execution because the notice is issued at the instance of the court So also swearing an affidavit proving the service of notice unaccompanied by any application does not give a fresh start to limitation, 94 I. C. 44 · 1926 Cal. 879, 21 C. W. N. 423 *Dist.* 24 C. W. N. 55 *fol.*

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filing of an
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ral applies
st, it was a
1 ; 108 I. C.

588.

——but where the executing court directed the decree-holder to file written process and affidavit of service of notice under Or 21 R. 22 and the affidavit was filed but not the processes, *held* that the filing of affidavit was not a step. 108 I. C. 430 : 6 pat. 694 : 9 Pat. L. T. 833 : 1928 Pat 145

——application for summoning witness, is, 21 C. W. N 868, 5 A. 344.

(4) Limitation, step in aid of execution.—*contd.*

——an application to the court to do an act in aid of execution though (here for time to adduce evidence) refused is, 14 C. W. N. 486 : 5 I. C. 147.

——an application praying for the disallowance of objection of the Jt. Dr and for confirmation of sale, 21 C 23, 5 A. 576.

——an application which does not contain particulars as to the amount of the decree and costs is not in accordance with law. 65 I. C 120, 23 C 217 . 18 C. L. J. 538 *Fol.*

——where an application was not amended according to the court's order it cannot be said that the application was never properly presented in accordance with law 2 Pat 809 : 74 I. C 174.

——an application for execution in which by *bona fide* mistake the minor Jt Dr. was described to be under the guardianship of a dead person is a step 4 Pat L T 54 ; 72 I C. 1003, (17 M. 76, 35 C 1047.) *Fol*, 31 A 572 P. C *Dist*

——the question whether an application is or is not a step-in-aid of execution must depend upon the circumstances of the case. 27 C. W. N. 505 : 37 C L J 292.

——order of fresh step is not a step-in-aid of execution. 1923 M. W. N. 871 75 I C. 489

——an application for stay is not a step in aid of execution. 1923 Bom. 212.

——to constitute a step-in-aid of execution an application must pray for some relief which can be granted by the court 35 C. L J. 82.

——an application for bringing the legal representive of the Jt. Dr. on the record and for issue of notice under Or 21 r. 22 C. P C. is a step-in-aid 35 C. L J 82

——an application for the revival of the previous proceedings for execution is a step-in-aid 64 I C 727 (c), 27 C 285 *Ref.*

——application for certificate of transfer is a step-in-aid, 3 Pat. L T. 298 65 I C 332

——execution of the decree against surety is a step to save the decree against Jt Dr. also 43 A 152

——an application for a copy of the decree is not a step in aid 39 M. L. J 572 : 1920 M W. N. 700 · 60 I C. 117.

Bom. L. R 107 . 60 I C 916.

——when a decree is transmitted for execution application for the issue of notice to the Jt Dr made in the original court is no step. 26 C. W. N 292 63 I C 116 (c), 2 Pat 247 · 74 I. C 608.

——an application to make a preliminary decree final is not a step-in-aid of execution 45 B 952 *Contra.* 23 Bom. L. R. 1913.

——a "counter statement" filed by the D. Hr. in answer to an application by the Jt *Dr. to enter up satisfaction of the decree is* not a step-in-aid. 45 M. 466.

(4) **Limitation, step in aid of execution.**—*contd*

. . . . the Jt Drs s
limi . M. L. T. 57.
M. . .

mortgage-decr

31 M. 68

——application by D. Hr to have witnesses summoned to de in claim case is, 5 A. 344, 1923 A. 415, 19 A. L. J. 843.

——application for leave to bid, and for set off of the dec amount is, 21 B. 331, 13 A 211, 22 A. 399, 24 C. W. N. 621, 30 C. 8 C. W. N. 251, 10 C. W. N. 209. *contra*. 23 C. 990, 24 C. L. J. 462.

——application for execution made by *bonafide* mistake ag wrong person or dead person is. 35 C. 1047, 20 C. 388.

——an application by the assignee of a decree to have his n substituted is a step in aid of execution. 9 O & A. L. R. 74 I. C. 40

——*bonafide* application to wrong court is, 7 I. A. 167 A. 792, P. C.

——deposit of *nilami fees* is, 9 C, 644, and deposit of pr fee is, 23 C. 374, but unaccompanied by any petition is not. 3 179, 228, 722. *contra*. payment of talabana is not 9 O. & A. I 68 ; 73 I. C. 211.

——payment of court-fee to validate decrees is not, 1 W. N. 959

——an application for transfer is not, 20 C. W. N. 889 : 2 L J. 645 F. B., 23 C. L J. 649 *contra*, 35 A. 389 : 22 C. 375, 2 C N. 415. 20 C. 29, 1923 M. 72 . 69 I C. 932, 40 M. 1069.

——an *ex-parte* order allowing time-barred petition is not C. W. N. 1288.

——time occupied in getting succession certificate is 37 B. 559.

——payment of nazir-fee is not, 17 C. L. J. 422, (9 C. 644, 28 399), *Dist*., (9 C. 730, 23 C. 146), *Ref*.

——application by D. Hr. for permission to bid is not. 24 C J. 462, (13 A. 211, 22 A 399, 21 B. 331) *Diss*.

——an application to withdraw a pending application for ex tion with liberty to put in fresh application is not. 23 C. 817, A. 75 *Diss*.

——an application for execution taken out against a dischar insolvent Jt. Dr. is not legal and as such is not a step in ai execution 25 Bom. L. R. 1237

——presentation of second appeal is not a step in aid of exe tion. 74 I. C. 279, 47 B. 783 : 25 Bom. L. R. 518 : 1923 Bom 4 73 I. C. 1030.

——an order for attachment is not a step in aid of executi 45 M. L. J. 680 : 1923 M. W. N. 660.

——an applicatioin for confirmation of sale is not an applicat to take some step in aid of execution. 2 Pat 249 : 1923 P. 2 Pat L. R. 6, 72 I. C. 938.

(4) Limitation, step in aid of execution.—*contd.*

——an application by D Hr. for delivery of possession is not a step in aid of execution 1923 P. 22 : 2 Pat. 249, 1 Pat. L R. 6 : 72 I. C. 938.

——application for adjournment by both parties to come to a compromise in an execution proceeding is not a step in aid of execution. 25 Bom. L R. 490 : 1923 Bom. 461 : 73 I. C. 1011.

——an application for execution in which by *bona fide* mistake a dead person was described as the guardian of a minor, constituted a step in aid of execution. 4 Pat L. T 54 72 I. C 1003.

step in aid
ise. In this
in aid of

——a mere adjournment has been held not to be step in aid of execution but an application for adjournment to obtain further evidence has been held to be step in aid. 1923 Bom. 213, 27 C 285

——order for fresh step after an arrest warrant has been returned unexecuted is not a step in aid of execution. 1923 M. 686 1923 M. W N. 871 18 L W. 109 75 I. C. 489

——when a decree has been transferred for execution an application made to the court from which it has been transferred is not a step in aid of execution. 2 Pat. 247 1923 P 384 : 74 I C. 608, 39 M. 640 *fol.* 26 C W. N 292 1922 Cal. 3, 24 Bom L. R. 798 1922 Bom. 359 : 68 I C. 506.

bring on record the legal representative of a deceased Jt Dr. and for issue of notice under Or. 21 r 22 is such a step. 35 C. L J. 82 : 1922 Cal. 44 : 65 I. C. 571

——"step in aid of execution"
is not an initial application for
to take some step to advance an
M. L. J. 303 : 1922 M. 79 : 1922 M

——it is not what the D. Hr. does but what he asks the court to do and starting point of limitation is that date. 18 N. L. R. 62 : 1922 Nag. 166 65 I. C. 681.

——an application to the court to record a part payment of the decree certified to it, is a step. *above case*

——an oral application by the D Hr. to record a payment is a step. 67 I C. 899.

——an execution petition not containing particulars as to the amount of decree and [illegible]
a step. 65 I C 120,
L J. 82 : 1922 Cal 44,
14. Omission to make
defect, *last case.*

(4) Limitation, step in aid of execution.—*contd.*

——an application against Jt. Dr. alone saves limitation against Jt. Dr, and his surety. 20 A. L J. 726: 1922 A. 481, I. R. 3 All 523, 60 I. C. 265.

[illegible] is incompetent [illegible]
[illegible] 597.
[illegible] decree final is not a
[illegible] R. 308; 61 I. C.
159, *Contra* 23 Bom. L. R 1013, 22 Bom L. R. 76 *Fol*

——an application by a D. Hr for a copy of the decree is not an application to take some step. 39 M. L. J. 572: 1920 M. W. N. 700 : 69 I. C. 117

——an application by a mortgagor who has obtained a decree in a redemption suit for extension of time of payment is a step 41 M L J. 374 1921 M W N. 391.

——an application by the D Hr. for time to ascertain the respective shares of the Jt. Drs is a step. 23 Bom. L. R. 107: 60 I C 916

——an application for confirmation of sale is not an application to take some step. 2 Pat. 249 72 I. C. 938

——an application to be put in possession of the property is [illegible]
1923 P. 22: 72 I. C. 938.
[illegible] against an order in an execution
[illegible] tion in accordance with law or

——compromise petition filed by both parties is not a step in aid of execution 25 Bom L. R 490 : 73 I C. 1011.

(5) Objection of limitation.

——when there has been adjudication on the point, the question of limitatian cannot arise. 17 C. W. N. 113, 11 C. L J 91, 11 B 537, 12 C. L. J. 312, 8 C 51 P C.

——where Jt. Dr having an opportunity does not avail of that to challenge the decree he cannot subsequently take the objection 25 C. W. N. 591 P. C, 8 C 51, P C., 12 C. L. J. 312, 6 A. 269 P C. 7 A. 102, P C., 2 Pat 759 74 I. C. 130, but when no notice under sec. 248 (old, is served personally upon the Jt Dr he can take objection. 13 C. L. J. 26 or, where the question whether execution of a decree is barred is not decided because the parties do not appear, there is no bar to the adjudication at a latter stage 11 C. W. N. 114 (8 C 51, 8 I A 123, P C., 6 A. 269: 11 I A 37, P C 7 A 102: 11 I. A. 181. P C) *explained* and *Ref.* 15 A. 84 *app.* 6 C. 203, *not fol*, (28 C 122 10 C W. N. 209. 3 C L. J. 240, F. 15 A. 198 *Ref.*

[illegible] if there is not sub
[illegible] 21 C.W.N. 915
[illegible] yet he can not
[illegible] 11.
[illegible] R. 22 the Jt
Dr. does not appear but the execution petition is dismissed there being no adjudication the Jt. Dr. can subsequently raise the plea of limitation 112 I. C 265. 1928 Pat 47: 9 Pat L T. 805: 7 Pat 465

(6) Mode of execution.

——when a D Hr. takes delivery of possession and is disturbed his only remedy is either in criminal prosecution or in a suit for damages 43 M. L. J. 179 : 31 M. L T. 356.

——execution of decree against co-sharer. 44 A. I 5

——delivery of symbolical possession is sufficient against Jt. Dr. where actual possession ought to have been taken, 71 I. C. 999, 3 P. L T. 628, 71 I C 885, 43 A. 520, 36 B. 378 but it is not effective against those parties against whom no decree for possession has been obtained. 24 Bom L R 499, 1922 Bom 2 . 68 I C. 91.

——when the property is capable of immediate actual possession no symbolical possession is effective. 6 N. L J. 157 : 1923 Nag. 237 : 72 I C. 318

——in case of decree for demolition of particular structure being executed it cannot be executed again to demolish a new wall subsequently erected. The remedy lies in fresh suit. 5 Lah L. J. 70, 20 P. W. R. 1921 . 59 I C. 594.

——though the tendency of modern legislature is against sending woman to jail in civil matters in case of decree for restitution

persists in leading an immoral

ined in civil prison. 1923 Lah.

e wife is not entitled to make a

——restitution of conjugal right by detention of the wife in prison is discretionary with the court. 44 B. 972 59 I C 361

(7) Procedure in execution proceeding.

——execution proceeding is a proceeding in suit 2 Pat L T. 374.

——a D Hr is barred to implead the representative of the Jt. Dr only when a default under the decree occurs and execution becomes necessary 14 L W 632

——no execution can proceed in pursuance of an illegal attachment. 1921 Pat 205

——death of one D Hr does not abate the execution proceeding. 2 Pat L T. 619

——execution proceedings do not abate on the death of a joint D Hr., 2 Pat L. T 619.

——the surviving D Hrs may proceed with the execution case for the benefit of all including the heir of the deceased. 43 I. C 1008 (M).

——some of the D Hrs. may proceed with the execution for the benefit of all. 33 C 306, 18 M 464

——Or 21, r 54 (C) is wide enough to cover the case of a deceased partner 1923 Bom 66.

——when money is paid into court in compliance with an order the court is not concerned with the source from which the money comes 45 B 967 23 Bom L. R 291 61 I C. 403.

——a sale is not concluded when the property is knocked down and the deposit is made, the court has a discretion to order a re-sale. 1923 Cal. 316

(7) Procedure in execution proceeding.—*contd*

—the court has inherent power to refuse to confirm an execution sale if it is satisfied that it was misled either in giving *leave* to bid or in fixing the real price 46 M. L. J. 683 : 32 M. L. T. 285 : 1923 Mad. 635.

—in granting leave to bid, the main question for the court to consider is whether it is to the advantage of every one concerned in order to obtain the highest price that the plff. should be allowed to bid, *above case*.

—at a court sale the price obtained may not represent the true value of the property. 25 C. W. N. 756.

—an attaching creditor of an auction purchaser has the right to have the sale confirmed. 11 C. W. N. 158.

—C. P. C does not provide compensation to the D. Hr. auction purchaser in case of sale being set aside with respect to the portion of the property claimed by third person under Or 21 r. 100, 25 C W. N. 756, 43 A. 60.

—there is no statutory obligation binding the Jt. Dr. to disclose his full defence at the inception of an execution proceeding as though s 11 Expl. IV C P. C. applies to such proceedings, but he cannot defeat the decree by improper delays. 1928 M. W. N. 67 : 109 I C 866 : 1928 Mad 203.

(8) Properties against which execution may be allowed

—a property was sold in execution along with the arrears of rent due. In respect of the arrears a decree had been obtained, held that the decree-debt was included in the sale. 87 I. C. 742 1925 Cal 1274.

—property attached must be in existence. 25 C. L J 595.

—money is not "moveable property" within the meaning *of Or 21 r. 78*. Money decree cannot be sold in execution; the procedure of attaching money decree is laid down in r. 53, 2 Bur. L. J. 151 : 1925 Rang 21

—debts payable outside jurisdiction cannot be attached. 24 C. L. J. 533.

—a decree-holder can only obtain against the garnishee what the Jt. Dr. can honestly give him 40 C L. J. 228.

(9) Simultaneous or repeated application for execution.

—a decree may be executed simultaneously in more than one court. 1 C. L J. 315 (8 C. 687, 14 M I. A. 529 P. C), *Ref.* 4 Pat. L. T. 99 : 1923 Pat. 61 : 2 Pat. 318 : 71 I. C. 74, but it cannot be executed simultaneously against the same property in more than one court. 11 C L. J. 69 : 14 C. W N 396 : 3 I. C. 105.

—when a decree-holder is obstructed in taking delivery of possession he may apply again under Or. 21 r. 97 to get possession even after 30 days. 1921 M. W. N. 698. 13 M. 504, 4 Pat L. J. 94, 8 B. 602 *contra*, 11 A. 473, 26 A. 365.

(10) Stay of execution.

——the provisions of Or 21, RR. 21, 26 and 37 do not exhaust the cases [illegible]
It has in [illegible]
exercised [illegible]
prejudicin [illegible]
Cal. 581 : 102 I. C 513.

——pendency of appeal against a decree is no reason for not enforcing execution by arrest when execution is not stayed. 73 I C. 766.

——appellate court cannot stay anything not relating to appeal. 41 M. 813, 59 I. C 883, (Pat.)

——all proceedings by lower court after the order of stay by higher court has been intimated, become void. 41 M 151 F. B. *overrules* 38 M. 766, *but see below.*

——order of stay is considered to be made on the day the order is pronounced. 3 C. L J 67 · 33 C. 927, 1 C. W. N 226, 54 I. C. 928 (N).

——sufficient reason for stay must be shown. 15 C. W. N. 475.

——an appellate court dealing with an appeal against an order of dismissal of petition to set aside an *ex parte* decree, cannot stay execution. 35 I. C. 443 (Pat)

——the court has an inherent power under s 151 C P. C. to stay execution on the ground that the *exparte* decree was obtained by fraud. 1923 Lah. 514 · 75 I C 419.

——when the proceedings in an execution case is suspended by the court, limitation does not run. 1923 A 471 : 71 I. C. 963, 74 I. C. 279 (C).

——nor does limitation run when the exeection proceeding is suspended at the instance of stranger. 1923 A. 600, 27 A 337.

For stay of execution by appellate court, see "*Appeal, stay of proceeding or execution.*"

(11) What decrees may be executed.

——the only decree that can be executed is the decree of the court of last instance, 39 C. 925, 926.

——the decree to be executed must be a subsisting one. 30 C. 718. 29 M 175

——a decree declaring the rights of the parties only cannot be executed. 4 M 219.

——a decree directing monthly allowance to be paid from month to month can be executed from time to time. 19 C 139, 22 C. 903.

——a decree for specific performance of contract of sale is capable of execution by both the plff. and the deft. because if the plff. refuses to take the sale deed and pay the consideration money the deft. is left to no remedy. 1923 Bom. 26.

——it is not inherent upon the decree holder to obtain possession of property decreed through court. He may save the trouble of going to the executing court if he can oust the Jt. Dr. peacefully without unnecessary force. 93 I. C. 40 · 1926 Pat. 244 : 7 Pat. L. T. 79 (criminal case)

(1) Court's jurisdiction.—*contd.*

——the court can grant relief to shorten litigation. 20 C. W. N. 667.

——the court has an inherent power to reconstruct its own records when owing to accident or other cause the records are destroyed or lost. Way of reconstruction laid down. 39 C. L. J. 53 n.

——the jurisdiction of a court to deal with proceedings ceases when the proceedings are stayed by a superior court and any order passed by the lower court afterwards in the matter is without jurisdiction 41 C. L J 349 · 88 I. C. 921 : 1925 Cal. 1023.

——the successor of a judge cannot modify mortgage-decree passed by his predecessor 42 C L. J. 592. : 50 M. L. J. : 24 A. L. J 33 91 I. C. 1033 28 Bom. L. R. 1126 . 5 Pat. 135 : 30 C W. N 492 1925 P. C. 280.

——the word "jurisdiction" may be used in two senses (1) in the sense of jurisdiction over the subject matter of the litigation (2) in the sense of power to make the order. 30 C. W. N. 41. 42 C L. J. 22 . 89 I C 744 1925 Cal 1258.

——there is a clear distinction between the existence of "jurisdiction", and "exercise of jurisdiction". 37 C L. J. 585 · 70 I. C. 784 : 25 C. W. N. 585, 77 I. C 851 : 5 Pat. L. T. 473 · 1924 P. 537.

——the boundary between an error of judgment and usurpation of power is this · the former is reversible by an appellate court within certain time and is therefore voidable but the latter is an absolute nullity 37 C L J. 585 · 70 I C 784.

——if a proceeding is instituted in a court which has no jurisdiction the transfer therefrom does not cure the defect. 1 Rang 236 · 1923 Rang. 185.

——in case of local jurisdiction the principle applies that the state of things existing at the commencement of the suit is sufficient to determine the jurisdiction on the theory that it is not effected by the subsequent change of residence or country by the deft. But this doctrine does not apply where question of jurisdiction relates to the subject matter. Jurisdiction over the subject matter must exist throughout the proceedings , jurisdiction over the subject matter is given by law and cannot be given by consent nor it can be waived by the parties ; a judgment without such jurisdiction is a nullity. 36 C. L J. 124 . 1922 Cal. 274, 1922 P. 322 . 67 I. C. 686.

——the question of jurisdiction should be determined with reference to the claim made and not to the decision on the claim 1923 Lah. 284 : 72 I C. 389 4 U P. L R. 23 : 65 I. C. 443.

——action to restrain, if co-ordinate. 63 I.C. 465.

——the High Court's pleader's letter must be regarded by the lower court and case should be postponed accordingly. 15 C L J 335 (2 C. W. N. 438, 5 C. W. N 110, 1 C. W. N 1031, criminal case)., *Ref.*

——if a suit appears from the statement in the plaint as barred by law, it should be rejected under Or. 7, r. 11 cl. (d) and not dismissed. 29 C. L. J, 17.

(1) Court's jurisdiction.—*contd.*

——though the principle is that money paid by one person to the other under compulsion of legal process, which is afterwards discovered not to have been due, cannot be recovered back in an action for money had and received, there must be *bona fides* on the part of the party who has got the benefit of the payment to apply this principle. 20 C. W. N. 188.

——District Judge cannot transfer a case without notice. 19 C W. N. 68 n.

——it is at the discretion of the court to admit a document produced at a later stage which has not been entered in the list of documents filed by the parties for the furtherance of justice and the appellate court should not interfere with the exercise of such discretion 44 C. L. J. 385. 99 I C. 258 1928 Cal. 168.

——civil court cannot set aside a Collectorate partition except on the ground of fraud or wrongful loss. 5 I. C. 454 (C), 7 M. L. T. 107 : 5 I. C. 776, 6 I C. 688 (A).

——a civil court can grant a declaration that under a decree of Revenue Court such and such rights passed to the parties. 10 O. L. J. 315

——proceedings of the Revenue authorities if tainted by fundamental irregularity may be quashed in the ordinary civil courts. 53 C. 561. 1926 Cal 1064 98 I. C. 334

——suit for declaration in the civil court with the object of affecting the decision of the Revenue Court in a pending suit within the exclusive jurisdiction of that court, is maintainable. 23 A. L. J. 941 ; 89 I. C. 1013 · 1925 All 637 F. B.

——the civil court cannot question the right of the Government to resume the subject matter of a Saranjam grant. 28 C. W. N. 449 ; 37 C. L. J. 469 35 Bom L. R 527 : 47 B. 327 : 44 M. L. J. 471 : 17 L. W 405 : 32 M L. T 111 72 I. C. 898 P. C.

——the acquittal of a person in criminal court on a charge of embezzlement does not prevent the civil court from trying the question whether he took the money. 69 I C. 212.

——when the action of the Revenue authority is wholly unauthorised, s 37 *Public Demands Recovery Act* does not oust the jurisdiction of the Civil Court to make a declaration, to issue an injunction or to grant other necessary relief. 35 C. L. J. 304 : 1922 Cal 101 : 67 I C 375.

——though the H C [illegible]
batwara proceedings [illegible]
between the parties [illegible]
ing into the same, [illegible]
6 P L. T. 524 · 1925 Pat. 710.

——the H C. can decide questions as to the proceedings of local legislature. 1925 Pat 710.

For other cases, see "C. P. C. ss. 143—152"

(5) Valuation and pecuniary jurisdiction—*contd*

——there are suits in which the subject matter is not capable of being estimated at a money value. 4 M. 146, 12 M. L J 84, [illegible] affected should be [illegible] . 378 [illegible] profits.

——when the claim for mesne profits exceeds the pecuniary jurisdiction of the court the proper procedure for the judge is to return the plaint to the plff. 38 C. L. J. 142.

——a munsiff cannot try in excess of pecuniary jurisdiction 24 I. C. 232

——where a judge has, in the proper exercise of his jurisdiction, passed a decree for possession and also a preliminary decree for mesne profits, he must be held to have jurisdiction to make a final decree in accordance with the decision. This jurisdiction is not limited, if, as a result of the enquiry directed by him the mesne profits are found to exceed the amount of his pecuniary jurisdiction as regards the value of the suit 29 C. W. N. 869 : 42 C L. J 49 1925 Cal 1076 **F. B.**

——In a suit for restitution of conjugal rights the value given by the plff. determines the forum 34 C. 352 : 11 C. W. N. 458 5 C L. J 400, 31 C 819 . 8 C. W N. 705, 20 P. L R 1919 52 I. C 101.

——jurisdiction of the court in redemption suit depends on the whole amount found to be due and not on the principal amount 28 C. W N. 710.

——unless it can be shown that some item has been improperly made the subject of valuation or excluded therefrom or that there is some fundamental principle affecting the valuation rendering it unsound, it is too late to object before the Privy Council for the first time. 25 C W. N. 289 : 48 C. 110 : 39 M. L J. 195, 28 M. L. T. 149 : 18 A. L J. 1095 : 22 Bom. L R. 1370, **P. C.**

——court which passes a decree can excute it if interest, rent or mesne profits subsquently ascertained exceed the pecuniary jurisdiction. 10 B 200, 21 C 550, 40 C. 56.

——in case of award out of court, amount of the award and not the amount originally in dispute determines the forum of the court '18 C. W. N. 807, 31 C. 203 *Fol.*

——a suit to set aside an award must be filed in a court which has got pecuniary jurisdiction to the extent of the liability which the plff. tries to set aside. 1923 M. W. N. 747 : *18 L W.* 399 75 I. C. 115

—— a decree passed by a Munsiff of the power of *Rs* 2000, may be executed by his successor of the power of Rs 1000. 1917 Pat 116, (6 C. 513, 15 C. 667),*Fol.*

—— jurisdiction must exist throughout the proceeding. 36 C. L J. 124.

——onus is on him who presses ouster of jurisdiction 39 M. 21.

(5) Valuation and pecuniary jurisdiction—*contd.*

——a decree or order without jurisdiction is a nullity 10 C. L. J. 189, 31 C. L J 272, 38 C. 639, 15 C W. N 725, 16 C L. J 77, 229 P. W. R. 1915 · 29 I C 796, 4 P L. W. 445 · 45 I. C. 920.

——judgments and orders relating to matters outside jurisdiction are void and not only voidable. 27 C. W N 542 : 1923 Cal 619, 38 C. 639, 9 A 191, 11 M 26

——the exercise of jurisdiction with which the civil courts can interfere must relate to the subject matter, pecuniary value, locality of the parties 2 Pat. 403.

(*Appellate Jurisdiction*)

——jurisdiction of an appellate court depended upon the value assigned to the subject-matter of a suit by the plff in his plaint and not upon the amount of the decree awarded by the trial court. 47 A 534 · 86 I C 1055 1925 All. 376, 47 A 64 · 85 I C 730 1925 All. 290, 26 P L R 456 88 I C. 327.

——the value of suit remains unchanged in all stages of the *lis* and determines the *forum* of appeal 89 I C 407

——when the forum of the appellate court would be changed but for the under-valuation, the decree of the appellate court is a nullity, 38 C 689.

LEGAL REPRESENTATIVE.

——plff. is to choose who should be made party after the death of a deft., when plff acts *bona fide* and true person is not represented the latter is bound by the decree 18 C W. N. 129 (33 M. 6, 26 M. 230, 4 C. 342). *Fol. contra* not so bound even when he is made deft in different capacity. 18 C W N 173

——when deft is already in record but in different capacity sec 22 L. Act does not apply. 14 C W. N 26 37 C 229. **P. C.**

——when a suit is brought against a dead person his representative cannot be brought on the record. 24 I C. 112, 11 C W N. 1026 *Dist.*

——surviving partner can sue without making the heirs of the deceased, parties 24 I. C, 268.

——a reversioner can sue several alienees of a widow in a single suit 24 I. C 95

[illegible] C. W. N. 31. [illegible] n execution [illegible] case not to [illegible] 17 C. L J. 573, *Ref* 35 C L J 9

——the definition in s 2 (11) is only for the purposes of procedure in instituting and defending suits and cannot affect the rules of substantive law When a person intermeddles with the property of the deceased he must be regarded as legal representative to the extent of the property he has intermeddled with but a decree against him cannot bind the real heir who is not party. 75 I. C. 144. But see 76 I. C 314.

——a sale is not a nullity if the legal representative of the deceased who has died during the execution of the decree is not brought on the record in execution proceedings 75 I. C. 46.

——the question of legal representative should be decided by the executing court under s 47 and he cannot leave the point open 1923 P 149

——where a person is in possession of the estate of the deceased he is the legal representative under s 2 (1) and execution taken against him is legal 69 I C 179

For other cases see. "C P C. ss 52 and 53, and Or 22."

PARTY *See, "C. P C Or 1 RR 1-3."*

PLEADINGS.

(1) How to frame pleadings.
(2) Alternative claim in pleadings. (General) (Or. 6, rr. 1-10).
(3) Signature and verification of pleadings.
(4) How to frame plaint, (Or. 7, rr. 1-8)
(5) How to frame written statements, (Or. 8, rr. 1-10)
(6) Rejection of plaint. Or 7, RR. 11-13
(7) Return of plaint (Or 7, R 10)
(8) Amendment of pleadings, see, Amendment

(1) How to frame pleadings, (General) (Or. 6, rr. 1-10).

——scandalous matters should be avoided and if inserted it should be expunged, but allegations of dishonesty if relevent to the issues cannot be held as such 14 C W N. 153.

——undue influence being a species of fraud, must be plea[illegible] with precision 2 Pat L T 111 5 Pat L T. 744 : 1921 Pat 1[illegible] 60 I. C 282

——particulars of undue influence must be stated, it cannot [illegible] allowed to be set up in appeal 83 I C 616 : 1924 Bom 457.

——fraud alleged must be proved and relief cannot be grante[illegible] on any other ground 34 C. L J. 531.

——when fraud is vaguely stated in defence the plff's. pleader may apply to the court to order the deft. to deliver further and better particulars of the charge of fraud 1924 A. 17 : 21 A. L J. 571 . L. R. 4 A. 464 : 74 I C. 466

——evasive denials in the W S are deprecated and the points of defence must be stated specifically and clearly. 1923 Cal 578.

——pleadings should not be embarrassing to the deft,—plff. need not state the evidence, he may under certain circumstances rely upon several different inconsistent rights alternatively, but cannot be permitted to allege the absolutely inconsistent state of facts each of which is destructive of the other 20 C W. N. 310.

——plaint need not specify the exact date of cause of actn which may be provided in evidence. 15 C. W. N. 882.

——all the reliefs upon the same cause of action must be aske[illegible] C. W N 163.

(1) How to frame pleadings, (General) (Or. 6, rr. 1-10)—*contd.*

——under Or. 11 r. 15 the deft is not entitled as of right to have inspection of the documents relied upon by the plaintiff before filing W. S, 24 C. W N 302

——facts of the plaint not traversed in W. S are taken to be admitted. 18 C W. N 113, 41 B 89 *contra* the strict rule that averments not traversed must be taken to be admitted, is not applicable to pleadings in Indian courts 34 C 57 11 C. W N 225 · 5 C L. J. 81, 9 M. I A 287, *fol.*

——relief may be granted on subsequent event also 24 C L. J 140.

——statement of witness may be partly accepted and partly rejected, *but statement in the pleadings must be taken as a whole* 19 C. W. N 713, P C

——though the claim is too much plff. is entitled to get a decree for less amount 10 C W N 620 P. C

——the relief to be awarded depends upon the facts established and not upon an unfounded assertion of claim 62 I. C 633 (C).

——defence of limitation must be raised in the written statement. 32 C. L. J. 236 · 60 I. C. 280, 45 B 920 : 23 Bom. L. R. 279 61 I C 347, 34 C. L J 205

——a prayer for general relief is unnecessary as a court may always give general or other relief, though not asked for. 1923 Pat. 153 : 1923 P. 386.

——court cannot find a fact which both the parties deny in pleadings. 6 C. W. N 575 But it can take notice of illegality of its own motion. 27 A 266

——a deft. is not precluded by the law of limitation to resist a claim by way of defence on the ground of fraud or undue influence. 28 B 639, 30 M 169.

Variance between pleadings and proof

——variance between pleadings and proof (in this case as to [illegible] 18 C W N 473.
[illegible] *aterial when the* [illegible] W N 85.
[illegible] t a court is not [illegible] really [illegible] a court [illegible] by the [illegible]

——the objection that the plff. should not be allowed to succeed on a case different from that set out in the plaint should be one of *substance* and not one of *form* 23 C L J 429, 23 W R 39 P. C. *Fol*

——the determination in a cause should be founded upon a case either to be found in the pleadings or *involved in* or *consistent with* the case thereby made. 23 C L J. 429, 11 M. I. A. 7 P. C, 14 C 801, 14 I. A. 168 P. C., 5 C. W. N 865 : 29 B. 8 *Fol*

——amendment should not be allowed when it would prejudice the opposite party. 24 C. W N 749

(1) How to frame pleadings, (General) (Or 6, rr. 1-10)—contd.

——pleas and facts constituting them should be expressed 84 I. C. 386 : 6 P. L. T. 465. 1925 Pat. 168.

——every pleading shall contain and contain only a statement in a concise form of the material facts on which the party pleading relies for his claim or defence as the case may be but not the evidence by which they are to be proved. 3 Pat L. R. 36 : 86 I. C. 629 : 1925 Pat 410.

(2) Alternative claim in pleadings

——claim of shebaitship and ownership is maintainable. 21 C. W. N. 939

——claim of easement and ownership is maintainable. 34 C 51. 11 C W N 20 4 C L J 437, F B. (16 B 592, 15 C. 684) Dist 18 A 125, 16 W. R. 198, *not fol.* 4 C. L J. 357, 8 C. L. J. 289 and plaint can be amended making alternative prayer. 10 C. L J 538 3 I C 346

——alternative relief may be granted though not asked for. 17 C W N 11.

——objection to alternative claim cannot be taken in appeal for the first time 4 C L. J 357, 8 C L J. 289.

——a pleading cannot be changed so as to change the case 17 C. W. N. 427 P. C.

——claim of limitation and tenancy is maintainable 2 C. L J. 125, 8 C L. J 557, 7 C. W N 294, 7 B. 96, 16 C. 806, 12 B. L R. 274 21 W R. 70 F. B., 25 A 256, 24 A 90, L. R. 3 A. 485

——parties cannot take inconsistent plea,—when the deft. tenant denied the relationship successfully, in a subsequent suit for khas possession he cannot plead tenancy. 24 I. C. 181, (8 I. C. 660, 13 C. L J. 1, 15 C. W. N. 335, 5 I C. 708, 14 C. W. N. 339, 2 C. W. N 775, 2 C L J. 380, 9 C. W N 928, 3 C. L. J. 201). *Ref.* 20 C. W. N. 310

——a party litigant cannot be permitted to assume inconsistent position in court, to play fast and loose, to blow hot and cold, to approbate and reprobate to the detriment of the opponent, 39 C. L. J. 140, 26 C W. N 294 35 C. L J. 103.

——single suit by two sets of plffs. with prayer for alternative relief is maintainable 43 M. L. J. 277 · 1922 M W. N. 316 : 1922 Mad. 174.

——a suit for rescission of contract and for return of earnest money is maintainable with an alternative claim for specific performance. 1923 Pat. 357 : 75 I. C. 433

——in a suit for rescission of contract and for return of earnest money the plff. can be allowed an amendment claiming specific performance as an alternative relief. 1923 Pat. 357 · 75 I. C. 433

——claim of easement can be allowed where the plea of ownership is not substituted. 46 B. 200 : 64 I. C. 517.

(3) Signature and verification of pleading.

——some portion was written after verification and signature, still it was a good plaint. 19 C. W. N. 220 n.

(3) Signature and verification of pleading—*contd.*

—verification may be made after the period of limitation. 46 A. 637 : 22 A. L. J. 690.

—plaint not signed and verified should be thrown off and returned for amendment 2 C L J. 11

—signature in the plaint is a matter of practice and procedure and authorisation is a question of principle, when suit is duly authorised, mistake in signing may be amended at any time. 49 A 147 . 22 A 55 18 A. 396

—n signing a pleading
to do so and this is
31 C W. N 1030 :

—omission to verify is a mere irregularity curable at any stage, 46 A. 637 87 I C 938 : 1925 All 79

—signing and verification may be cured by amendments as they are technical defects. 69 I. C. 422

—when verification is amended subsequent to the filing of the plaint it takes effect as if it was verified on the date of filing. 31 C. W N. 397 54 C 380 1927 Cal 376 · 101 I. C 573, 46 A 637 and 48 C. 110, *Ref* 2 C. L J. 11 *Differed from*

—irregularity in signature or verification of the plaint cannot be fatal to the case in second appeal when the merits of the case have not been affected 101 I. C 698 1927 All 514

—the signature is only a matter of procedure and the omission can be rectified at any time. 80 I C. 141

—a plaint is valid if it is signed by person instructed by pltf to sign 1925 Lah. 144

—where plaint or the *vakalatnama* is not duly signed and presented the court should allow the plaintiff to sign the plaint when the mistake is detected 23 Bom L. R. 911

—where a plaint is signed by a third person on instruction from real and ostensible plff it must be deemed to be signed by a person duly authorised 71 I C. 880

(4) How to frame plaint ? (Or. 7, rr. 1-3).

—plaint need not specify the exact date of cause of action which may be provided in evidence 15 C W. N. 882

—all the reliefs upon the same cause of action must be asked 20 C. W. N. 163.

—the plff is not bound to assert specifically in the plaint the particular class of the land the question should be decided after preliminary decree but before final decree is passed 6 P. L T. 152 : 86 I. C 785 1925 Pat 433

(4) How to frame plaint? (Or. 7, rr. 1-3)—*contd.*

——scandalous matters should be avoided and if inserted it should be expunged, but allegations of dishonesty if relevant to the issues cannot be held as such. 14 C. W. N. 153

——a prayer for general relief is unnecessary as a court may always give general or other relief, though not asked for. 1923 Pat 153, 1933 P. 386

——though the claim is too much, plff. is entitled to get a decree for less amount. 10 C. W N, 620, P. C.

——the relief to be awarded depends upon the facts established and not upon an unfounded assertion of claim. 62 I. C. 633 (C).

——relief may be granted on subsequent event also 24 C L J. 140.

——statement of witness may be partly accepted and partly rejected, but statement in the pleading must be taken as a whole 19 C. W N 713, P. C.

——in a suit under s 91, C P C, particulars and details of the special damage to the plaintiff should be given in the plaint. 1926 Cal 549 : 91 I. C. 728.

(5) How to frame written statement? (Or. 8, rr. 1—10).

——defence of limitation must be raised in the written statement. 32 C L. J. 236. 60 I. C. 280, 45 B 920 : 23 Bom. L. R. 279 : 61 I C 347, 34 C. L J. 205.

——evasive denials in the W. S are deprecated and the points [illegible] 1933 Cal 578

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plaint is not evidence on which a suit can be decreed. 10 Lah L. J 339 1928 Lah. 769.

——a deft is not precluded by the law of limitation to resist a claim by way of defence on the ground of fraud or undue influence 28 B 639, 30 M. 169.

——a plea of illegality of consideration (withdrawal of non [illegible] first time at the

925 Lah 345

out unless it is

defence, with

record, the trial

670 · 88 I C

——deft. having first stated in the statement that he would [illegible] claiming a set off

equitable set-off

for contribution

as he has paid on

(5) How to frame written statement ? (Or. 8, rr. 1-10)—*contd.*

——where the sum claimed is not an ascertained sum of money Or. 8, r. 6 C P. C, is not applicable, but if the cross-demands arise out of one and the same transaction or are so connected in their nature and circumstances that they can be looked upon as part of one transaction, the courts of equity in England have held that the deft. may be allowed to plead a set-off although the amount may be unascertained The doctrine of equitable set-off has been recognised by Indian courts 1925 Mad. 830 · 49 M. L J. 14 1925 M W N. 228.

——points as to fraud or forgery challenging a contract should be specifically pleaded, general words of defence will not do. 97 I. C 543 : 1226 M. W. N. 812 1926 P. C 109 31 C. W. N. 538 : 25 A. L. J. 20 : 38 M L. T. 3 P. C

——plea of estoppel should be definitely raised and issues should be framed on the point 96 I C 915 · 1926 Mad 1052.

(6) Rejection of plaint (Or. 7, rr. 11—13).

——before rejection of plaint under R 10 the court should give the plff. opportunity to correct the valuation or to pay the proper court fee, as the case may be. 105 I. C. 881, 1927 Mad. 1002.

——when a plaint is rejected on the ground that the plff has not filed an amended plaint as he was asked to do, Or 17. r 3 does not apply, but the case falls within Or 7. r 11 cl (c). 86 I C. 491 : 1925 Mad 1045.

——a plaint was rejected under Or 7. r 11 for nonpayment of court-fee as directed by the court. An appeal was filed paying the same court-fee as paid in the first court and it was summarily rejected as insufficiently stamped, held that the appellate court ought to have first tried the question as to what the real value of the property was and then given the appellant an opportunity to pay up the deficiency, if any 87 I C 651 (c)

——when a plaint is rejected for non-payment of court-fee owing to the money being misappropriated by the pleader's clerk the trial court should itself grant relief whether the application by the plff. is deemed to be under ss 147, 148, 149, 151 or Or. 47. r. 1. 4 Pat 180 . 1925 P H. C. C 147 1925 Pat. 435

——a court is not competent to order that the plff should pay the additional court fees and that if he fails to do so the plaint should stand rejected and the suit dismissed on merits 7 Lah. L J. 18 . 86 I C 266 : 1925 Lah 326.

——if from the statement in the plaint it appears that the suit is barred by limitation it should be rejected under R. 11 cl. (d) and not dismissed 29 C. L. J. 17

(7) Return of Plaint. (Or. 7, r. 10).

——where a plaint contained two distinct causes of action one of which arose within and the other outside jurisdiction it was returned under Or 7, r 10, 19 A. L J 822

——when the plaint contains different causes of action but the court has jurisdiction to try only one of them, it should return the

(7) Return of plaint (Or. 7, r. 10)—*contd.*

plaint and strike out the part which is beyond its jurisdiction 94 I. C 783: 1926 Bom. 283 · 28 Bom. L R. 521.

——where the court finds that it has no jurisdiction, its duty is to return the plaint and not to dismiss the suit 44 A. 686: 1922 A. 424

——where a munsiff returns a plaint on the ground that the ... has no jurisdic- ... aside by superior ... turned the plaint for presentation to the Munsiff's Court. 2 Pat. L. T. 739

——where in a suit for money the real cause of action arises only after the institution of the suit the court should not reject the plaint and drive the plff. to file a fresh suit. 1923 Lah 591 75 I C 562

——where a plaint being returned for presentation to the proper court the plff appeals against that order, he is not debarred to present the plaint to the proper court subject to the bar of limitation 89 I. C 68: 27 Bom. L. R. 652: 1925 Bom. 418.

——when a plaint is returned to be presented to the proper court under Or. 7. r. 10, the order is subject to an appeal under Or 43 r 1 (a) but no second appeal lies. 88 I. C. 753: 27 Bom. L R 635. 1925 Bom. 431.

——when a plaint is returned under s. 23, Pro. Sm C C. Act to be presented to another court and it is presented to an ordinary civil court, any order for return of the plaint by that court is not an order under Or 7, r. 10 and no appeal lies from that order, 85 I C 1002: 1926 Cal. 83.

——order returning a memorandum of appeal to be presented to the proper court is revisable. 7 Lah L. J 285: 26 Punj L. R 594: 90 I. C. 603

——where a plaint is rejected on the ground that the plff has not filed an amended plaint, as he was asked to do Or 17, r 3 does not apply but the case falls within Or. 7, r. 11. cl. (c), 86 I. C. 491 1925 Mad. 1045

——when a court returns a plaint for presentation to proper court ... d be costs in ... ad 563: 53 M

——where a suit is triable by more than one court and the deft applies under s 22 for the transfer of the suit the court having juris diction to try the suit cannot return the plaint on the ground that ... to the deft. to have the suit tried in

... e presented to ... plaint on the ground that the deft. was not a raiyat and the District Court upholds that order, the order of the District Court was not binding on the District Munsiff 92 I. C. 621: 1926 Mad. 365: 1926 M W. N 178: 1926 M. W. N. 123.

(B) Amendment of pleadings.

——the power to allow amendment is very wide and amendment [illegible] a suit unless it changes the [illegible] Cal 477, 99 I. C. 770 : 1927 [illegible] J. 25, 103 I C 670 : 1927 Mad. [illegible]

[illegible] to sue, [illegible] person [illegible] W. 377 [illegible] is taken when the question of fact to be raised by amendment has already been raised and evidence adduced on the point 95 I C 991 · 5 Pat 745 ; 1926 Pat, 427 7 Pat L T. 719.

——in a suit for possession of properties if it is admitted that the plff. is entitled to a share, the plff may be allowed to amend the plaint to convert the suit to one for partition. 92 I C. 396 · 1926 Mad. 909.

——in a suit against a dead man and his heirs the plaint may be amended by striking of the name of the dead man 105 I C. 284 (c)

——when the deft was sued as the Agent of a Railway Company but the parties understood that the Railway Company was sued, no amendment should be allowed making the Railway Company a party, 9 Pat. L T. 542 , 112 I C 323, 7 Pat L. R. 57 *Rel. on.*

——an alternative claim for money lent cannot be introduced by way of amendment in a suit on a *hundi* 52 B 640 ; 1928 Bom. 516 : 30 Bom L. R 1300.

——a suit for specific performance or damages in the alternative can be amended to convert it to a suit for damages only , but it would be a wise precaution for a Judge before allowing any such amendment in a contested suit to require the plaint to be actually remodelled in a form appropriate in action seeking compensation for breach of contract and nothing else 52 B 597 30 Bom. L R. 1242 32 C W N 953 48 C. L J 451 . 26 A L. J. 1220 1928 M. W. N. 893 55 M. L J. 523 111 I. C. 413 1928 P C 208

——it is not permissible to allow amendment so as to change the nature of the suit as framed, and even if it be allowed, the party affected by the amendment must have an opportunity to rebut such new case by fresh written statement and a new trial will be held. 31 C. W. N 469 . 6 Pat, 323 45 C L J 313 29 Bom. L. R, 796 . 1927 M W N 69 , 100 I C. 56 1927 P C 18

——when the suit is premature amendment cannot cure it. 49 A 599 25 A. L J. 385 1927 All. 451 101 I. C 643.

——an amendment should not be allowed to remove the bar of limitation 101 I C 390 · 1927 Mad 650 ; 38 M L T 345

——ordinarily amendment asking for the recovery of possession is allowed in a suit for declaration of title and for confirmation of possession But where such amendment takes away the valuable right of a person acquired by reason of limitation under Art. 12 (d) of the L. Act the amendment should not be allowed. 46 C. L. J. 51 : 1927 Cal 733 104 I C. 151.

See other cases, under "**Amendment.**"

POUNDAGE.

——no deduction can be made from the poundage except as the Rules provide so the expenses of the court-sale cannot be deduced 96 I. C. 363 : 1926 Bom 335 . 28 Bom L. R 590.

PRACTICE.

-- when found to be 32 C W. N. 953. I. C. 413: 1929

——the practice of allowing counsel or vakil to file memorandums of arguments is bad. 111 I. C 849 1928 Mad 1130. 1928 M. W. N 788 . 28 L. W. 511

——according to the well-known practice of the English Bar a counsel should never file ... which he appears

documents the 51 M. 599 108

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the plff. as his witness. he takes the risk of making the statements made by the plff. a part of his own evidence 92 I C 844 : 1926 Mad. 384 23 L. W. 29

——it is an elementary principle of law that a case fixed for hearing on a particular date cannot be taken up prior to that date without the consent of parties or their agents 105 I C 271 : 1927 Pat. 354 : 6 Pat 108

——the Patna H C. will not ordinarily depart from the long course of decisions of the Calcutta H. C., 111 I. C 84. 1928 Pat 641. 9 Pat L T. 573 . 7 Pat 613, 110 I. C 469 1928 Pat 410 : 7 Pat. 690 9 Pat. L. T 357

——when authorities have laid down rules it is not always necessary ...

court ... each clearl ... are before ... ument Court ... High

... of the decision the practice of the Chief ...pecial Bench ...4 : 54 C 266.

... the decisions ...ss a definite disagreement with them. 1927 All. 244 : 99 I C. 762

Practice—*contd.*

——when there is a difference of opinion prevailing upon the Bench, the usual practice is that the Judges holding the view of the minority will deliver judgment first. *96 I C 1039: 1926 All* 369: 24 A. L. J. 825 F. B

——a Full Branch decision (on pre-emtion law) of long standing may be overruled if the original texts of personal Law are all against it and the view is not contrary to the principles of justice, equity and good consience and when its upsetting cannot affect many titles 31 C W. N. 14 44 C. L J 194 98 I. C 220 · 1926 Cal. 1153. Sp. B.

——however wide and unsatisfactory a claim in the plaint may be, as a general rule it is better for the court to take the pliff's evidence before dismissing the case 96 I C. 89: 1926 All 672.

——the practice of trying cases piecemeal should be deprecated 92 I C. 712 1926 Lah 125. 7 Lah 42

——party knowing the facts of the case must examine himself on his own behalf and submit to cross-examination, his non-appearance as a witness would be the strongest possible circumstance going to discredit the truth of his case. 32 C W N. 119, 46 C L J. 272; 29 Bom L. R 1392 1927 M W N. 776 105 I. C. 220. 1027 P. C 230.

PRELIMINARY DECREE

——a preliminary decree ascertains what is to be done while a final decree states the resultant achieved. 20 C L J 476: 19 C. W. N 755

——an order deciding one issue and remanding the case for disposal of another issue amounts to preliminary decree L. R 4 A. 124.

——the legislature contemplates ordinarily only one preliminary decree in a case but there is nothing illegal in passing more than one in appropriate cases 27 C W. N. 989 38 C. L J 255: 74 I C 375

——an application for final decree in a mortgage suit is governed by s. 181 L Act and commences to run from the date when the [illegible] 'tween the parties 43. A.

[illegible] minary decree final is not a [illegible] 23 Bom L. R. 308. 61 I C. [illegible] L R 76 *Fol.*

——after the passing of a preliminary decree the dismissal of an application not on the merits but owing to some other grounds cannot result in the dismissal of the suit itself. 46 M. L. J. 46: 1924 M W N. 115 19 L. W. 69

——passing of a final decree without passing a preliminary decree in a mortgage suit is not without jurisdiction It is at the most an irregularity or illegality and cannot be challenged in execution proceeding 1927 Cal. 1179. 96 I C. 686.

For appeals against preliminary decree, see, "**Appeal**".

REVISION, See. C. P. C. S. 115.

SALE CERTIFICATE.

——auction-purchaser may sue for possession without getting any sale certificate 19 C. W N 835 : 20 C L. J. 433, 20 C. W N. 675

——an auction-purchaser becomes the owner of the property purchased on the date of auction-sale 16 C. W. N. 985, P. C., 33 A. 45, 63

——sale certificate does not create title and auction-purchaser may prove his tittle independently of the sale certificate. 7 C. L J 384, 9 C L. J 346, 19 C 63, 9 C. 842, 7 C 199, 5 A. 305, 5 M 54, 10 B. 144, 5 A 297.

——a sale certificate is no more than an evidence of title 1927 Cal. 881 . 104 I. C. 384

——certificates of sale are documents of title which ought not to be lightly regarded or loosely construed and the mortgagor Jt Dr. cannot bring a suit to refer back to the original mortgage deed to show that the property in question was not sold 44 M 483 1921 M. W. N 374 : 63 I C. 708.

——if there is error in the sale certificate the court has ample power to amend it 28 C W. N. 403 . 39 C. L. J, 222 : 82 I C 297 1924 Cal 881, but cannot pass an order *exparte*. 23 W. R. 301.

——the court has the inherent jurisdiction to amend a sale certificate in which property has been wrogly described. 19 C L J. 209 [illegible] 7 C W N 358 [illegible] 18 C. W N
But n [illegible] ·der amending
313 P [illegible] an amending
a cert [illegible]
order as the matter is not one relating to execution under sec 244 (old), 47 (new) 3 C. W. N. 374 : 25 C 529, 20 M 487, nor from an order rejecting amendent, 23 A. 476, 18 A 36, 26 C 529

——where there is an error in the sale certificate the court has ample authority as a court of justice, equity and good conscience to rectify it. 28 C. W. N. 403

——sale certificate is conclusive proof of title 44 M. 483

——if in a certificate issued by the revenue authorities on the sale of an estate the boundaries of the estate are not mentioned, the estate being described by its name only the purchaser takes all that comprised the estate as it stood at the date of the sale. 32 C L. J. 402.

——in granting sale certificate the court's action is ministerial and not judicial. 4 Pat. 760 : 90 I. C. 501 : 1925 Pat. 615.

——in order to determine the title of the purchaser it is to be seen what was actually offered for sale and bid for. What was offered for sale is to be ascertained by the decree, by the order [illegible] the order has been [illegible] t sale and nothing [illegible] hatever words of [illegible] been inserted in [illegible] t, 27 B. 334 (22 W. [illegible] ist.

Sale Certificate—*contd.*

——the court in construing a sale certificate refused to go into the facts lying behind it for the purpose of contradicting its terms. 22 W. R. 181, 26 W. R 104.

——where the sale certificate, though containing errors, was accurate as to any part of the description of the subject matter of sale and could be used to identify it with the assistance of extraneous evidence, such evidence could be received to show what was intended to be sold 25 W R 401

——mere inaccuracy of language or misdescription will not vitiate sale-certificate. The intention of the parties must be looked to. 7 W. R 245, 15 W R. 490, 21 W. R 93

——where a sale certificate declares the sale of the rights of a particular party in land of which the identity is not in dispute, the mere misdescription of the rights so transferred does not constitute a difficulty in the way of giving the purchaser possession, 19 W. R 276

SET-OFF (Or 8, rr. 6—7)

——before a set-off can be claimed the parties must fill the same character as they fill in the plff's suit. 28 Panj. L R 427 1927 Lah. 228 · 101 I. C 762.

——C. P. C is not exhaustive as regards the law of set off, it should be granted on equitable grounds. 17 C W N 1060, 11 C 557, *Fol.* 16 C 771, 10 A. 587, 15 A. 9, 21 B 126, 8 C. W N 174

——C. P. C. does not exclude what is called an equitable set-off provided the deft's cross-demand arises out of the same transaction as the plff's claim 1923 Bom. 113, 1225 830 1925 M W. N 228 : 49 M. L J. 14.

——it is not obligatory upon a deft to plead an equitable set-off. 1925 M. W N. 228 49 M L J 14 : 1925 Mad. 830.

——where the sum claimed is not an ascertained sum of money Or. 8 r. 6 is inapplicable. But if cross-demands arise out of one and the same transaction or are so connected in their nature and circumstances that they can be looked upon as part of one transaction then it is applicable as courts of equity in England have held that in such cases the deft. may be allowed to plead a set-off, the doctrines of equitable set-off having been recognised by Indian courts. 1925 M. W N. 228 1925 Mad. 830 . 49 M. L. J. 14.

——the right of set-off will be fonnd to exist also in cases when [illegible] and circumstances [illegible] ver and the deft [illegible] 11 C. W. N 215 [illegible] set-off for costs [illegible] by a benamdar [illegible] andlord was made [illegible] 11 C W N. 215,

——specified amounts are not necessarily "ascertained debt" 16 C 711, 95 I. C. 358 . 1925 Sind 225.

Set-off (Or. 8, rr. 6-7)—*contd.*

——time-barred debt may be set-off by way of equitable set off. 19 C. W. N. 1180, 32 C 576, *Fol* 40 B 60.

——a deft may prosecute a set-off if the claim was not time-barred at the time of the issue of the plaint but was barred subsequent to this, it is the law in India as well as in England that limitation applies to set-off. 25 C. W. N. 800.

——if the set-off is not specifically pleaded in the written statement the court may decline to allow the same. 102 I. C 688. 1927 Lah 431 ; 28 Puj L A. 297.

——in a suit for contribution of rent, deft may claim set-off of rents he has paid for previous years, though that claim is time-barred. 12 C W. N 60

——a set-off and counter-claim are governed by the rules of procedure and a person can only plead by way of set-off or counter-claim that which is permitted by those rules; a set-off can be pleaded as a defence and can only be raised where the claim to set-off one against the other exists in the same right 47 B. 182. 1923 Bom 24

——in a partition suit amongst the members of a joint Hindu family a barred debt due to a member cannot be set-off. 41 M. L J. 370 14 L W 534 62 I C 852

——deft. having first stated in the statement that he would make a separate counter claim is not estopped from claiming a set-off in the same suit. 83 I C 769 · 20 L W 531: 1925 Mad 238.

——where an auction sale held at the instance of certain co-sharers was set aside and they were ordered to pay the costs of the auction purchaser and Jt Dr and some co-sharers paid the cost of Jt. Dr. and another paid the cost of the auction-purchaser, in a suit for contribution by the former the latter was entitled to claim set off. 87 I C. 788: 1926 Cal 454

——in a suit for the price of goods although the deft's counter-claim for damages for non-delivery is not maintainable he may be allowed to plead a set-off. 20 L. W. 531.

——in a suit for the price of goods the defence that there were counter dealings between the parties may be allowed. 82 I. C. 340: 22 A L J. 844 · 1924 All. 872

——in a suit by a clerk for wages the employer cannot claim damages for leaving service without notice 39 A. 362.

——in a suit for possession of immoveable property, if the deft. has a right of maintenance out of the property, set-off claim may be allowed in execution proceedings 5 C. W. N. 881, 28 I A. 190: 23 A. 394 P. C.

——a voidable judgment should be set aside in due course of law otherwise it cannot be questioned by way of defence. 13 C. L. J 404, 18 C. W. N. 766.

——a writen statement claiming set-off requires court-fee. 12 C. L J. 365, 10 C. W. N. 199.

——when set off is pleaded, court fee is payable only on the amount claimed in excess of the amount claimed by the plff. and only when the deft. wants a decree for that excess. 97 I. C. 916 . 1927 Nag. 74.

SUITS (General).

——the word suit ought to be confined to such proceedings, inder that description, are directly dealt with in C. P C , or h as by the operation of the particular Act which regulates m, are treated as suits 22 C 943

——' suit ' does not include an appeal. 23 C. 415.

——a suit can ordinarily be said to terminate when there is hing more to be done in it except execution 22 C. 952 n. (But hority of pleader extends to execution 16 C. W. N 736, 1017 ,. 100)

——when a suit is not allowed to be withdrawn with liberty bring fresh suit, the proper order for the court to make is to miss the suit, otherwise the suit remains pending. 20 C. W. 100

——all the reliefs upon the same cause of action must be asked. C W N. 163.

——causes of action does not depend upon relief asked for but the facts of the case. 38 B 44

——rights of parties at the date of the suit must be looked into, l in special cases subsequent circumstances may be looked to C W. N. 1099.

——relief may be granted on the subsequent event also. 24 C J. 140, 20 C L J 107, 20 C W. N 1099

——when worshippers of a mosque sue the *mutwalli*, Or 1. r. 8 l apply and not sec. 92 23 C. W. N 115.

——there is distinction between public highway and village road, ht to village pathway may be sued for without special damage. C W. N 73, 15 C 460 F B. *Fol*

For other cases see, " C. P C. Or. 1 ".

intainability of Suits.

——dismissal of restoration petition under sec. 108 (old), is no to regular suit on the ground of fraud or other valid reason. C. W. N 219

——but when petition of review is rejected regular suit on the ne ground is not maintainable 18 C. W N. 1204, 2 C L. J. 50 ; C. W. N. 527 *Fol*

——suit for rectification of a decree is not maintainable 17 C. N, 82.

——but a decree may be rectified on the ground of fraud. 19 W. N 1228.

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M ... N. ... n. *contra*. 1... N 1010 : 33 336.

Maintainability of Suits.—*contd.*

——suits for compensation for use and occupation without prayer for ejectment operates as waiver to eject and such a suit is treated as rent suit. 13 C. W. N. 635.

——a suit to rectify a decree on the ground of mistake is not maintainable unless it is based on a contract of parties which may be rectified on such ground. 19 C. W. N. 1225. (17 C. W. N. [illegible] 15 C. L. J. 675, 3 C. W. N. 75, 21 C. 612), *Ref.*

——a suit to set aside a decree is not maintainable on the ground that the pleading was allowed to be amended *ex-parte* 3 C. W. N. 395

——if a property claimed by a person in personal capacity is sold as the property of another person, in execution of a decree passed in a suit in which he was sued in a representative capacity no separate suit lies, as objection could be taken under S. 47 C. P. C., 27 C. L. J. 572.

——suit does not lie for the enforcement of prohibitory injunction embodied in a decree, remedy lies in execution. 27 C. L. J. 506 : 22 C. W. N. 851.

——where it is provided by an indent that each monthly shipment and item should be treated as a separate contract, separate suits for damages are maintainable. 41 C. 825.

——a suit for declaration of right to sacrifice to deity is maintainable. 4 C. L. J. 469

——a suit by Hindu widow who has obtained letters of administration in respect of husband's property and has a minor son cannot sue in her own name. 2 C. 431. 6 C. 483, *Dist.*

——suit for declaration of tenancy right against the decree of Collector in Partition suit is maintainable. 16 C. W. N. 639.

——no claims for possession and representation can be joined with prayer to enforce registration of a document in a suit under s. 77 of the Registration Act. 39 C. L. J. 40, 9 M. L. J. 107.

——where a suit under s. 106 B. T. Act is withdrawn with liberty to bring fresh suit and a fresh suit is brought in the civil court and not under s. 106, it is not maintainable. 23 C. W. N. 703.

——money recovered in the execution of a decree cannot be recovered back in a fresh suit while the former decree remains in force. 39 C. L. J. 312 P. C., 10 M. I. A. 203, 3 C. 30 *Ref*

——where the purchaser in execution of a decree on the second mortgage sued for possession and the purchaser under the first mortgage resisted the same, their mutual rights could be determined in the same suit, 46 C. L. J. 570; 55 C. 603; 107 I. C. 355 : 1928 Cal. 116.

Claim see *C. P. C. Or. 21 rr. 58-63.*

Coercion see "*Contract Act, contract.*"

COLLATERAL PURPOSE.

——an unregistered deed of gift executed in 1882 is admissible for collateral purpose 34 C. L. J. 432 · 26 C W. N. 65.

——an unregistered deed of gift is admissible for collateral purpose, 46 M. 349, and on the question as to the date on which possession was taken. 45 A 565

——an unregistered deed of gift is admissible in evidence to prove possession 24 C W. N. 346 . 43 M 244 P C

——an unregistered partition deed is admissible to prove fact of division in status 61 I C 399

——a document which is compulsarily registrable may be admissible as acknowledgment, 5 C. 215, 26 C 334, as liability to debt 5 C. 611, as personal liability, 9 C. 523, in a case of specific performance, 12 C L J. 548, to prove nature of tenancy 19 C W. N 115 n, to prove the nature of the occupant's possession 39 A. 696, 40 C. 801 P. C, and for other collateral purposes. 11 C L. J. 548, 5 B L R 18 F B, 4 B. L. R 1 F B., 20 W. R 107, 5 B. 143, 10 C. 315, 11 C W N. 342.

——a document required by law to be attested cannot be admitted in evidence for collateral purposes without being properly proved, even if it be so admitted without objection, its admissibility may be challenged at a later stage. 35 C L. J. 473, 27 C W. N. 134 : 1922 Cal 160 68 I C 86

Commutation, see " *B, T Act, s 40* "
Compensation, see, " *Damages.*"
Compromise, see " *C P. C Or. 23, R 3.*"

CONSIDERATION

——a stranger cannot question the assignment on the ground of inadequacy of price, that being a matter between the assignor and the assignee 18 C. W N. 450, 35 C 420 12 C. W N 393 ; 7 C. L J. 335, P C , 20 I A 112, 127 P. C., 14 C W N 191, nor on the ground of non-payment of consideration 4 C. L J 354 27 A 271 : 32 I. A 113, 9 C W. N. 477, P.C , 47. C. L J 365 - 107 I. C. 744 : 1928. Cal 299

——admission of receipt of consideration before the sub registrar is evidence of passing of consideration. 2 Lah 249 : 64 I C 901

——a sale deed cannot be challenged by a stranger, where apart from untrue recital in it as to consideration, there is no other flaw. 9 C. W. N 477 27 A 271 32 I A 113, P. C

——it is sufficient if the promisee does some act from which a third person is benefitted and which he would not have done but for the promise 28 C L J. 152

——a decree may be purchased by less amount, still whole dues may be realised 18 C W N 113 at p. 115.

——mortgagor is to prove denial of consideration but when stranger objects, mortgagee is to prove passing of consideration. 5 C L. J 653, 6 C L. J 659 (6 C 268, 17 A 428, 5 C. W. N. 403, 5 C. L J. 653), *Ref*, 3 C. W. N. 324, *Diss* 4 Lah L. J. 199 :

Consideration.—*contd.*

I Bom. L J. 248, 42 M. L. J. 339, 4 Lah. L J. 73, 2 Lah. 249, 66 I. C. 694, 68 I C. 303.

——where part of the consideration is paid, mortgage bond is valid to that extent. 10 C. W. N 932.

——to refrain from criminal proceedings of a compoundable offence is a valid consideration of a contract 3 C. W N 5

——in order to show that the object of the agreement was to stifle the criminal prosecution it is necessary to prove that there was an agreement between the parties express or implied, the consideration for which was to take administration of the law out of the hands of the Judges, and to put it into the hands of a private individual to determine what is to be done in the particular case, and that the contracting parties should enter into a bargain to that effect. 29 C W N. 1029 90 I. C. 463, 29 C. W. N. 855. 42 C. L J 90, 89 I C 200, 90 I C 624.

——forbearance to sue and forbearance to take definite steps to enforce legal right have always been held to be adequate consideration to support an agreement 47 A. 637 88 I C 768 1925 All. 503, F B, 44 A 424 20 A. L. J 285 : 67 I C. 4: 1922 All. 260

——agreement to drop prosecution for breach of trust in consideration of a mortgage for a portion of the embezzled money and cash, is opposed to public policy, 53 C. 51 : 1926 Cal. 59.

——where a Hindu husband, who was in bad terms with his wife but not such as to entitle her to claim separate maintenance or residence, promised to pay her separate residence or maintenance it was not enforcible for want of consideration, 4 C. W. N. 488

——a contract to pay a certain sum for the marriage of a daughter of a co-parcener, at the time of partition, is valid. 26 M 151

——in case of rival purchaser the burden of non-passing of a consideration under the first purchase is on the second purchaser 68 I. C. 732.

——admission of receipt of consideration-want of passing—Registered sale deed. 27 C W. N. 8 20 A. L J. 961 · 30 M. L T 232 15 L W 104 24 Bom L R, 675, P C.

——want of adult member in the transaction 30 M. L T. 26

——passing of consideration may be presumed from the recital in the document. 1923 C 319, 38 C L. J. 114 · 74 I. C. 173

——burden lies on the executant. 1923 Pat. 20 : 70 I. C 804 5 Lah L. J. 198 71 I C. 783.

——consideration may be payable to third person and the transferor may sue for the sum if unpaid 36 M. 348, 18 C. L J 603 · 17 C. W. N. 1143, 14 C. W. N. 805 : 32 A. 410, P. C. so also the third person can sue. 27 C. L. J 483.

——creditor may sue the transferor of a debtor. 22 C. W. N 279, 17 C. W. N 1143, *Fol*

——contract to pay barred debt is valid. 18 C. W. N 329, 23 M 94, 20 M L. J. 656 *Diss*, 6 Pat L J 121 : 2 Pat. L T. 303 : 60 I. C 514, 41 M. L J, 567.

Consideration —*contd.*

——contract to appoint one to public office is illegal 19 C W. N. 919

——a consideration is legal even if it does not benefit the promissor; a mortgage is binding on all the mortgagors equally even if some of them may not be benefitted thereby. 22 C. W. N. 138.

——acknowledgment of liability of other's debt may be legal consideration: urgent need of money dose not of itself place the lender in a position to dominate the borrower's will. 23 C W. N. 52 n, 34 C. 150, *Fol.*

See other cases under 'Contract Act, agreement'

CONSTRUCTION.

1. **Of Documents.**
2. **Of Statutes**
3. **Of Judicial orders**

(1) Of Documents.

Documents should be construed liberally

——document in this country should be construed liberally 20 C. W N 210: 22 C. L J. 452, 22 L L J. 180 · 19 C. W. N 873. 18 M L. T 31 37 A. 269 P. C., 97 I. C. 124

Construction of a document is a point of law

——construction of a document is a point of law and there cannot be estoppel by reason of misrepresentation on a point of law unless the point of law is not clear and free from doubt. 30 C. 883 p. 894

Document must be construed as a whole.

——it is one of the cardinal principles of construction of a document that it must be construed as a whole True intention of the parties should be ascertained from each provision which must receive attention 32 C. W. N. 569. 47 C L J. 183 · 1928 M. W. N. 91. 30 Bom. L R 261 26 A. L. J 489 107 I C. 1; 1928 P. C. 35.

——when each point by itself is not conclusive the document must be construed as a whole. 33 C W N 578 1929 P C 115.

Each part should expound the other

——the best construction of a deed is to make each part expound the other, so as to make all the parts agree 63 I C 625.

Document when not self contained

——a document which is not absolute and self-contained must be read with and interpreted in the light of an established custom, if any. 63 I. C 43.

When the description is conflicting

——construction in case of conflicting description. 4 Pat L T 652 · 72 I. C. 643

(1) Of Documents.—*contd.*

Same word should have same meaning.

——generally same meaning should be given to the same word used, throughout a document unless there be some good reason justifying the attribution of different meaning. 95 I. C. 140.

——but the rule that the same meaning should be given to an expression in every part of a document in which it appears is not of general application but is applicable only to cases of ambiguity or difficulty in construing the document. 47 C. L. J. 295 : 107 I. C. 459 ; 1928 P. C. 115.

When repugnant clauses are used.

——if there are two clauses or parts of a deed repugnant to each other, the first will be received and the latter rejected unless

of an Act 25 C. W N. 9.

Natural meaning should be adopted.

——an instrument should be construed according to its natural meaning in the light of the circumstances in which it was executed. 1922 Cal 300 · 68 I C. 937

——the natural and obvious meaning of the words in a deed cannot be refused to be given to them merely because it is suggested that the words have been inserted in the deed for the purpose of ascertaining and specifying the stamp duty in which case it should be specially stated 38 C. L. J. 21 75 I. C. 492.

——if apt words are not used and if reservations are not made then it does not lie in the mouth of the grantor to contend that the grant is not so extensive as on an ordinary interpretation of the words it would seem to be so. 1923 Cal. 335.

——a document should, if possible, be construed in a manner giving effect to all the directions in it. 111 I. C. 22 · 1928 Mad. 349.

When more than one interpretation is possible.

——where more than one interpretation of a deed is possible, it is proper and necessary to look to the statute by which the form and purposes of the instrument are prescribed to fix upon that construction which is consistent with the state 33 M. L. T 438 P. C.

——if it is possible to construe a document in two different ways the court may accept the construction which makes the document valid in law 55 C. 448 · 32 C. W. N 248 : 105 I. C. 647 ; 1928 Cal. 130.

Construction by another document.

——it is always dangerous to construe the words of one document by the construction put upon similar words in another

1) Of Documents.—*contd*

document All the clauses must be looked at and given effect to ignoring none as redundant or contradictory. 1 Pat. 295: 1922 Pat. 70 : 2 Pat. L T. 273 : 65 I. C 977

——it is not proper to construe one document in the view taken with regard to another document which is differently worded 42 C. L. J. 172 1925 Cal. 1248, 86 I C 737 87 I. C. 758 1925 Mad 1175, 112 I C 113 (c).

——the previous correspondence between the parties cannot be [illegible] to for construing a document. 93 I C 184 28 Bom L. R. 25 : 1926 Bom. 209.

If contemporary document can be used to explain.

——statement contained in a contemporaneous document furnishes a legitimate aid to construction Where there are two conflicting descriptions, that which is more certain and stable and the least likely to have been mistaken must prevail. 37 C. 393: 10 C L J. 570 · 4 I C 713.

If subsequent document can be looked to

——a subsequent deed between strangers should not be allowed to explain a document. 37 C 626 . 7 I C. 875

Other document not in suit cannot be used.

[illegible]
in a [illegible]
suit [illegible]
1925 [illegible]

Surrounding circumstances can be considered.

——to determine the true construction of a deed of settlement regard must be had to the object and whole scope having reference to the surrounding circumstances. 32 C. L. J. 453, 28 Bom. L. R. 25 1926 Bom 209 93 I C 184.

——evidence of surrounding circumstances are relevant. 40 C. L J 481 27 Bom L R. 4: 47 M. 729: 82 I C. 993, P. C., 29 C. W N. 57 26 Bom L. R 786. 80 I. C. 807: 48 M. 230: 1924 M. W N 609 P C.

——in considering whether a particular interpretation is beneficial or not to a party, circumstances not appearing on the face of the deed may be taken into account. 1924 P. C. 233: 20 L. W. 884 P. C.

Construction of a settlement deed.

——in construing a settlement deed the true rule is to find out the intention of the settlor from the expressions used in the deed itself and then to ascertain whether such intention is valid in law or not. 55 C. 418, 32 C. W. N. 248; 105 I. C. 647 : 1928 Cal. 130.

——in construing a deed of settlement in India unless there is a special reason afforded by the deed itself to the contrary, the technical meaning given to the words in English law must be disregarded 52 B. 176: 30 Bom L R. 282: 47 C. L J. 198: 32 C. W. N. 925; 26 A. L. J. 560: 1928 P. C. 33

(1) Of Documents.—*contd.*

When intention of the parties can be looked to.

——where a document is not itself ambiguous the intention of the parties should not be taken into consideration and the mere delivery of a document of title does not constitute a transfer of the right to property. 42 C L. J. 79. 82 I. C 411

——in all cases the object is to see what is the intention of the parties expressed by the words used But from the imperfection of language it is not possible to know what is the intention without inquiring further and seeing what the circumstances were with reference to which the words were used 47 C. L. J. 300: 30 Bom L R. 760 107 I C 346 1927 P. C. 272.

——meaning of the words used should be looked to and not the intention of the parties to the deed 7 C. L. J. 292.

——question is not so much of parties' intention as of meaning of words used 49 B 99: 84 I C 397. 1925 Bom. 12

——but the intention of the parties should be looked to in construing a document containing repugnant words. 97 I. C. 580 1926 Mad 1208.

——the document must be construed as a whole and intention of the parties must be gathered from each provision which must receive attention 1928 M W N 91. 32 C. W. N. 569: 47 C L J 183: 30 Bom L R. 261: 26 A L J. 488, 1928 P. C. 35

——the intention must be gathered from the document itself and oral evidence is excluded 45 A. 581. 21 A. L. J 503. 1923 A 586

——for the right administration of justice the substance and the real meaning of the parties and not the form of expression and the literal sense of the transaction are to be constantly kept in view as the basis of decision 34 C L J 323.

——whether deed is a mortgage or not depends upon the intention of the parties to be gathered from the circumstances of the case. 64 I C. 583.

——a document called a will is really a deed of gift if the intention is to make a transfer *in praesenti.* 74 I. C. 653.

When conduct of the parties can be looked to

——conduct of the parties is evidence to construe a deed of doubtful import. 34 C. L J. 129, 96 I. C. 183: 1926 Pat. 340. 1925 P. H C. C 199, or where the terms of a contract are ambiguous 29 C W. N 166 40 C. L J 322, 33 C. L. J. 332: 25 C. W N 309 61 I C 818, 111 I C. 701. 1928 All 34.

——conduct of parties is relevant to explain a deed capable of several meanings. 29 C W N 559: 1924 P. C 88: 51 C. 374. 83 I. C 1031. 46 M. L. J 618 P.C.

——the conduct of the parties to a contract reduced into writing may not vary or alter it, but their conduct may help to explain or elucidate different meanings. 1924 P. C. 88

——subsequent admission of meaning and conduct of the party cannot be relied in aid of construction; interpretation of ancient document is difficult. 12 C. L. J. 378.

(1) Of Documents.—*contd.*

——evidence of the acts and conducts of parties is inadmissible to show that document is not what it purports to be. 71 I. C. 1030 (c)

——when the general words of an ancient grant is uncertain they may be fairly explained by subsequent usage 53 C. 533. 30 C. W. N. 745 : 94 I C 974 : 24 A. L J. 761 : 1926 P C. 41

Construction does not depend upon name of the document.

——the true construction does not depend upon the name given to the document but it must be determined with reference to all its terms. 9 O. L. J. 104 : 1922 Oudh 42 : 66 I C. 110

——but the name of the document by which the instrument is called by the maker must be borne in mind and should not lightly be brushed aside though it is not conclusive. 111 I C 22 · 1928 Mad. 349.

——a document named sale-deed under which in lieu of a debt due, land is sold for a period of 50 years, it is in reality a mortgage and can be redeemed even before that period 76 I. C. 336

——the mere fact that the document of title held by the grantees is called a *patta* and that they executed a kabuliyat in similar terms is not conclusive of the question of whether they were made lease-holders i.e. farmers of revenue or were true proprietors paying a jamabandi to the overlord. 40 C. L. J 473 : 48 B. 613 82 I. C 779, 1924 M W. N 694 26 Bom. L R 1143 47 M. L. J. 574 P C

Substance shall be looked to and not the form

——in determining whether an instrument is liable to duty as a transfer only or the full duty of a mortgage, the court will look at the substance of the transaction and not merely at the form of the instrument 51 C. 185 · 28 C. W N. 497 : 1924 Cal. 578, 81 I. C 471

Nothing shall be considered redundant

——no part of a document should so far as possible be left as redundant 74 I C 653

——common words of style used in conveyance of any sort may be and often are words of surplusage but when they are not words of surplusage they must be given the proper effect of their own meaning The word "Adha" and "Udha" in the settlement deed made it plain that there was every intention to convey all below the surface as well as on it or above it, 29 C W. N 725 86 I C 289 : 27 Bom. L. R 753 20 A. L. J 712 P C.

——but while for the purpose of construing the operative part the whole of the instrument may be referred to, yet the recitals leading up to it are more likely to furnish the key to its construction than the subsidiary clauses of the deed. 3 Pat L. T 653, 65 I. C. 882 P. C.

Gift or a will

——where a Mahamedan lady executed a deed purporting to give away the whole of a zemindary estate, reserving usufruct of a

(1) Of Documents.—*contd.*

portion for her life and directing the donee to pay the Revenue on the whole, the gift was a gift *inter vivos* and not a will. 27 C. W. N. 53 : 45 A. 301 : 43 M. L J. 453 . 24 Bom L. R. 1268 : 68 I C. 254 P. C

——to ascertain whether a document is a will or gift the whole document and subsequent conduct is to be considered. 1925 Mad 471 : 86 I C. 8.

——in construing a deed drawn by a layman in India whether it is a will or a gift not only the words used should be considered but also the circumstances should be considered, 94 I. C. 967 (c)

——words which, when used in will or deed of gift, create hereditary interest, do not do so when used in grant or lease creating intermediate interest 30 C. 20 7 C W N. 314.

——where a document styled a will constitutes nothing more than a declaration of an intended adoption which was not carried out and the statements of the wishes of the executant thereafter, it is in the nature of a transaction *inter vivos* and if not registered it is not valid. 25 C. W N 511 28 M L T 190 : 1920 M. W. N. 559 . 58 I C 228 P. C.

——a *document alleged to be a will and relied upon and established as a will* in a Probate Court cannot be found not to be a will but a deed of gift, but the court may construe the will and hold that the executant had no power to execute it. 2 Pat L T 728 : 62 I. C 611.

Construction of ancient document

——an ancient document should not be construed in the light of present usage or modern understanding of law. 9 C L. J. 475

Instrument not drawn by professional men.

——instruments not drawn by professional men should be liberally construed. 12 C. W. N. 942 and not only the words actually used should be considered but also the circumstance should be taken into consideration and the matter ought to be broadly looked at, 94 I C. 967 (c).

Construction of a surety bond

——the terms of a surety bond should be construed favourably to the surety. 55 C 91 · 1928 Cal 177 109 I C. 538

General words or clauses apply to ejusdem generis

——the words "on any account-whatsoever" in lease must be construed *ejusdem generis* with the preceding provisions 5 I. C. 1022 29 C. W N 124 : 82 I C 315 1925 Cal 346

——general words of release operates to pass only what the parties contemplated 11 C W. N 776

——where in a lease-deed the payments to be made are specifically dealt with and afterwards a general clause to the effect that whatever else is payable by law is to be paid, the general clause is taken to be referable to the subject matter [illegible] to before 79 I. C. 369 (c).

(1) Of Documents.—*contd.*

——where a deed specially relates to one kind followed by other kinds and then a general clause is inserted, the general clause refers to kinds immediately before it. 1925 Cal 522.

——but a general description of mortgage property cannot be restricted by its enumerative description following the general description 63 I. C. 625.

In the absence of words of reservation all interests pass.

——where there is no reservation all interests possessed by the endor pass to vendee 30 C 556 · 7 C. W N. 482 30 I C. 71, P. C.

Application of law in construing a document.

——any ruling as to the interpretation of a document can only e applied in its entirety to a document absolutely indentical in anguage, and in a case the general circumstances of which are ubstantially the same 46 A 274. 22 A L. J. 137 80 I C. 550: 924 All 324 F. B

'rms of a document conferring an a grantee can be abandoned or of custom ancient, invariable, the force of law, 1925 Pat 228.

I. C. 204

——*in the case of construction of documents the only question* s how the law is to be applied to the particular facts of the case efore the court 65 I C 707.

——it is not allowable to read into an agreement the provisions of in Act subsequently passed 8 C W N 521. 26 A. 299 31 I A 116 P. C

——terms of judicial orders should be construed according to law. 17 C W N 565 16 I C. 374 (c).

Description of boundary

——boundaries must prevail as against the measurement 46 M. L. J. 182 · 19 L. W. 245

——where the boundaries can be ascertained effect must be given to the description by boundaries irrespective of area. But if the boundaries are uncertain then area must be considered 64 I. C. 737 (c). 41 C 49 *Ref*

——if the boundaries specified in a lease can be identified the ordinary rule is that the statement of area must give way to the description of boundaries 64 I. C. 751 (c), 50 P. L R 1922, 98 I. C 351 · 1926 *Pat.* 257. 7 *Pat. L. T* 134.

——ordinarily when a piece of land is sold with definite boundaries, unless it is clear from the circumstances surrounding the sale that a smaller extent than what is covered by the boundaries was intended to be sold, the rule of interpretation is that boundaries must prevail as against the measurement 78 I C. 414 · 1924 Mad. 493 34 M. L T 315. 1924 M W N. 203

——when a deed contains an adequate and sufficient definition of the property intended to pass, any erroneous statement contained in it as to the dimension or quantity will not vitiate the descript. 1 Pat. L. R 377.

(1) Of Documents.—*contd.*

——where description of land is given by boundary and area, the land within the boundary passes 13 C W. N. 702 : 9 C. L J 585, but where boundaries cannot be ascertained with perfect certainty, area specified and intention of the parties should be looked to. 14 C. W. N 268

——in case of conflict between the Survey numbers and the boundaries, the boundaries should prevail. 105 I. C. 172 : 8 Pat L T. 829 1928 Pat. 89.

Miscellaneous cases.

——where a *deed* is executed for valuable consideration it may be construed adversely to the grantor in case of doubt as to construction. 63 I C. 625

——when the tenant is required to submit to *Jarip Jumabandi* and to new *imposition* by the Govt. the lease is not one for fixed rent 1923 Cal 351

——*Contract*—Court should lean towards a construction favouring the validity of a contract rather than its illegality. *85 I. C. 177*, 1925 Bom 115

——under the construction of a document by which deft agreed to work the pltf's Railway, deft was held only to be pltf's agent and not partner 30 C. W. N. 76 1925 M. W. N. 358 · 83 I. C. 107 : 27 Bom L R 810 49 B 320 P C

——personal liability in a security bond, construction of 25 C. W. N 737 36 C L J. 5 43 M L J. 66 . 1922 M W. N. 376 24 Bom L. R 971 · 31 M L T 129 ; 2 P L. R. 1922 P C.

——construction of a trust-deed. 32 C W. N 677 · 47 C. L. J 429 · 6 Rang. 113 30 Bom L. R. 788 . 107 I. C 461 : 1928 P. C 44.

(2) of Statutes

How to construe Statutes

——the life of law is not logic but experience 35 C L J 36

——nothing is to be regarded within the meaning of the Act which is not clearly and intelligibly described in the very words of the Statute itself, 8 C 214 In interpreting the Act full and accurate effect to every word used is to be given 18 All 364; the essence of the *Code* is to be exhaustive on the matter in respect of which it declares the law, and the Judge cannot disregard the letter of the enactment 29 C 707, 715, 4 Bom L. R. 793, 796 P. C. full and natural meaning should be given to the provisions *8 C. 637.*

——no clause, sentence or word shall be considered superfluous void or insufficient 8 Lah. 617 1927 Lah 435

——in construing a statute *absurdity* should be avoided 45 C. L J 185 101 I. C 349 ; 1927 Cal 415

——it is the essence of a Code to be exhaustive on *matters* with which it deals *96 I* C. 910 . 1926 Lah. 670, 29 C. 707 P C. *Fid*

——words not to be found *in* the section may be supplied by necessary implication if the context so requires. 1925 All. 610 ; 90 I. C. 180 . 6 All. 601F. B.

(2) Of Statutes.—*contd.*

——it is always dangerous to paraphrase an enactment and not the less so if the enactment is perhaps not altogether happily expressed. 18 C 23 17 I. A 122 P C

[illegible] 'es provisions which are not [illegible] cannot be otherwise avoided. [illegible] 337, 6 M. I A 1 P C., 1928 All 62

——where the terms of an enactment are quite clear it is unnecessary to inquire into the reason for the change they have made in the previous law 48 M 488. 87 I. C 399 · 1925 Mad. 589. 48 M. L. J 406.

——where the language is clear consideration of hardship is not relevant. 31 C W N 502 : 1627 Cal 474 : 102 I C 115.

——in enterpreting the statute it is not the function of the court to make the law reasonable but to expound it as it stands 1926 Sind 58 ; 91 I C. 99 F. B.

——where the construction of a rule of law is clear a court cannot go behind the rule by any enquiry into the reason of the rule. 48 M 559 · 86 I C 201 1925 Mad 449.

——specific rules of inquiry must be followed 53 C 561 98 I C 334 : 1926 Cal 1064

——the Code must be construed most favourably to the liberties of the subjects. 1 B 308 311.

[illegible] strictly against the Govt [illegible] 19 1928 Pat. 85, 105 [illegible] 987, 1927 Bom 483 [illegible] pecial nature and not [illegible] with great caution [illegible]

——statute imposing restrictions must be strictly construed 71 I C. 722.

——proviso cannot extend substantive provision of law unless there is real ambiguity in the substantive enactment. 53 C. 492. 1926 Cal 927 97 I C. 376

——words in Act should not be regarded as surplusage 52 C. 275 : 1925 Cal. 1 F B, 50 A. 569 26 A. L J 298. 109 I C 38 1928 All 241

——new words may be read into statute if context so requires. 48 A. 175 24 A L J 56 1925 All 610

——when the words of the Act as enacted, are clear, the Legislature only, and not the Courts, can correct any mistake involved in their use 13 C L J. 250

——it is more reasonable to hold that the intention of the legislature was expressed in an unguarded manner than that a meaning should be given to them which could not be intended. 53 C. 492 : 97 I C 376 1926 Cal. 927.

——*the general rules of constructions of statutes is expressio unius exclusio alterius* i. e. the express mention of one thing implies exclusion of another But this maxim cannot be applied without limitation. (How this maxim is to be applied discussed). 36 C. L J 352.

(2) Of Statutes.—*contd.*

——where statute confers jurisdiction *it impliedly* grants also the power to do such acts, adopt such measures and *employ such* means as are essentially necessary to *its* execution 26 C. W. N. 381 69 I C 814, 23 C *514, 24 C 751 Ref.*

——where a statute purports to oust the jurisdiction of the civil court it must be very strictly construed. 1928 Pat 615 : 9 Pat L T 627, 9 Lah 504 29 Punj L. R. 396 : 108 I. C. 748 : 1928 Lah 121 F. B.

——a generous interpretation should be given to the enactment which gives the power to restore. 110 I. C. 377 : 1928 Mad. 83 30 Mad 274 *fol*

——division of the *same* section into subsections does not affect the construction of the section 44 C. L. J. 350 : 53 C 929 98 I. C 116 : 1927 Cal 149.

Long established construction should be followed.

——in construing a Statute, the *court* will give much weight to the interpretation put upon it since its enactment. 23 C. L. J. 17 7 C L J. 563 35 C. 701 *Ref*

——the court should be reluctant to divert from the view expressed in long established decided cases. 36 C L J. 36.

——where statute uses language of doubtful *import* and has been interpreted in a particular manner for a number of years, the explanation given to the obscure meaning may reduce the uncertainty to a fixed rule, 34 C 954 F. B.

——where the words in an Act have received a judicial construction the same meaning will be presumed to apply to subsequent enactment. *26 C* W. N 703. 35 C. L. J 36

——a statute interfering with the established state of law must receive a strict construction 9 Lah 504 : 29 *Punj.* L. R. 396 : 108 *I. C.* 748 : 1928 Lah 121 F. B.

Legislation is generally prospective and not retrospective.

——every legislation is prospective only, it is retrospective also when expressly so provided, or when it relates to practice or procedure. *17* C. W N. 889, 18 C W. N 804 : 23 C. L. J 506, 12 C 853, 96 I. C 93. 1926 *All* 667, 23 N L. R. *50* : 101 I. C. 284 : 1927 Nag. 127, 104 I. C. 292 1927 All 659.

——when provisions of a statute deal merely with the matters of procedure they may, unless that construction is inadmissible, have retrospective effect but provisions which touch a right in existence are not to be applied retrospectively in the absence of express enactment or necessary intendment. *Provisions* which applying retrospectively would deprive of *their* existing finality orders which, when the statute came into force, were final, are provisions touching existing rights. 29 Punj. L. R. 37 : 1928 M. W. W 35. 106 I C. 156 : 32 C. W. N. 237 : 47 C. L. J. 1 : 30 Bom. L. R. 60 : 9 Lab. 284 : 25 A. L. J. 964 : 8 Pat. L T. 791 : 1927 P. C. 242. 55 C. 67 : 103 I. C. 662 : 1927 Cal. 763.

(2) Of Statutes.—*contd.*

——when a Code regulates the procedure it is unlikely that the Legislature intended without express words to abolish or extinguish substantive right of an important nature which admittedly existed at that time 55 C. 519 · 48 C L. J. 55 32 C. W. N. 482 : 26 A L. J 464 30 Bom L. R 744 : 1928 M. W. N 926 · 108 I. C. 361, 1928 P. C. 16.

——statutes are presumed to be prospective and not retrospective unless clearly provided 19 N L. R. 110 · 72 I. C 438, 24 N. L R 85 109 I. C. 647.

——retrospective effect should not be given to a statute unless an intention to that effect is expressed *in plain and unambiguous language* This principle applies to B T Act 31 C. W. N 1007 : 103 I. C 674 : 1927 Cal 748

——where general words in a later Act are capable of reasonable and sensible application without extending them to subjects [illegible] on [illegible] ay [illegible] be

——where the new provisions are substantive which are not made to depend on the corresponding provisions of earlier statute the question of retrospective effect does not arise. 47 C L J. 284 1928 P. C 128 107 I C. 455 P C.

——if a new enactment provides certain new rights unknown previously to the existing law and certain remedies are provided for the infringement of such rights, such remedies should be enforced only in the manner and by following the procedure indicated 1928 M. W. N. 442 711 I C 225 · 1928 Mad. 571.

——when the law is altered by statute pending an action the law which existed at the commencement of the suit will decide it unless a contrary intention is expressly provided 5 N. L. J. 251.

——if the application of the provisions of an amending Act makes it impossible to exercise a vesting right of suit, the Act must be construed as not to apply to such cases. 36 C. L J. 263. 1 P. L. R. 285, 41 C. 1225 17 C. L. J. 316 *Rel* 36 C L J. 132. Vesting right cannot be forfeited by a repealing enactment. 36 C L J. 132 50 C 115 · 27 C. W. N 183. 17 C. L J. 316 18 C. L. J. 274 39 M 645, 18 N. L. R. 85

——the usual rule that an Act is not retrospective does not apply to a Declaratory Act such as the Attachment of Immovable Property Act, I of 1926. 1928 Mad. 1173 · 55 M. L J 382.

——but enactments which are declaratory in form, are not necessarily retrospective in their operation 55 C 67 : 103 I. C. 662 : 1927 Cal. 763.

——the repeal of an Act, unless a different intention appears, cannot affect any right, privilege, obligation or liability acquired, accurued or incurred under any enactment so repealed or affect any remedy or any investigation or legal proceeding commenced before

(2) Of statutes—*contd.*

legislature intended by any particular amendment to make substan-
o arrive at a conclusion
ısly was. 32 C. W. N 482:
Bom. L. R. 744 : 9 Pat L T.
so 7 Pat. 221 : 47 C L.
... 26 A. L. J. 385 : 1928 M. W. N. 282 107
I C. 14 : 1928 P. C. 2

Mandatory or imperative and directory.

——there is an universal rule that disobedience of a mandatory provision in a statute has the consequence of nullification of all proceedings irrespective of any question of prejudice. Whether a mandatory provision is imperative or only directory depends upon a consideration of various circumstances. 42 C. L J. 131 : 90 I C. 308 : 1925 Cal. 1246.

——there is no universal rule that disobedience of a mandatory provision in a statute has the consequence of multification of all proceedings irrespective of any question of prejudice. 42 C L. J. 131 · 1925 Cal. 1246 · 90 I. C 308.

How to reconcile inconsistent provisions.

——where two co-ordinate sections are apparently inconsistent, ... If impossible the latter ...strictly construed

that jurisdiction given by one sec of the Act has been taken away by another and subsequent sec, 34 C. 836. 6 C. L J. 130.

——a statute should not be construed so as to impute absurdity to the legislature 1928 Mad. 746 : 28 L. W. 885.

——an enactment should be construed as far as possible in accordance with the terms of the other statute which it does not expressly modify or repeal. 1928 Lah. 609 : 10 Lah. L. J 413 : 111 I C 175.

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construc ... ent or ... d that ... 54 C. ... F B.

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the language is clear and explicit the court must give effect to it whatever may be the consequence. 32 C. L. J. 303, 97 I. C. 455 :

(2) Of statutes—*contd*

1926 All. 617 : 24 A. L. J. 945, 111 I. C. 865 : 1928 Sind 149 : 22 S L R. 349 F. B. 110 I C 776 . 1928 Lah 495, 55 C. 173, 32 C. W. N 264 : 109 I. C. 739 1928 Cal 209.

——when the language is plain in itself it is not open to add to it or to deduct from it or even to consider whether the rule is likely to create hardships in particular cases if it be read in its ordinary sense

——when a word or phrase is defined as having a particular

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How to construe definitions.

——where a statute gives a definition for an instrument that definition may not be controlled by the understanding of the common people with regard to it. 48 M. 454 . 1925 M. W. N 467 : 88 I. C. 401 . 1925 Mad 723.

——when general intention is expressed by the legislature and

175 : 1928 Lah. 609. F. B.

Meaning of certain words.

——words are presumed to be used in their popular meaning unless otherwise expressly provided. 16 S L. R 112 : 71 I. C. 161 F. B., 47 B 843.

(2) Of statutes—contd

to private opinion, according to law and not honour. 48 B 87: 26 Bom. L. R 1 1924 Bom. 1.

Administrative despatches cannot be looked into.

——in construing the terms of an enactment Administrative despatches cannot be looked into 51 B. 516: 29 Bom. L. R 498: 104 I C. 8 1927 Bom. 278 F B.

Report of the Select Committee reference to.

——in interpreting the statutory provision reference to the Report of the Select Committee and proceedings of Legislature is not permissible. 47 C L J. 66: 103 I. C. 853: 1927 Cal 821, 32 C. W N. 115 36 C L. J 220, 1928 Lah 337, nor reference to the debates in the Council is permissible. 1928 Lah. 337

——Bill cannot be referred to 55 C 67: 103 I. C. 662: 1927 Cal. 763

——in interpreting the section of the book Reports of the Indian Law Commission may be referred to 8 B. 241, 18 B 616, 635, 7 A. 44, 17 C 852, 19 W R 48, 53

Proceeding of Legislature, reference to.

——in interpreting a statute reference should not be made to the proceedings of the legislature which result in the provisions of an Act 27 C W. N 115· 26 C L. J. 220, 22 C. 788, P. C. 21 C 732 *Ref*, 72 I C 433, 104 I C. 661. 28 Punj. L. R 595.

——in construing a statute the court cannot look into the proceedings of the legislature to see what took place during passage of the Bill or what was the reason for the insertion of a particular clause 53 C, 929 44 C L J 350. 1927 Cal. 149: 98 I. C. 116 (Cr) 22 C 788 P C *Rel. on*

——Proceedings of the Legislative Council and the Reports of the Select Committees of the Legislative Council cannot be referred to, 22 B 125, 128, 22 Bom L R 508 P. C. *contra.* 22 M 49, 504

——proceedings of the Legislative Council should not be referred to determine the true interpretation of the language of a section which should be interpreted as it stands 50 A. 318 108 I. C 573 1928 All 124 25 A L J 1061.

Statements of objects and reasons, reference to.

——where the meaning of words are clear the court cannot look to the statement of objects and reason of the Act. 1922 Lah 211 69 I C 748, 22 B 125, *contra* 18 B 516. 104 I. C. 661: 26 Punj L R 595, (22 C. 788 P. C, 44 M 550, P. C., 69 I. C. 748) *fol.*

Preamble, reference to.

——if the statute is expressed in clear and unequivocal terms it overrides the preamble, but if ambiguous or doubtful phraseology is used in the body the preamble may be referred to to resolve the ambiguity. 104 I C 661: 28 Punj. L R 595 (43 Mad. 529 P. C., 45 C. 343) *fol.*

——Preamble does not control the law when it is express 55 C 67. 103 I C. 662, 1927 Cal. 763

——enactment overrides preamble. 9 Lah. 260· 1928 Lah 35

——in case of ambiguity or where it is necessary to interpret the Act the preamble of an Act may be referred to but definite and unambiguous words cannot be strained by such reference simply

(2) Of statutes—*contd.*

because their natural interpretation would seem to extend the scope of the Act. 92 I. C. 1053 : 50 M. L. J. 301 : 1926 Mad. 381.

Punctuation

——punctuation is to be taken into consideration 17 Bom. L. R. 56, 12 M. L. T. 224, 49 M L J. 42

Schedules annexed to an Act

——schedules annexed to an Act and the heading under which they are placed are parts of the enactment but if the language of the enactment is clear they are not to be taken into consideration. 30 C. W N. 334 93 I. C. 909 1926 Cal. 638.

Heading of the Chapter

r is not to clear, 48 25 All 787.

——illustration does not control the section 1 All 34, 36, 15 B. 491, 24 C W. N. 982, 32 C. L J. 24 *contra*, it forms the part of the statute. 21 Bom, L R 558 P. C

——the court should accept, if that can be done, illustrations given under the section as being of value in the construction of the text To warrant the rejection of illustrations on the ground of repugnancy with the section requires a special case, 55 C 154 : 109 I. C. 752 1928 Cal 204

Marginal notes

——marginal notes are not parts of the section but there is no reason why they should not be consistent with the sections themselves. 41 C L J 45 . 29 C W N. 151 52 C 463 85 I C. 135 · 1925 Cal. 329.

——when the language is not clear the court may look to the 45 M. L J. P C , 2 Bom. J 561 F. B. All 393, 406, 156, 29 Bom. R. 576 P. C., 2 Bom L. R 918, 1 P L T. 11, 23 C 55, 59, they can sometimes be looked at if there be any doubt about the meaning of the words used 47 A 637 88 I. C 768 F B.

Rules framed under the Act, reference to.

——a Rule framed under the Act should not be referred to for the struction of an Act urt attributes to the W. N. 803 . 43 C. L. J.

——where the Act confers right in general terms rules restricting such rights are repugnant to the provisions of the Act. 1928 Mad. 1182 . 1928 M. W. N. 856 : 55 M. L J. 551, F B.

(3) Of judicial orders.

——judicial orders should be reasonably construed. 17 C W.N. 565.

CONTENTIOUS SUIT, see *Tr. P. Act. s. 52.*

CONTRACT ACT.

(1) APPLICABILITY OF THE ACT.

——the Indian contract Act deals only with that part of the law of contract applicable to British India 1924 Cal 990.

(2) AGREEMENT, LEGAL OR ILLEGAL.

Agreements Void for illegal consideration.

——an agreement to give a son in adoption in consideration of certain allowance to the natural parents is void. 12 B. L. R. App 42.

——agreement between a Hindu husband and wife that on breach of certain condition the mortgage would be void, is illegal, 11 B L.R 129, 28 C 751

——an agreement between Mahomedan husband and wife that wife would be at liberty to live with her parents, is void 6 Bom L R. 728, 7 Bom L R 602, 18 C W N. 693.

——but agreement that a Mahomedan wife would be at liberty to divorce herself from her husband under certain specified valid conditions, is legal 8 C. 327, 18 C W. N. 693.

——a landlord cannot recover the rent of lodgings knowingly let to a prostitute who carries on her vocation there. 9 B L.R App 37

——an assignment of a mortgage to a woman for future cohabitation is void 28 M 413, 17 A 266

——cohabitation *past* or future, if adulterous, is illegal consideration 27 A 260 *contra*. 1 A 478, 3 A 787, where *past* co-habitation was held to be legal consideration for a contract.

——an agreement to pay a sum of money in consideration of services rendered by a kept mistress of the promissor is not enforcible because the consideration is illegal. 66 I. C. 240 : 1924 Bom. 135 : 25 Bom L. R. 252

——consideration for a bond being future adulterous co habitation the agreement is void. 45 M. L. J. 551 : 1923 M. W. N. 566

——an agreement affecting the cause of justice is invalid. 37 M 403.

Agreements void for illegal consideration—*contd.*

——a promissory note executed by a minor though void is not unlawful consideration for a bond executed by his son after his death. 1923 A. 590 : 21 A. L. J. 446 : 73 I. C. 458.

——adequacy of consideration is not under expl 2 to s 25, Contract Act a matter of consideration in deciding the validity of an agreement. 45 A. 590 : 21 A. L. J 446.

——an agreement which entitles the father of a Hindu bridegroom to receive on the marriage of his son a certain amount from the father of the bride is as much against public policy as where the payment is to be made to the father or guardian of a girl. 22 B. 658.

——in practice the receiving of gift by the bride's parents or relations at any time in connection with the marriage is not permissible ; but gifts by the bride's parents to the bridegroom and his relations is not bad as it is in vogue Under s. 23 an agreement to make a gift at the marriage to the bride or the father of the bridegroom by the parent
is actually made and
be recovered back. 7
185 *Rel. on.* I C L. J

——agreement to pay money to a stranger hired to procure a wife for him is void 17 M. 9.

——it part of the single consideration is unlawful the whole agreement is void 49 B 619 89 I C. 199 27 Bom L. R. 682.

——if part of the consideration is illegal it taints the whole 20 C. W N at p 767.

——agreement for attendance and manual labour is illegal. 19 C. W. N 1118.

——agreement in restraint of trade is void 21 C. W. N. 979.

——when a Kanungo, who is liable to be dismissed under departmental rules if he purchases property in his own district, purchases it in the name of third person, he cannot recover it 27 A. 73

——a contract for sale for the consideration that the purchaser would push up a departmental enquiry against the vendor is void. 18 C. W. N 689.

——an agreement to stifle a prosecution is distinguishable from the contract compounding a compoundable offence, 29 C. W. N. 855 42 C. L. J. 90 : 89 I. C. 200, 29 C. W. N. 1029 90 I C 463, 91 I. C. 624

——compromise of doubtful right is enough basis for agreement. 1925 Pat. 68.

——money paid to a jailor procuring the release of a person cannot be recovered 9 B L R App. 38.

——an agreement to pay money to a public servant to retire
id. 30 M. 530.
the execution
3 Pat. 625 :

Agreements void for illegal consideration—*contd.*

——where the parties promised to abide by the statement of the deft. on oath there is nothing illegal in such contract and it is binding. 21 A L. J 209 : 1923 A. 443 : 71 I. C. 761.

——once it is established that the parties are *pari delicto* the courts will not assist an illegal transaction in any respect, that is to sa ... 45 A. 39(

the

illegality of a contract, 74 I. C. 653

Agreements opposed to public policy are illegal.

——an agreement between A and B that B's daughter will marry A's son and if she fails to do that B shall pay a certain sum, is opposed to public policy 37 M. 393.

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——an agreement between the *panda* and pavwal of a temple to share the offerings made by pilgrims is against public policy. 45 A. 79 : 1223 A. 56

——where a client agreed to pay his pleader Rs. 500 in cash and further undertook to convey to him certain immoveable properties for charitable purposes in the event of his carrying on the litigation to full success such an agreement was contrary to public policy and unlawful under s. 23, 49 B 619 . 27 Bom. L R. 682 : 83 I. C 199

——where a person provides funds for a litigation on condition that he is to be paid a portion of the proceeds and the proportion is neither unfair nor extortionate, the agreement is valid. 93 I. C. 959, 1928 M. W. N 5 : 109 I C 87 . 1928 Mad. 437.

——the work done by a pleader appointed as commissioner in a suit is no work done for the party but for the court, so any bond executed by the party in favour of such commissioner is not enforceable. 27 C. W. N. 430 : 37 C L. J 406 : 1923 Cal 436.

——when conditions are prescribed by statute for the conduct of any particular business or profesion and such conditions are not observed, agreements made in the course of such business or profession are void. 100 I. C. 846 . 8 Lah. 310 : 1927 Lah 333 : 28 Punj L R 161

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00 I. C. 1040 :

25 A. L. J 516

Agreements compromising criminal case.

——agreement compromising criminal prosecution for a non-compoundable offence is void. 1927 M. W. N. 118 : 102 I. C. 561 : 1927 Mad. 478.

——where the defendant in a bond suit pleaded that the bond had not been executed by him out of his own free will but there was a criminal case pending against him and it was withdrawn on the execution of the bond, held that therewas no agreement not to prosecute; there was nothing to prevent the plff from taking a security for the payment of the debt, even if the debtor was induced to give the security by a threat of criminal prosecution To prove that the object of an agreement was to stifle a criminal prosecution it must be shown that there was an *agreement between the parties express* or *implied, the consideration for which was to take the* administration of the law out of the hands of the Judges and to put it into the hands of private individuals 29 C W N 1029 · 1926 Cal 455; 90 I C. 463

——where there was good consideration for executing the bond

——where during the pending of a criminal case the dispute was referred to arbitration and an award was made and the complaint was finally dismissed under s 203 Cr P. C, held that the mode of settling disputes being a very satisfactory one there was no stifling of a criminal complaint vitiating this award The essential element in stifling a prosecution is the tampering with the administration of justice by a private individual 91 I C 624 1926 Cal 519

——an agreement to stifle a prosecution is distinguishable from the lawful compounding of a compoundable offence Compromise of non-compoundable offence is illegal and opposed to public policy. 29 C. W. N 855 : 42 C L J. 90 53 C 51 . 89 I. C 200 . 1926 Cal 59

Wagering contract

——contracts by way of wagering and gaming are void but not illegal. 27 C W N 422 1923 Cal 445

——to constitute a gaming
be a *definite agreement*, the
demanded without a breach of
parties. 45 M. L. J, 716 33 M

——a suit for damages for breach of a wagering contract cannot be brought 86 I C 299 1925 Mad 971 49 M L J 300

——neither in India nor in England has the legislation gone so far as to enact in express terms that betting transactions are

Wagering contract—*contd.*

illegal but it regards it as undesirable in the public interest that any assistance should be afforded by courts of law to enforce obligations created by betting or wagering transactions. 52 C 677 · 1925 Cal. 1007: 90 I. C. 59.

——to constitute a contract by way of wager within the meaning of s 30 Contract Act, a common intention to wager is essential and speculation does not necessarily involve a contract by way of wager. 33 C L J. 533, 22 C. W N. 625, 108 I C 58: 1928 Lah 420

——the mere fact that a contract for sale and purchase of goods is of a highly speculative character cannot alone vitiate a transaction as a wagering contract. To produce that result there must be proof that the contract was entered into upon the terms that performance of the contract should not be demanded but that differences only should become payable. 51 M. 96: 47 C. L. J. 144: 26 A L. J. 484 30 Bom. L R. 238. 107 I. C. 29: 1928 P. C 30

[illegible] of the parties [illegible] nent but only [illegible] act 93 I. C

[illegible] 90 I. C. 4[illegible]

——*chit* fund with arrangement for payment of price every month by casting lots was held to be illegal as lottery. 85 I. C. 1016 1925 Mad. 281: 47 M. L. J 876, 49 M. L. J. 791: 1925 M. W. N. 857 *Overruled* by 50 M. 696: 1927 Mad. 583: 1927 M. W. N 545. 103 I. C 318 F. B.

——where both parties are members of Stock Exchange, onus of proving transaction to be wagering one is on deft., 1925 Mad. 330. 85 I. C. 410

——Teji Mandi contract are not presumed to be wagering contracts. 1926 M. W. N. 830: 51 M. L. J. 809: 98 I. C 333: 29 Bom L. R 1376: 1926 P. C. 119, 51 B 1: 44 C. L. J. 509 P. C.

——contract to supply goods at a future date at fixed prices, though speculative, is not a wager and a suit for damages for breach would be maintainable 1923 A. 273: 21 A L. J 153: L. R. 4 A. 119

——if there is nothing to show that according to the contract as between the principal and agent either party stood to win from or lose to the other according to the fluctuation of price or any other event the contract between the principal and agent is not necessarily a wagering. 25 A. L J. 736: 103 I. C. 218, 1927 All. 238 *Ref.*

—— s. 30 does not prevent a principal from recovering money from the agent deposited as security in connection with the wager. 49 A. 438· 100 I. C. 774 · 1927 All. 238: 25 A. L. J 213, 25 A. 639. *Rel on.* 18 A. L. J. 513, *Disapproved*, 9 B. 358. *Dist.*

——similarly the agent can recover from the principal any money that he had to pay to the vendors in consequence of a breach of the contract committed by the principal in not delivering the goods on the due date. 102 I. C. 605: 25 A. L. J. 693, 1926 P. C. 119, 1923 All. 585, 1926 All. 238.

Promise to pay time barred debts is legal.

[illegible]

——s. 25 (3) Contract Act covers the case of a judgment debt. 50 C 974.

— [illegible] Lab. 481 : 7 [illegible]

— [illegible] A. 12 : 75 [illegible]

——where in consideration of non-execution of a decree the Jt. Dr. promises to pay the decretal amount with interest by a certain time it is enforcible as valid contract even if the original decree is barred 50 Cal 974

——but a *hatchitta* which was merely acknowledgment of a debt does not come within s 25 (2). There must be a promise to pay the debt 67 I. C. 298.

Forbearance to sue or not to prosecute a criminal case.

——forbearance to sue is good consideration of a contract. 44 A 424 20 A. L. J 285 · 1922 All. 260 : 67 I. C 4

——forbearance to sue and forbearance to take definite steps to enforce legal rights have always been held to be adequate consideration to support an agreement. 47 A 637 : 23 A L J. 561 88 I C. 768 : 1925 All 503 **F. B.**, 44 A. 424 : 67 I C. 4 . 1922 All 260 : 20 A. L. J. 285.

——and agreement not to proceed with a compoundable criminal case is valid, 3 C. W. N 5, 29 C. W. N 855 · 42 C. L. J. 90

——where the consideration in a bond is an agreement to abandon the prosecution in a non-compoundable case the bond is void even if part of the consideration is legal 1923 Cal. 292, 1923 Lah. 689 · 73 I C 668, 74 I. C 843

Sale of office of shebaitship &c.

——sale of an office of shebait is invalid 4 M. 391, 6 M. 76, 23 M. 271, 1 M 235, **P. C.**, so also the sale of the office of *mutwalli* of a *wakf*, 8 C. 732.

——but alienation made in favour of a member of the founder's family standing in the line of succession is valid. 6 B. 298, 23 C. 645.

(3) APPROPRIATION OF PAYMENTS (SS 59 AND 60.)

Subheadings of Notes.

- (A) **Appropriation as Interest**
- (B) **Appropriation in case of several debts.**
- (C) **Appropriation of rents and revenues**
- (D) **Appropriation towards time barred debts.**
- (E) **Appropriation when can be altered**

(A) Appropriation as Interest.

——the creditor to whom principal and interest are owed, is not *entitled to* appropriate against the interest any sum which the debtor pays stipulating that it is to be *appropriated against* the principal. If the debtor on paying a sum stipulates that it should go in discharge of principal, the creditor can refuse to accept it on that *condition*, but if he accepts it he is bound by the stipulation. 48 C. 839 · 26 C. W. N 153 . 30 M. L. T. 39 P. C.

——where the debtor makes a payment to the creditor without appropriating the payment towards the principal, the creditor can appropriate it towards interest. 50 M. 614 : 1927 Mad. 620 : 103 I. C. 394 ; 38 M. L. T. 323 : 1928 M. W. N. 202.

——where the money paid is not appropriated on either side the payment must first be applied in payment of interest and then in payment of the *principal*. 44 M. 570 : 26 C. W. N. 33 : 23 Bom L. R. 644 : 40 M L. J. 549 ; 33 C. L. J. 447 P. C.

——where the creditor has not appropriated in taking accounts a debt which did not carry interest should rank last. 17 C. W. N. 25 . 18 I C. 535 P. C.

——debtor is to satisfy whether the payment was made *for* principal or interest, 8 B L. R. 110 p. 112.

——when a sum is realised on account of a decree that amount is to be deducted from the interest first. 22. W. R 525, 1922 P. 369 ; 67 I C. 606 1922 Pat 66, 21 C. W N 1055 : 41 I. C. 348

——it is well settled *practice to appropriate payments* first to the interest then to the principal, 28 A. 25 24 P. R. 1915 · 29 I. C. 346, 21 C. W N. 1055 : 41 I. C 348.

——*circumstances may be proved to show the intention*, 13 C. L. J. 139.

——where payments are made towards a debt, but there is nothing to shew whether they had been made in respect of principal or interest the court is entitled to find out on the evidence for what *purpose the payments* were made. 44 C. 667.

interest if not otherwise
5 : 41 I. C 348, 33 C. L. J.
36 M. L. J. 296 · 58 I C
777.

not expressly deal with interest, but the principal underlying these sections can well apply to interest as well, 1922 P. 66 . 1922 P. 369 : 67 I. C. 606.

any indefinite payment
in making a payment
principal, 1921 M. W N.
465, 1922 Pat. 66 : 1922

——where the stipulation is to pay interest in default of payment of instalment, acceptance of an overdue instalment amounts to waiver of the right to charge interest *provided* the payment is made in discharge of the specific instalment in arrears and not in reduction of the debt generally. 43 A. 38 : 18 A. L. J. 774.

(A) Appropriation as interest—*contd.*

——where payments are made in liquidation of a debt and the amount due on account of interest largely exceeds the amount paid, the creditor may properly appropriate such payments towards the interest. 23 C W. N. 534 : 29 C. L J. 305 . 51 I. C. 88.

——rent does not necessarily include interest, so a sum paid as rent cannot be appropriated as interest, 11 C. W. N. 110 : 5 C L. J 69, 25 C 571, 575.

(B) Appropriation in case of several debts. Ss 59, 60.

——the rule in Clayton's case which is embodied in s 59 is that if a
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applicable where there are several instalments of the same debt. 104 I C 673 . 29 Bom L R. 950 : 1927 Bom 479

——appropriation must be made at the time of payment 37 A 649 and to the special debt specified by the debtor 59 I. C 121.

——creditor's right of appropriation under s 60 in the absence of a direction by the debtor lasts until he intimates the appropriation to the debtor 5 Pat, 326 · 94 I C 273 . 7 Pat. L. T 577 1926 Pat 330.

——but the intimation need not be made along with the payment. The words " with an intimation in" s. 59 are not inconsistent with an intimation after a reasonable interval * * * *The essence of an appropriation is that it should be known to both parties* and hence an uncommunicated appropriation is not complete as between them Where the first communication of appropriation was made by the debtor three or four months after the payment and the creditor did not communicate his own appropriation till more than a year after payment, the latter's concealed appropriation is ineffective as against the intimation of the debtor 50 M L J. 242 : 94 I C 384 1926 Mad 792

——but the Punjab H. C expressed a contrary view and held that the debtor's intimation must synchronise with the payment but the creditor is entitled to make the appropriation at all times up to the time of the trial 92 I. C. 947 1926 Lah 183 27 Punj L R 9 · 7 Lah 17

——if the debtor who has the first right does not appropriate *the payments made by him, the creditor may appropriate to any* particular debt or to any particular portion of a running account. But if neither party does anything the court can declare appropriation to debts in order of time. 1 Pat L J 474 : 35 I. C. 375.

(B) Appropriation in case of several debts. Ss. 59 60—contd.

——where debtor omits to indicate and there are no circumstances indicating to which of the several debts a payment is to be applied, the creditor may apply it to any debt actually due 26 C. 39; 25 I A. 179: 2 C. W. N 633. *P. C.*, 1 P. L. J 474: 35 I. C 375: 82 P R. 1914: 25 I. C. 560.

——where the debtor makes a payment without appropriating it towards principal it is open to the creditor to appropriate it towards interest. 50 M. 614: 52 M. L. J. 612: 1927 Mad. 619: 103 I. C. 394

——the rule in Clayton's case embodied in s. 59 is that "if a man owes another two debts upon two distinct causes and pays him a sum of money the payer has a right to say to which account the money so paid is to be appropriated. 104 I. C. 673: 1927 Bom 479: 29 Bom. L. R 95

——where there are two bills and the amount paid by the debtor does not even cover the first bill, nevertheless the creditor is in law entitled to credit payment to both bills so as to save, if necessary, limitation in respect of each unless an appropriation has been made by the person making the payment. 29 C. W. N. 496 : 87 I. C. 598 1925 Cal. 937

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the cred
A. 649
L R. 95(

——appropriation by the plff. towards the single money decree and not to the mortgage debt is right and cannot be questioned 37 M L. J. 367 : 52 I C 950

——a surety has no right to control the appropriation by customer or banker of moneys paid in by the principal debtor in the absence of special agreement. 20 C. W. N. 562: 23 C. L. J. 256 33 I. C. 34, 25 M L T 257: 49 I. C. 273: 1919 M. W. N. 23

——in order to invoke the aid of s. 60 the creditor must establish that there was a ' lawful debt" actually due and payable to him from the debtor for the satisfaction of which he has applied the sum. 1928 Cal. 229, 37 M L. J. 397. *Fol.*

——where a decree is reversed by the Appellate Court but no provision is made as to the costs of the deft, such costs do not constitute a "lawful debt." 104 I. C. 799 : 1927 Cal. 906.

(C) Appropriation of rents and revenues

——landlord is to prove the existence of arrears towards which he credited the payment 1922 P. 446.

——ss 59 and 60 of the Contract Act applies to transactions relating to realisation of land-revenue i.e the Collector cannot credit the amount for one *kist* whereas it was paid for another *kist*, 35 C. 636 : 12 C. W. N. 646 : 8 C. L. J. 41, 33 C. 1193 . 10 C W. 948, *Diss.*

(C) Appropriation of rents and revenues—*contd.*

——s 59 of the contract Act applies to payment of Govt. revenue. When there is a direction for payment to one kist the Collector cannot appropriate the payment to another kist 30 C W. N. 618 : 43. C L J. 468, 1926 Cal. 866 : 53 C. 886.

(D) Appropriation towards time-barred debts

——if there are several debts and payment is made without specification, special circumstances may be looked to, to determine whether the payment of interest was made on account of all or any of the debts then due. 13 C L. J. 139: when there are several debts, the inference is that the payment should be attributed to those not barred. 13 C L J. 139 at p. 145.

——the creditor is entitled to appropriate payment made by his debtor to the discharge of prior dues then outstanding and not barred by limitation. 19 I. C. 6 (C)

——but it has been held that payments of some of the debtors jointly and severally liable for the debt can be appropriated in order of time towards barred items even though all debtors did concur in making payments. 41 I. C. 421 (c)

——so also where payment is made without indicating towards what loan the creditor is to appropriate it, he can appropriate it to the earliest loan even if it is time-barred 90 I C 239 · 1926 Nag 75

(E) Appropriatian when can be altered.

——when money is paid to satisfy the kist and received and acknowledged on that account it is not in the power of one of the parties to alter the appropriation 38 C 537 · 15 C W. N 443 : 13 C. L J. 525 : 9 M. L. J 446, 8 A L J. 480 P C.

(4) CONTRACT.

(A) Minority.
(B) Free consent
(C) Coercion.
(D) Lunancy and unsoundness of mind.
(E) Undue influence.
(F) Fraud.
(G) Misrepresentation.
(H) Mistake of fact.
(I) Construction of Contract
(J) Substituted Contract
(K) Breach of contract.
(L) Performance of Contract
(M) Stranger to a contract can claim benefit thereunder.

(A) Minority.

——where under a contract the minor is to perform something on his part, the contract is void, otherwise not, the P. C. ruling in 30 C. 539 : 7 C. W. N 441 holds only that a mortgage by a minor is void. 20 C. W N. 120 n (33 C. 23, 33 M. 312, 33 A. 957). *Dist*

(A) Minority—*contd.*

——a sale in favour of minor is void. 33 M. 312, 30 C
P. C. *Fol.*

——wherever transaction by a minor has been held to b
the essential fact which rendered it void was that some agre
by the minor was an essential part of the contract 37 M. 390,
minor can enforce a contract in his favour which imposes no
gation on him. 99 I. C 318 : 1927 Lah. 24, 8 Lah. L J. 539.

——mortgage executed in favour of a minor is not void
the minor had nothing to perform. 22 C. W. N. 130, (39 C
16 C. W. N. 74, **P. C.** 30 C 539 · 7 C. W. N. 441, **P. C.**) *D*
I C. 543

——all transactions entered into by the minor are void,
cannot execute a fresh bond on attaining majority in conside
of a bond executed by him during his minority. 49 A 137 : 19
242 100 I C. 748 25 A L. J 132 (16 M. L. J. 422, 37 M. 38) *f*
11 C W. N 135 *not fol*, 16 I. A. 221 *Dist.*

——a minor is not estopped from repudiating a contrac
has not exercised fraud but only misrepresentation that he
juris 20 C W. N 418 (26 C. 381 ; 3 C W. N. 463, 25 C. 616 : 2
N. 330) *Fol* 15 C. W N. 339, *Dist.* But in case of fraudulen
representation minority cannot be pleaded by way of defen
C W N. 18, but no personal decree against the minor can be p
24 C 265

——a minor can sue on a promissory note executed in his f
2 Bur L. J 227.

——the power to set aside sale deed executed by a minor
not be exercised by the court in favour of a unscrupulous
45 A. 644 21 A. L J, 596

——a minor cannot be allowed to profit by the deceitful
his agent. 21 C W. N. 473, **P. C.**

——a minor on whose behalf an ancestral trade is carri
is not personally liable for the debts incurred in such busines
C W. N. 488.

——if contract ... behalf of a min
his guardian, and
cifically enforced.
for the benefit of
allowed 10 C W.
11 B 551

——when there are two promissors one cannot take the pl
minority of the other in a claim against himself. 20 C. W. N
24 C L. J 74 **P. C.** 34 M 314, *Fol.*

——sec. 68 (claim for necessaries supplied to person inca
of contracting) applies to minors as well as to persons of uns
mind 30 C. 539 ; 30 I. A 114 **P. C.**

——costs incurred in successfully defending a suit on beha
a minor in which his property was in jeopardy or costs incurr
defending him in prosecution for decoity, are necessaries w
sec. 68. 7 C. 140 *contra* 17 M. 257, 22 M. 314

(4) (B) Free consent

——when a person entrusts to his own man of business a blank paper duly stamped as a bond and signed and sealed by himself in order that an instrument may be drawn up and money raised, if it is duly drawn up and money obtained from a person acting *bonafide*, it is binding, 5 C 39.

——where document was signed only on the first page and was not signed on other pages as the executant discovered that it was not drawn up according to contract the document was a nullity. 30 C. 433.

——if a person of competent capacity signs a deed it is to be presumed that he understood the instrument to which he has fixed his name. The principles of *pardanashin* lady does not apply to a man because he is old and not in robust health. 10 O L J. 86. 74 I. C. 517.

——in a marriage of a girl verging majority, her consent is necessary, 17 C. W N. 429.

As to pardanashin lady see "pardanashin lady"

(4) (C) Coercion.

——to constitute co-ercion under s. 15 there must be the committing or threatening to commit any act forbidden by the Penal Code or the unlawful detianing or threat to detain any property to the prejudice of another 1927 M W. N. 761.

——where the principal fearing that the stoppage of the business was likely to cause heavy loss executed a release deed as required by the agent who threatend him, the release was obtained under co-ercion. 50 M. 785 105 I C. 5: 1927 Mad 852: 39 M. L T. 240.

——there can be no legal plea of pressure which will not include coercion 25 B 10.

——the mere fact that an agreement to refer to arbitration was entered into during the pendency and in fear of criminal proceeding, is not coercion 22 A 224.

——bond executed by J. Dr in duress, for his release from custody in execution of a decree of court without jurisdiction, is not enforcible. 4 A. 352

——when property attached belongs to third person he may deposit under protest and then sue, such payment is made under coercion 17 C W. N 541: 17 C. L J 478 P C.

——specific allegation as regards coercion must be proved, suspicion will not suffice 29 B 149

——s 72 Contract Act, in laying down that a person to whom money has been paid by mistake or under co-ercion must repay it implies that the money was not really due to the payee. 43 A. 272: 19 A. L J. 41 60 I C 881

——the word "co ercion" referred to in s. 72 is used in its general and ordinary senses, its meaning not being controlled by the definition in s. 15, 65 I. C. 517 (C), 40 C. 598 P. C. *Rel.*

(4) (D) Lunacy and unsoundness of mind.

——contract by lunatic is void and he cannot be compelled to refund the consideration money. 20 C. W. N. 59 n. 30 C 539 : 7 C. W. N 441 : 5 Bom. L. R. 421. **P. C.** *Fol.*

——mere weakness of [illegible]

total [illegible]

judgme[illegible]

——[illegible]

sufficie[illegible]

——in order to avoid a contract on the ground of one of the parties being of unsound mind the question to be decided is whether that person was of unsound mind when the contract was made. 104 I C 327 : 1927 Cal. 889 : 55 C. 285.

——unsoundness of mind depends largely upon the inference to be drawn from the evidence. 104 I C. 527 : 1927 Cal. 889 : 55 C 285.

(4) (E). Undue influence.

——where a party to a contract is weak but has ample property and independent advice and the other party does not take any undue advantage of his weakness, the court will not exercise its equitable jurisdiction to protect him. 55 C. 285 : 104 I. C 527 : 1927 Cal 889

——as to what constitutes undue influence, a useful guide is afforded by sec. 48 of the [illegible]

——[illegible]

relative [illegible]

——[illegible]

lieu of [illegible] which carried a very high rate of interest. [illegible] A. 666 : 24 A. L. J 822 : 96 I. C. 684

——the mere fact that a bargain appears to be unconscionable does not, under sec 16 C Act raise the presumption of undue influence. 28 C. W N 834 **P C.**, 100 I. C. 679 : 1927 All 315

——the relief given by a Court of Equity is a secondary consequence of the [illegible] s in a relationship [illegible] d to exist, cannot [illegible] intention to make [illegible] tionship itself does not necessarily preclude the making of the gift but the burden lies on the donee to show that there was no such influence as to the source of the gift. 103 I. C. 239 : 1927 P. C. 145 : 39 M. L. T 105. **P. C.**

——but the presumption of undue influence does not apply to a gift by a mother to her daughter. 33 C. 773 : 10 C. W. N. 573 3 C. L. J. 484. **P. C.**

——before the creditor can be called upon to prove that the transaction was not unconscionable and was not procured by undue influence, two elements must be established, first that the creditor was in a position to dominate the will of the borrower and secondly that the transaction is on the face of it unconscionable 48 A. 666 : 24 A. L. J. 822 : 96 I. C. 684, 3 Pat. 279. **P. C.** 16 A. L. J. 935, **P. C.**, *Ref.*

(4) (E) Undue Influence—*contd*

——the mere fact that the borrower is in need of money does not put a creditor in a position to dominate the will of the borrower within s. 16 31 C W N 693 8 Pat L T 480 101 I. C. 29: 1927 P. C 84: 25 A. L J 314 P. C

——urgent need of money does not itself place the lender in a position to dominate [illegible]
C 150: 34 I. C. 9 P. C

——but where the [illegible]
village and contracte[illegible]
unconscionable, undu[illegible]
102 I. C. 707

——*undue influence and fraud must be pleaded in the pleadings.* 2 Pat. L T. 111 5 Pat L J 744 60 I C 282

——it is against public policy to induce public officers for money or other valuable consideration to use their influence to procure a benefit 48 C. 427: 32 C L J. 168 25 C. W N 297.

——there is no presumption that landlord is in a position to dominate the will of the tenant; full particulars of undue influence must be given in the pleading 8 C. L J 135.

——a deft is not precluded, by the law of limitation, to resist a claim by way of defence on the ground of fraud or undue influence. 28 B. 639, 30 M 169.

——under the Contract Act, coercion, undue influence &c are separate and separable though they may overlap 19 C W. N. 729. P. C.

——undue influence and incapacity to enter into contract are totally different things 104 I. C. 527 1927 Cal 889 55 C. 285, 22 C. 324 P C. *Fol*

——*pardanashin* lady or a married woman acting under the undue influence of husband vitiates the transaction. 18 C. W. N 1133, 17 C W. N 541. P C., 6 C W N. 809 P. C., see other cases under '*pardanashin lady*'

——to bring a case within the first clause of sec 16, it is necessary to show that an unfair advantage has been obtained over [illegible] b-sec. (3) it must be proved [illegible] the mere fact that one of [illegible] e the will of the other will [illegible]

——where a contract is challenged as providing a high rate of interest it is necessary to prove that one party had undue advantage over the other in the settlement of the rate 41 C. L. J. 453: 1925 Cal 722, 90 I. C 727.

——it is not enough to prove undue influence that a vendor of property was in a distressed state of mind and anxious to dispose of his property at the time of sale 72 I C 1032, 68 I C 372.

[illegible] necessary
and [illegible] 1928
M. [illegible] J. 334:
9 I [illegible]

(4) (E) Undue Influence—*contd.*

——a stipulation to pay compound interest at 24 p c per annum with 6 monthly rest is not unconscionable one in the absence of evidence of any domination of the will of the debtor by the creditor. 50 M. 614: 103 I C. 394: 1927 Mad. 620.

——a stanger to a contract (here a mortgage bond) cannot avoid it on the ground of undue influence. 40 C. L. J 67.

——a deed of gift executed by an old-illiterate Mahamedan lady in favour of her confidential managing agent was held to be void 18 C. 545. P. C.

——an attorney cannot partly act as attorney and partly as agent of the same client and so he is not entitled to donation for services rendered by him beyond his professional remuneration 23 C. 595 6 C W N 816, 12 C W N. 1102.

——when a person standing in fiduciary relation purchases property by means of mixed fund belonging to both, the other person is entitled to a charge on the property purchased for the amount of his money. 40 C L J 393.

——the execution of a document is induced by undue influence, in fact, in a case where the mind of the person who executes the document is not free and unfettered, and where the execution of the document is proved to have been induced by some person possessing a personal ascendancy over the will of the person who executed the document, if one person, having a dominion over another person's will, induces that other person to execute a document, whether it be in his favour or in favour of the third person, then the doctrine of undue Influence applies, and the court will not allow that document to stand 40 C. L J. 393

——a contract will be set aside if it is shown that the consideration was so inadequate as to lead to the inference of fraud or undue influence, but the inadequacy of consideration must be apparent on the face of the transaction and must not be left to be spelled out by dexterous argument as to value. 1926 Pat 539; 95 I C. 468

(4) (F) Fraud,

——in a suit for cancellation of document on the ground of fraud it must be distinctly alleged and proved, 20 C. W. N. 638, 17 C. W. N. 524, 24 C L. J 335

——fraud may be proved by theorem and inferences from facts proved. 18 C. W N. 185

——inadequate consideration may give rise to the inference of fraud or undue influence. 96 I C 468. 1926 Pat 539.

——if a contract is obtained by fraud or cheating it is voidable at the instance of the party defrauded or cheated, but if the performance of the contract is obtained by fraud or cheating the contract cannot be avoided 23 Bom. L. R. 1144.

... made which
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(4) (G) Misrepresentation

——where a clause of re entry contained in a Kabulyat was represented by Zemindar's agent as a mere penalty clause, the contract was vitiated by misrepresentation. 17 C. 291 : 16 I. A. 223, P C.

——a stranger cannot impugn a registered document on the ground of misrepresentation, fraud or coercion 36 B. 47.

——where the misrepresentation or fraud is of such a nature that it could not have affected the consent of the party, the contract is avoidable and cannot be set aside 1921 M W. N 340 13 L. W. 525 · 62 I. C 764.

(4) (H) Mistake of fact

——deft having no title must refund the money advanced. 21 C W. N 404 : 40 B. 639

——in case of mutual mistake of fact the agreement is void. 30 C 615 · 1923 Cal 641 : 74 I. C. 996

——money paid under a mistake of fact on the part of both the parties is recoverable as money had and received. 1922 Cal. I, 110 I C 299 1928 P C. 261 26 A. L. J 753 · 1928 All 500. 42 M 661 *Ref.* 22 A L J 558 *not fol.*

——the words "latent defect" mean a defect which is not obvious to the eye and is not apparently noticeable. S 116 Contract Act applies to a sale by sample. 43 C L J 126,

(4) (I) Construction of contract

——to convert proposal into promise the acceptance must be unqualified and without condition 1922 Pat 24

——the court is not entitled to see what the parties might have intended. 85 I C 99 1925 All 97

——it is not proper that a contract in one case should be interpreted in the view taken with regard to another contract which is differently worded and is under consideration in another case, 42 C L J. 172 1925 Cal 1248

——where time is not the essence of the contract. 1925 Cal 324

(4) (J) Substituted Contract. ss 62, 63

——whether the parties agreed to substitute one contract for the other under s 62 Contract Act is a question of fact and intention Where a mortgage was executed for the purpose of securing the amount lent on a hatchitta, held, that the original debt had not become merged in the mortgage deed 30 C W. N. 58, 31 C W N 703 1927 Cal 538 102 I. C 871.

——the contention that the promissee mentioned in s 63 can only do the acts he is by that section empowered to do if there be an agreement as defiend by (2) (e), amongst the parties to that effect, cannot be accepted The language of the section does not convey any such agreement and cannot be enlarged by any implication of English doctrines 32 C W N 738 47 C. L J 503 : 26 A L. J. 603 · 29 Punj L. R 333 · 108 I C 673 . 30 Bom L. R. 837 : 1928 P. C. 97 : 9 Lah 510 P C., 28 Bom 66, *overruled*

(4) (J) Substituted Contract, ss. 62, 63—*contd.*

——s. 63 enables a deft. who has in his possession a letter extending the period of credit to plead that although the letter is not supported by any consideration it is nevertheless a binding extension of time and prevents any action being taken within the period of credit. 49 A. 599 : 1927 All. 451 : 25 A. L. J. 385 : 101 I.C. 643, (19 M. 398, 45 M. 398, 45 M. 180) *Ref.*

(4) (K) Breach of contract.

——the measure of damages in case of breach is the difference between the contract price and the higher price of the subject matter on the last day of performance. 30 C. 477 : 7 C. W. N. 411 : 1 C. 264.

——where lessee is to pay the rent of the superior landlord under the contract and makes default and the property is sold in execution of decree, the lessee is not liable for the loss of the property. 35 C 683 . 12 C. W N. 628.

——a tailor to make large profits on the occasion of a festival delivers a sewing machine and cloth bundles to a Railway Company *to be conveyed and through the fault of the company's servant they* are not timely delivered, the company, having no notice of the special purpose, was not liable for compensation 21 M. 172

——the seller of goods cannot sue the buyer who has failed to take delivery, for the price of the goods : his remedy is to have the goods sold first and then to seek to recover the loss, if any. *10 Bom* L. R. 1113.

——the legislature has not prescribed a different measure of damages in the case of contracts dealing with lands and with *commodities* 21 B. 175, 185

——a plff. who brings a suit for damages for breach of contract is absolved from showing that he was ready and willing to perform his part of the contract when the deft has repudiated the contract before suit. 88 I. C 737.

——under a C. I. F. contract it is the duty of the vendor to tender the document ; in case of vendor's failure to tender the document the vendee is entitled to compensation. 41 C L J 570 1925 Cal. 941 : 89 I. C. 836

——*by mere extension of time of performance no new contract* is made, but where new term is introduced subsequently for the inspection of goods and after the time of delivery has expired deft. takes delivery of goods which are much less in quantity than the original contract, it is a new contract and nothing under the *old contract is enforcible. 17 C. W. N 1098.*

——there may be contract by one executing document and the other accepting it. 20 C. W. N. 408, 35 C. 653 : 12 C. W N. 628 : 6 C. 94, 4 C. L. J. 510.

——a contract to give an immoveable property may be made by letter and conduct which is enforcible. 20 C. W. N. *1054 :* 19 C. W. N. 250 **P. C.**

(4) (K) Breach of contract—*contd.*

——in case of an anticipatory breach of a contract involving deliveries in several months, the true measure of damages is the sum-total of the differences between the market rates at the appointed times for delivery and the contract price. 20 C W. N. 240.

——damages of breach of contract between seller and buyer, how to be ascertained. 23 C. L J. 137 **P. C.**

——plff. is not entitled to damages if he could avoid the loss. 19 C. W. N 1311.

——the vendor is to make out marketable title, failing that, is not entitled to refuse execution of the conveyance on the ground that the purchaser did not complete the transaction as stipulated 27 C. W. N. 77 31 M. L T. 159 : 1922 **P. C.** 339.

——even when there is no clause in the contract as to the forfeiture of deposit, if the purchaser repudiates the contract he cannot get back the money when the contract goes off through his default. 1922 Cal 104 : 67 I C. 714 . 24 Cal. 897, *Ref.*

——if the purchaser by his default in completion after he has [illegible]

vendor s title does not confer on the purchaser the right to recover the deposit. 1926 Cal. 339.

(4) (L) Performance of Contract.

Terms of the contract must be settled

——unless all the terms are settled it cannot be specifically enforced, but when terms are settled specific performance of it may be enforced. 20 C. W N 66.

——where the contract was to execute a kobala containing "necessary stipulations" held that the expression evidently meant the stipulation for sale implied under the law and contained in the T. P. Act and that there was no vagueness or indefiniteness in the contract. 1927 Cal 889 104 I C. 527 (13 W. R 979 and 20 C. W. N 66), *Dist.* 1923 P. C 47 *Rel. on*

——payment of earnest money is itself proof of concluded contract 20 C W. N. 66.

——rate of payment for work done under a contract should be according to the contract, no extrinsic evidence is to be allowed. 23 C L. J 177

——terms should be ascertained by oral evidence 23 C L. J 515.

Contingent contract.

——In case of contingent contract, it cannot be specifically enforced unless the contingency happens. 20 C W N. 929, 12 C. 152 : 14 C. W. N. 151 : 11 C. L. J. 346.

——a contingent contract to bequeath a villiage may be specifically enforced. 24 C. L. J 279 **P. C.**

(4) (L) Performance of Contract—*contd.*

Impossible to perform s. 56.

——mere difficulty in the performance of a contract or the need to pay exorbitant prices in order to perform it does not amount to impossibility within s 56 Contract Act. 62 I. C. 815.

——impossibility includes physical or legal impossibility but not economic unprofitableness 63 I. C. 267.

——where goods could not be delivered owing to the Govt. having requisitioned all the ships available, the contract became impossible of performance and there was no liability for damages 105 I. C. 319.

——a contract may be cancelled for subsequent impossibility to perform in part 7 C. 474 : 8 C L R. 501.

——in a suit for damages for breach of contract against a Hindu father to give his minor daughter in marriage, performance of the contract does not become impossible simply because the girl declares her unwillingness to marry. 21 B. 23

——the real question that must be considered when it has to be determined whether s 56 is applicable or not in any suit except where the contract is sought to be specifically enforced, is not whether the contract was or became void but whether the promisor has to make compensation for nonperformance. 105 I. C. 319.

Pressure of work or avoidable accident.

——when a carrier receives goods under a contract of carriage he cannot shake off his statutory liability under s. 151, Contract Act by pleading pressure of work or avoidable accidents 1925 Cal. 737 : 85 I C. 786

Assignment of contractual right.

——the interest of a buyer of goods in a contract for forward delivery is an actionable claim within the meaning of the Tr. P. Act and can be assigned as such. 34 C. 289, 9 Bom. L. R. 839.

——when a contract is based upon personal consideration it cannot be assigned without the consent of other party. 17 M. 166. So also an executory contract for the future delivery of goods cannot be assigned. 16 B. 441. 5 Bom. L. R. 373.

——but contract containing certain buyer's option as to quality does not preclude the assignment of contract. 34 C. 289.

When performance can be enforced and when not.

——a vendor may enforce his right under a contract not to castrate the calf sold. 24 I. C 81.

——to enable a party to be relieved from the future performance of a contract by the conduct of the other, the conduct must amount to renunciation or absolute refusal to perform the contract such as would amount to rescission if he had the power to rescind. 83 I. C. 260 : 1924 Cal. 427.

——a contract for sale for the consideration that the purchaser would hush up a departmental enquiry cannot be specifically enforced on equitable grounds though not illegal. 18 C. W. N. 649.

(4) (L) Performance of Contract—*contd.*

——a person who contracts for an undisclosed principal where no such principal exists, cannot enforce performance. 18 C W N. 263.

——contract by way of wagering and gaming are void but not illegal. 27 C. W N 442 · 1923 Cal 445

——if part of the consideration is illegal it taints the whole contract. 20 C. W. N. 767.

Performance by third person

——when promisee accepts performance from third person he cannot enforce it against promisor 25 C L J 316 39 A 178, such acceptance of performance by stranger produces the same result of discharging the promisor although the latter has neither authorised nor ratified the act of the third party 1928 Mad 974.

Manner of performance

——it is not sufficient performance of contract of sale of immovable property for the vendor merely to execute a conveyance, as a conveyance is inoperative in law until it is registered. 95 I. C 187 : 7 Pat. L T. 730 1226 Pat 89.

——where a contract stipulated a shipment "per steamers" in certain months, promisor could exercise an option of shipping them in reasonable instalments in any number of steamers. 9 C. 473

Time of performance s 55

——where time was fixed in the *bainapatra* for the performance of the contract, in the absence of an express stipulation to that effect and in the absence of circumstances implying such an intention the time cannot be regarded as the essence of the contract but it may be made so by either party giving proper notice to the other party requiring him to perform within a reasonable time provided there has not been any default or unnecessary delay. 1926 Cal. 339.

——when time is the essence of the contract vendor may rescind it if vendee takes part delivery on part-payment 6 C 64; 6 C. L R. 582.

——where time for performance is fixed but time is not made the essence of contract either party can give notice to the other fixing reasonable period for performance 48 B. 368. 26 Bom. L. R. 105; 1924 Bom 357.

——date of performance being Sunday the contract may be performed on the next day according to trade usage. 26 C. W. N. 354.

——where the stipulation is to pay the rest within certain time, time is not the essence of the contract Whether time is the essence of the contract equity will decide that and not the terms of the contract. 23 C L J. 358 · 20 C. W N. 744, P. C

——promisee cannot extend the time of performance without the consent of the promissor. 37 M 412.

(4) (L) Performance of Contract—*contd*

——in the absence of an express stipulation to the effect and in the absence of circumstances *employing such* an intention, the date cannot be regarded as the essence of the contract and although time is not originally the essence of the contract it may be made *so by either* party giving proper notice to the other to complete within reasonable time provided that at *the time of* notice there has been some default or unreasonable delay by that other 1925 Cal. 369.

——in a contract to supply wagons the price was to be paid in 3 instalments, the last being on delivery. There was default in *payment* of the second instalment, still a number of wagons were completed and delivered, held such *delivery* showed that time was not the essence of the contract. 1924 Cal 427 ; 83 I C 260.

——when the vendor contracts to show the title deed within certain time and does *not do* that, he *does not fulfil* his part of the contract 19 C. W. N 89.

——in suits for specific performance of contract relating to *immoveable* property the rule is that time is not the essence of the contract if there is no *express stipulation.* 50 C 700 ; 27 C. W. N 693, 40 M L J. 13 ; 29 M L. T. 67 . 61 I. C. 457, 33 C. L. J. 244, 1923 Sind 50, 25 Bom L. R 1141, 25 Bom. L. R. 1037, 98 I. C 890

——in an action for specific performance instituted more than 9 years *after* the contract, which could have been within 12 months of its execution plff *must clearly establish some reasons* which throw upon the deft the entire blame *for* the delay or must show ... a short time before ... N. 396 : 48 I. A. 214.

... to laches, waiver ... sidered *10 C. 1061*, ... I C 852 and the court should see whether time was the essence of the contract 11 C W. N 946, 6 C. L. J. 682 ; 17 M. L J 454 · 4 A L. J. 740 P C , 20 C. W. N. 744 : 23 C. L. J. 358 ; 40 B 219, P. C, 30 C. 265 ; 7 C. W. N. 249, 85 I. C. 521 : 48 M L. J 150 · 1925 Mad 211, 46 M. 148 ; 44 M. L J. 107 : 72 I C. 868.

——when delay is a ground for refusing specific performance. 48 M. 148 ; 44 M L. J. 107 1923 Mad 284.

——mere non-payment or delay in payment for goods delivered does not amount to refusal or entitle the other party to rescind. 53 C 477 ; 3 C. L. J. 249.

——burden of cause of *delay in performance* is on the *deft.* 20 C. W. N. 159

——the terms " during August, September " in an agreement ... period of two separate ... ins whether it is to be ... C. W. N. 431. ... ate is not a valid tender ... 31 C. 183

(4) (L) Performance of Contract—*contd.*

Place of performance. s. 49.

——where there is no stipulation as to place of payment, debtor is to make the payment where the creditor is. 30 B 167

——promisee has the right to name the place of performance 24 C. 8, P. C.

——s 49 has no application when by manifest implication or necessary import, a place is fixed by the contract to make the payment 45 C. L. J. 633 : 31 C. W N 998 29 Bom L. R 1027 1927 M. W N. 520 : 25 A. L. J. 690 · 5 Rang. 51 : 102 I C. 610 1927 P C 156 P. C

Performance of joint contracts (s 43)

——all joint contracts are joint and several. 17 B 6, 11, 3 C. 353, 22 A. 307, 25 B. 378, 6 B 700, 24 B. 77, but a suit against some of the joint promisors bars a subsequent suit against others. 3 C. 353, 5 M. 37 *contra*. 22 A. 307.

——whether a contract is joint or several or joint and several [illegible] contract 97 I. C.

[illegible] if one refuses he

——one of several mortgagees cannot sue unless the mortgagee's interest has been severed with the consent of the mortgagor 31 C. W. N 374 101 I. C 530 · 1927 Cal 425, 1928 Mad 933.

——payment to one of the mortgagees does not operate as a valid discharge *above cases*, but that may operate as valid discharge if the person to whom the payment was made was the manager and the agent of all the mortgagees. 1928 Cal 125 . 105 I. C. 751

——one of the joint promisees cannot sue for his share of the debt 1927 Mad. 84 51 M. L. J. 648, 36 M 544, 24 M. L. J. 333, *Ref*

——one of several partners may sue for the recovery of a debt form a third party joining the other parties as defts. when the partnership has been dissolved and there is a dispute among the partners 29 Bom L. R. 147 100 I C 993 ; 1927 Bom 125

——representative of a deceased partner is not necessary party to a suit for the recovery of debt accrued due in the lifetime of the deceased. 9 A. 486, 17 B. 6, 17 M 108, 20 A. 305, *contra* 18 C. 86

——representative of a deceased partner may sue making the survivors defts if they refuse to join 21 B 412, 25 M 385

——where a contract is entered into by a partner on behalf of the partnership the promisee can compel all or any of the partners to perform the whole of the contract and there is no question of joinder 104 I C 700.

——where a pltf omits to implead all the heirs of his debtor as deft and sues only some of them, he is only entitled to a decree proportionate to the shares of defts. in the assets of the debtor. 62 I. C. 87.

(4) (L) Performance of Contract—*contd.*

——the deft. is to show that there was a definite contract that each promissor should not be separately liable. 105 I C 434 · 7 Pat 353 . 1927 Pat. 426 9 Pat L T. 137.

Suit for damages for non performance of contract

——in a suit for damages for delivery of the goods it is the duty of the plffs. to satisfy the court that they were ready with the money or that they had capacity to pay or that they had made proper and reasonable preparation and arrangements for securing the purchase money and that they demanded the goods from the defts on the due date. 111 I. C 498 : 1928 Lah. 20 . 9 Lah 118 : 29 Punj. L R 554

——a manager of a Hindu family is personally liable in damages for failure to perform the contract of sale of immovable property when the sale is found to be not binding on the minor coparcener 100 I C. 422 · 9 Lah L J 199 · 1927 Lah. 252 : 28 Punj L R 620.

——an intending purchaser is entitled to a refund of the earnest money when the contract is not performed for no fault of the purchaser. 51 B 247 . 101 I. C 229: 1927 Bom. 195 : 29 Bom L R. 19

——but such right being merely a right to sue cannot be transferred. 102 I. C. 766 1927 All 621 : 25 A. L. J. 811 : 50 A 82

——in a suit for damages for breach of contract the plff can claim damages as on the date when the deft, failed to take delivery of the goods. 54 C. 97 . 99 I. C 244 : 44 C. L. J. 364 : 1927 Cal 291.

(4) (M) Stranger to a contract can claim benefit thereunder.

——stranger to a contract can in certain circumstances claim a benefit thereunder 35 C. L J. 493, 32 A. 410. 41 C. 737, 46 C 160, 11 C. L J. 68, 37 C 449, 3 Pat L. J 394, 17 C. L J 70. *Ref*

——when a stranger to a contract has by subsequent dealings been brought into privity with the parties it is open to the court to grant relief to him on the contract 44 A. 702 : 20 A L J. 708 . 68 I. C. 778, 41 C 137 *Ref.* 1926 Mad. 1065 : 1926 M. W. N. 5.

——where a vendee was asked by the vendor to pay off the mortgage debt binding on the property the mortgagee had no right to enforce the payment of the mortgage money by proceeding against the vendee 7 Pat. L. T. 724 : 1926 Pat 474 : 96 I C. 287.

——a mere contract between the parties that one of them shall pay a certain sum to a third person will not necessarily make that third person *cestui que trust* so as to entitle him to sue the obligor for money. 30 C. W. N. 813 : 1926 Cal. 1009 : 96 I. C. 815 : 53 C. 922.

(4) (M) Stranger to a contract can claim benefit thereunder—*contd.*

——where a person is not a party to a contract he cannot take advantage of it or enforce it unless there is an equitable trust created in his favour. 1927 Mad 179 : 98 I. C. 609, *contra* where a contract is made between two persons for the benefit of another person the latter can sue the defaulting person. 101 I C 386

'he assignment on the ground of ... matter between the assignor and ... 35 C. 420 12 C. W N 393 : 7 C ... 127 P. C. 14 C W. N. 191, nor on the grond of nonpayment of consideration. 4 C L J. 344. 27 A. 271 32 I A. 113 : 9 C W. N. 477 P. C.

(5) CONTRIBUTION, SS 69, 70.

(A) Contribution (General).
(B) Contribution amongst wrongdoers.
(C) Set-off in claim for contribution.

(5) (A) Contribution (general).

——the liability to contribution is not entirely contained in ss. 69 and 70 of the Act although generally speaking a large number of such cases do come within the purview of those two sections. 30 C. W N 366 · 94 I C 159 1926 Cal 657

——the right to contribution though an equitable right arises out of an implied contract of indemnity between the parties liable for the same debt But the right is not confined to ss 69 and 70 of the Contract Act and may be based on other equitable considerations. 32 C W N. 221.

——right to contribution arises when the person making payment acts reasonably and prudently. 10 A. L J 73 L. R. 2 A. 45, 61 I. C. 892.

——contribution signifies payment by each of the parties interested of his share in any common liability. Mutuality is the test of contribution. So where the plff. denies joint liability his suit will not be for contribution but for money paid and will be triable by S C Court 18 C. W N. 1308. 20 C. L J 196. 24 I. C. 259 (16 C. L. J. 148. 17 I C. 45, 16 C. L. J. 156. 13 I C. 144.) *Relied*

——a sale of the right, title and interest of the J Dr in execution of decree for rent obtained by co-sharer landlord, may, in

I. C. 226,

(5) (A) Contribution (general)—*contd.*

——where the plff. was under reasonable apprehension that his incumbrance was in jeopardy and deposited the rent, he was entitled to contribution. 17 C W N. 276 n. 30 C. L J. 34

——where there is apprehension of one's right being affected, person making the payment under such apprehension is entitled to sue for contribution (in this case reversioner made the payment and sued the widow) 18 C W N. 779, 27 C. L. J. 607, 22 C. W N 347.

——co tenant of joint estate satisfying the whole rent decree is entitled to contribution 60 I C. 414

——joint tenant paying whole rent may sue for contribution 20 C L J 492.

——where the liability is not joint and several, contribution does not lie 62 I C 94 (c).

——s 69 is extended to include cases not only of personal liability but all liabilities to payment for which owners of lands are indirectly liable when such liabilities are imposed on lands held by them 43 C L J 142 94 I C 811 1926 Cal. 765

——the liability to pay under the sec should not be restricted to a liability existing between the person bound to pay and the person to whom the money is paid *1927 All 713 : 103 I. C. 289 : 25 A. L. J* 791.

——'another person" do not suggest that the person making the payment must be under no liability to make it 1926 Cal 1031 95 I C. 545, 4 C 369, 6 C W. N 903 : 38 C. (1. 18 C. W. N 317) *Fol.* 32 C 643 *Dist*

——sec 69 contemplates a case where the person who makes the payment is under no legal liability to make it and pays the money for another person who is bound by law to pay So a mortgage-purchaser who is liable to pay the arrears of rent cannot sue the mortgagor for contribution under this sec. 32 C. 643 : 3 C W. N 670, (1 C W. N. 670, 1 C. W. N. 458, 6 C. W. N 791) *Fol.*

——but where a puisne mortgagee pays off the amount due under the prior mortgage to avoid a sale, he is entitled to recover the sum then paid under s 69 of the Contract Act apart from s 74 of the T. P Act. 54 C. 424 . 45 C. L J. 191 . 101 I C. 130 : 1927 Cal. 393.

——where the estate of a deceased person was assessed to super-tax and the firm of which the deceased was a member made the payment, held that the assessment being invalid and the payment being voluntary the firm could not be reimbursed 31 C. W N 630 · 103 I C. 120 : 1927 Cal. 518.

——where the plff. made a deposit to prevent an execution sale of property in which he believed to have an interest he is entitled to be re-imbursed under s 69 Contract Act, on his failure to prove that he had share in property Even assuming that s 69 did not apply plff's claim could be supported on the principles under s 70 which lays down three circumstances as necessary. (1) that

(5) (A) Contribution (general)—*contd.*

the act should be done lawfully for another (2) that it should not be the doer's intention to do it gratuitously, and (3) that the other party should enjoy the benefit of it The existence of interest is generally a test as to the lawful character of the payment, but [illegible] ts on account
for by s. 70.
room for the
ood conscience
995 Cal. 1097:

——in a suit under s 69 it is essential that there should be firstly, a person who is bound by law to make a certain payment secondly, another person who is interested in such payment being made, and thirdly, a payment by such last mentioned person 41 C. L. J. 571 ; 52 C 914 90 I. C 851

——a debt for money paid arises where a person has paid money for another under circumstances and upon occasions which make it just and equitable that it should be paid , a debt or promise to pay is then implied in law, without any actual agreement to that effect *above case.*

——the word "interested" ought not to be construed as meaning only a person with a real interest If a person *bona fide* believes that he has interest in property and not merely for laying a claim makes some payment for those who are bound to make it, he is entitled to re-imbursement under s 69. 1925 Pat. 201

——the words "interested in the payment of money which another is bound by law to pay" might include the apprehension of any kind of loss or inconvenience or at any rate any detriment capable of being assessed in money. 41 C. L. J 571 52 C. 914 : 90 I. C 851 32 C. W N 1087 108 I. C 461 1928 Cal 389

——*an "interest" resting merely on grounds of sentiment or on* moral or social obligation is not an interest which would give in law a claim to repayment 8 O L J 94 61 I C 278

——person whose interest is not affected by the sale cannot sue for contribution, 6 C. W N. 336, 2 C. L J. 311.

——a co sharer who is also liable to pay the rent amount along with the other co-shares is a person interested in the payment of the money 30 C W. N 366 : 94 I C 159 1926 Cal 657.

——a purchaser from a co-sharer is a person "bound to pay" the money although he was not a party to the decree for rent and the period for which the rent was claimed was previous to his purchase 30 C W. N 366 94 I. C. 159 1926 Cal. 657

——under s. 70 Contract Act the party sought to be made liable must have not only benefitted but must have had the opportunity of accepting or rejecting the benefit 43 M L J 271 · 31 M. L. T. 164 . 16 L W. 231 · 1922 M W N. 608 1923 Mad. 64 ; 70 I. C. 405, 6 M L. T. 375 *Ref*

——s 70 is very wide and applied with discretion it enables the court to do substantial justice 32 C. W N. 1437 : 108 I C. 46 : 1926 Cal 389.

(5) (A) Contribution (general)—*contd.*

——sec. 70 has no application where the payment is made under such circumstances as to make it impossible for the person who is benefitted thereby to refuse to accept the benefit conferred upon him 38 M. 15 *Contra.* 12 C. L. J. 566 : 14 C. W. N 945

——when the benefit to himself is great, a person cannot be said to do an act for the benefit of another within s 70. Where a person does a thing which is greatly beneficial to himself and [illegible] the former cannot claim contribu[illegible] 271 : 31 M. L T. 164 : 1922 M. [illegible] C 496, 16 M. L T. 375. *Ref.* [illegible] his right to a stranger and in execution of a rent decree for the period prior to the sale entire property was put up to sale and was purchased by the vendee and then another co-sharer deposited the entire amount and got the sale set aside and brought a suit for contribution against all the [illegible] as a person [illegible] deposit be [illegible] 30 C. W. N

——a mortgagee whose deed was found to be forged cannot take the benefit of s 69 or 70, the word 'lawfully' in s. 70 means some interest in making payment. It is not every case in which a man is benefitted by the money of another that an obligation to repay that money arises; there must be an obligation, express or implied, to repay 25 C. L. J. 325 : 21 C. W. N. 331, 2 C. L. J. 311 : 2 I A 131 : 15 B L R 208 **P. C.** *Fol* 40 B 647

——the word "lawfully" in the section simply means "*bona fide*". In s. 10 there is no reference to a person being interested in making the payment and its scope is not restricted so as to confirm to the rules of the English Law. 109 I. C. 101 : 1928 Mad 317 : 1928 M. W. N 41.

——where a co-sharer paid a certain sum of money to the landlord in fraud of others in order to induce the landlord to re settle the tenure with him but the payment was subsequently appropriated towards arrears of rent for which all the co sharers were liable the payment was not "lawfully" made within s. 70 and no suit for contribution was maintainable. 44 C. L. J 261 : 1927 Cal 56. [illegible] the word *lawfully* and that [illegible] 27 L. W 406 [illegible] of the court it [illegible] The existence [illegible] awful character of the payment [illegible] 108 I. C. 46

——under sec. 70, a witness in a case can recover cost 8 C. W. N. 178.

When purchaser can claim contribution

——purchaser in execution of rent decree paying back rent is not entitled to the contribution. 6 C. W. N. 794

(5) (A) Contribution (General)—*contd*

——a purchaser of tenure is liable for the arrears before his purchase and he cannot recover it from his vendor 20 C. W. N. 40 n, 23 C. L. J. 125. 1 C. W. N. 458. *Fol*, 3 C. W. N. 384 and 4 C. W. N. 590, *Dist.*

——purchaser at a sale in execution of mortgage decree acquires the property subject to pre-existing rent charges and when he discharges that, he cannot sue the Jt Dr. for contribution. 1 C. W N. 458, 9 C. W N 670, *Contra* 29 C 813

——vendee paying incumbrance but afterwards his title failing, his right to be re-imbursed 1923 M 242 : 17 L. W 394 74 I. C. 416.

——the purchaser from an unauthorised person satisfying decree cannot claim to be re-couped 1923 A. 404.

When mortgagee can claim contribution.

——an usufructuary mortgagee making a payment under Or. 21 r. 89 C. P. C. to set aside a sale in execution of a decree against the mortgagor is entitled to be re-imbursed 1923 A. 127

——the mortgagee purchaser paying arrears of rent accrued due before his purchase in order to save it from sale, cannot have a right of suing his mortgagor for re-imbursement 1923 Pat 353 : 2 Pat 890.

——where a mortgagee paid the amount of the decree for rent under Or. 21 r. 89 C P C and the mortgagor sold the property to a third person who redeemed the mortgage the mortgagee was entitled to recover the amount from the purchaser although by the terms of the deed of purchase he was not liable for the back rents. 43 C. L. J. 142 : 94 I C 811 : 1926 Cal 765

——a mortgagee paying the Govt. Revenue is entitled to sue the proprietors jointly for contribution 16 C L J. 148, 156.

When a reversioner can claim contribution

——a reversioner expectant is not a person "lawfully interested" within s 70 and cannot be re-imbursed 25 C. W. N. 1029.

——a reversioner who has no right to redeem can deposit money to save the property from sale and can sue for contribution. 36 M. 426

Darpatnidar can claim contribution

——darputnidar paying decretal amount of the putni is entitled to contribution from all the putnidars whether Jt. Drs or not and is also entitled to possess the *taluk* under s. 171 B. T. Act, 21 C W. N. 628.

Surety for one of many Jt. Drs

——a surety for one of many Jt Drs. can sue all for contribution. 40 M. L J. 529 : 1921 M. W. N. 334 : 62 I. C. 706.

Executor paying debt.

——an executor paying a debt cannot recover it after the probate is revoked. 59 I. C. 128.

(5) (A) Contribution (General)—*contd.*

Claim by co-sharer

——when one co sharer dispossesses other, the former canno claim contribution of rent paid by him 6 C. W. N. 903, 110 I C. 435 (c)

——the basis of the right of a co-sharer to be reimbursed in respect of money realised by creditor by coercive process 26 C W. N 340

Co-judgment debtors should contribute.

——joint decree of cost against several co-plffs is a subject of contribution 43 A 77 . 18 A. L J. 872 : 58 I C 324, 32 A. 585, 5 C 120, 24 O C 148 63 I C 276.

——a co-judgment-debtor purchasing the decree may sue for contribution. 18 C. W N 113, 17 C. W. N. 271 n.

——when a third person pays up a joint decree and realises the whole amount from one Jt Dr. the latter may sue for contribution (Limitation is 6 years, Art 120 L Act applies). 18 C W. N. 410

——when assignee of a rent decree realises the decretal amount from one tenant the latter is entitled to contribution though under the law assignee cannot execute such decree 18 C. W. N. 458

——when a creditor obtains a decree against one partner for debt appertaining to the firm, all partners are to contribute. 19 C. W. N. 68, they must contribute according to promise. 19 C. W N. 193, P. C.

——where a tank was filled up at the requisition of the Municipal Corporation by a joint owner and tenants were settled on the filled up tank to the benefit of all it was a case under s 70 Contract Act, and Art. 120 of the L Act applied, time running from the date of completion of the work 25 C W. N. 813.

——the vendor of non transferable occupancy holding is liable to contribute the rent paid by his co-sharer, when his sale is not recognised by the landlord 18 C W N. 327, (4 C 369, 6 C. W. N 903, 8 C. 113), *Fol*

Amount of claim against each party must be distinctly stated

——claim for contribution must distinctly set forth the amount due by each of the parties 14 W R 373 : 1 A. 455, 12 A. 110, 3 N. W. P. H. C. R 215, 5 W. R. 112, 21 W. R 255.

(5) (B) Contribution amongst wrong-doers.

——where tort is not wilful, there may be contribution amongst tort-feasors 18 C. W N. 622 6 C. W N. 89.

——where the tort feasors act under a *bona fide* claim of right, they have the right of contribution *inter se*, otherwise not 5 C W. N. 393, 5 C 720 , 13 C. 300, *Ref* 9 A 221 ; 17 M. 78 ; 25 M. 599

——to defeat a claim for contribution among co-defts, it must be shown that the defts in the former suit were wrong-doers in the sense that they knew or ought to have known that they were doing an illegal and wrongful act. 1923 Nag. 255 ; 73 I. C. 223

(5) (C) Set-off in claim for contribution

[illegible] for several decrees, [illegible] C. L. J. 205 [illegible] ent decree saves the [illegible] sue the others for [illegible] as set-off payments [illegible] previous [illegible] against [illegible] n set off [illegible] claim is time-barred 12 C. W. N. 60.

——time-barred debt may be set off by way of equitable set-off 19 C. W. N. 1180, 32 C. 576, 40 B 60.

For other cases, see under ' *C. P C*, *set off*'

(6) PARTNER AND PARTNERSHIP.

How partnership is constituted

——the illustration to s. 239 indicates that an agreement to share property is essential to the constitution of the partnership. 28 Punj L R. 161 1927 Lah 333 100 I. C. 846 . 8 Lah 310.

——a partnership is constituted whenever the parties agree to carry on business or to share in the common profits. 21 C. W. N. 632

——there may be an agreement of partnership between solicitors. 51 B. 342 : 100 I C. 1025 1927 Bom 187 . 29 Bom L. R. 207.

Who are partners.

——the right to participate in the profits is strong test of partnership, but it is not conclusive , intention of the parties must be looked to , a person may be a lender and may participate in the profit 10 C. W. N 313.

——where a person was to get a fixed pay and 10 p. c. as commission on the nett proceeds of the firm and not any share of the profits, he was a partner 28 C W N. 34.

——a person who is to get a share of profits for his labour is a partner. 111 I C 686 1925 A. 549.

——persons who are working together to form a company, although they may intend to become members of the company after its formation, are not partners if this be the only relation between them , they are, it is true, engaged in a common object, and that object is ultimately to acquire profit, but their immediate object is the formation of a company, and even if the company is not to be incorporated they are only in the position of persons who intend to become partners after the company is formed 39 C. L. J. 537. 1924 Cal. 940

——a firm cannot be a member of a partnership as partnership is a relationship which subsists between persons 50 C 549 75 I. C. 81.

——business carried on in joint names—circumstances showing *partnership. 29 C. W. N. 496 1925 Cal. 937 87 I. C. 508.*

(6) Partner and Partnership—*contd.*

——an agreement authorising one partner to send another partner or to take a partner, evidences a partnership within s 239. 25 Bom L. R. 1225.

——when a person holds out to strangers that he is a partner, though in fact he is not, he becomes liable to them. 10 C. W. N 313 : 35 C. 877 *Ref.*

——an agreement to give a gomasta of a firm a specified share of profits in lieu of salary, does not constitute him a partner. *14 C. 791.*

——all the coparceners of a Hindu joint family are not necessarily partners in a firm in which one of them is co-partner. *107 I. C. 221* 1927 Sind 247, (27 B. 157, 2 S. L. R. 13, 1925 Sind 159) *Rel. on*

Application of the law to Hindu joint family.

——a managing member of a Hindu family can pledge the credit of the property of the family for the maintenance of the family business, 5 C. 792. but cannot pledge the family property embarking on entirely new business. 6 C. W. N. 429 : other coparceners are liable to the extent of the family property unless they are contracting parties 22 M. 166 : 23 M. 597, 29 A. 166, 176

——a Hindu infant does not necessarily become a member of a trading firm although by birth or inheritance he becomes entitled to an interest in the joint family business. 26 C. 349 : 27 B. 157.

——in case of partners composed of members of joint Hindu family and strangers, relations to parties are determined by Contract Act, 25 A. 378, 25 M. 149.

——a member of a joint Hindu family cannot sue for an account of the profit of a partnership but is entitled to an injunction. he is excluded from the management of the family business 23 B. 144.

——where subsequent to the partition of a Hindu joint family the family business is carried on jointly by two of the members on the one side and another member on the other, the death of the latter dissolves the partnership. 47 A. 784 : 89 I. C 27 : 1925 All. 595.

——according to the Hindu Law the death of one of the co-parceners of joint family does not dissolve a family-partnership 20 C. W. N. 708, 23 B. 144.

Extent of interest.

——burden of proof as to shares of partners in the business is on him who asserts inequality of shares. 26 C. 281.

Partnership share is saleable.

——share of a partner is saleable property. 20 C. 693

When the action of one partner binds the firm or other partners.

——where goods are purchased or money raised for joint adventure and the dealing though ostensibly by an individual is truly and substantially a dealing of the joint adventurers, the adventurers are liable as partners. 19 C. W. N. 337 P. C.

(6) Partner and Partnership—*contd.*

——all parters must contribute the partnership debt though decreed against some 19 C. W. N 19 P. C.

——any partner in a trading firm has an implied authority to borrow money for the business 25 Bom. L R. 1093 or to enter into an agreement for hire, 46 C. L J. 362 . 106 I C 516 : 1928 Cal. 57.

——where one member of a partnership borrows money on his own credit by giving his own promissory note for the sum so borrowed and afterwards uses the proceeds of the note in the partnership business, of his own free will without being under any obligation to or contract with the lender so to do the partnership is not liable for the loan. 28 C. W. N 824 . 81 I. C. 513 : 1925 Cal. 29.

——a fraud committed by a partner, while acting on his own separate account is not imputable to the firm 12 C W. N. 716.

——when managing partner buys stolen goods and sells them and enters the proceeds in the books of the firm without the knowledge of other partners the firm is liable for damage. 10 C. W. N. 1053

——the writing and signing of an acknowledgment by one partner doesnot bind his co-partners unless he had authority, express or implied. 10 B 358. 10 A 418, 26 M. 186.

[illegible] for the benefit of [illegible] C. [illegible] authority to [illegible] J 658 . 13 [illegible] also 39 M L. [illegible] . 132, which [illegible] 01

——relationship between company promoters 1924 Cal 940 : 83 I. C. 970.

Suit by a partner.

——one partner cannot alone sue to recover a debt due to the partnership But any partner may sue in the name of the firm and the names of co-partners to recover debt due to the partnership firm and a member unwilling to sue may claim indemnity for costs. 1917 Pat 239 *Contra.* When one of two partners sues to recover a sum of money due on accounts it is a case to which the rule in [illegible]

——one partner can sue his co-partner for contributions in respect of moneys borrowed by him for the purpose of partnership, without asking for a general account 26 C 254 : 25 B. 306.

——but one partner cannot sue another for money received by the latter on behalf of the firm but not accounted for by him to the firm. 11 C W. N 311

Right of a partner.

——a partner is entitled to purchase partnership property provided there is full disclosure. 21 C. W N 632.

(6) Partner and Partnership—*contd*

——a partner advancing money in excess of capital is entitled to interest on that. 23 C. L J. 148.

——a partner who has mixed up his accounts with that of partnership, will not be allowed the amounts honestly spent by him for the firm. 28 C. 53 **P. C**

Retirement of a partner

——a partner can retire but that retirement can only be by and upon notice to the other side 47 A. 756. 1925 All 787 · 891 C. 122 : 23 A. L. J. 725.

Dissolution of partnership.

——when partnership business comes to an end dispute amongst the partners will be settled in a suit for dissolution of partnership and for accounts, each partner cannot sue the other for the money he has received 17 C. W N 351.

——filing of a plaint by one partner for the dissolution is enough by itself to put an end to a partnership at will 31 C. W. N 857 101 I. C 17 1927 P. C. 70 : 25 A. L. J. 687, 1927 M. W N. 500 53 M. L. J 245 **P. C.**

——when suit for share was brought in 1902 and it was found that in 1891 the annual accounts of the firm ceased and a final account showing the division of both capital and revenue was made out and that the cessation of the annual account pointed to some radical change having taken place, presumption was that there was dissolution of the firm in 1891 and the suit was barred under Art. 106 L. Act. 18 C. L. J 13. 17 C W. N. 1006 : 36 M. 185 **P. C**

——stoppage of business or refusal of a partner to supply capital whenever demand is made on him cannot be treated as dissolution of the firm. 25 C. W. N. 847, 28 C. 55 : 5 C. W. 114 *Ref.*

——an c [illegible] partnership on the ground [illegible] The unsoundness [illegible] e the partnership. 30 C W. N 11.

—— a partner's claim to a decree for dissolution rests, in its origin, not on contract but on his inherent right to invoke the court's protection on equitable grounds. 27 C L. J. 623. 22 C. W N. 601.

——in the case of old customers the mere publication of notice [illegible] does not relieve a retiring partner [illegible] ır. L. J. 46 : 74 I. C 16. [illegible] ustomer there must be proof of [illegible] the partnership. 29 Bom L. R. [illegible] 520, 8 C. 678 *fol.* (1 Rang 47, 33 C. 214). *Ref*

—— a family partnership is not dissolved by the death of any member. 74 I. C. 721.

——where a partnership is dissolved by the death of a partner and a suit is filed for accounts the business is to be regarded as a continuing business up to the date of final decree 34 M. L. T. 69 : 1924 M. W. N. 660 : 29 C. W. N. 161 : 22 A. L J. 392 P C.

(6) Partner and Partnership—*contd.*

——s 264 applies not only to person who dealt with the firm before the dissolution but also to person dealing with the firm after the dissolution or change of partners. 30 C. W. N. 11, 1927 M. W. N. 770 : 106 I. C. 904 : 1928 Mad. 125

Partnership account.

——an action by a partner for the balance of a settled account would not be restrained merely because there was other unsettled account between the parties 21 C W. N. 632.

——all partners are bound to produce paper to account suit 18 C. W. N. 1025 2 C. L. J. P. C.

——interest on money advanced by a partner is not capital. 20 C. W. N. 634.

——account must be taken up to the date of dissolution. 15 C. L. J. 204

——all the partners are necessary parties in suit for account. 18 C. W. N 464

——the right to call for account upon the dissolution of a firm is mutual and each partner is entitled to an account from his co-partners. 11 C. L. J 658 14 C W. N. 1106

——the personal representatives of a deceased partner, are entitled to an accounting from the surviving partners. The former are bound to account when the deceased partner had the management or control of the assets of the firm 11 C. L J. 658 . 14 C. W. N. 1106.

——when an accounting party does not produce the account or destroys them, presumption will be against him. 11 C. L. J. 658 : 14 C W. N. 1106

Liability of a minor.

——a minor is not personally liable for the debts of the partnership business after the death of her father. 25 C. W N. 847, 25 M. 149 : 28 C. 53, *Ref*

Limitation.

——when co sharer manages business Art. 89 L. Act applies in account suit 17 C W N. 103

——in a suit for partition and account of profit of joint property against *karta*, Art. 127 and not 62 applies. 14 C. W. N 221.

——partnership continuing, no limitation 15 C L J 201.

——in a suit for account limitation period is 3 years from the date of dissolution 25 M. 149, same period even if instrument of partnership is registered 22 M. 14

(7) PRINCIPAL AND AGENT, SS 182-195 AND 211-238.

How the relationship is created.

——a man does not become an agent merely because he gives advice in matters of business 12 C. W. N. 28.

(7) Principal and Agent, ss. 182—195 and 211—238—*contd.*

Agent's action how far binds the principal.

——agent's action within apparent scope of authority binds the principal. 19 C W. N. 56

——an agent has implied authority to borrow money when necessary 33 C 343

——principal is bound by the action of his agent done beyond his authority if the contracting party has reasonable grounds for believing and in good faith believes, in the authority of the agent 26 C. 701; 3 C W. N 313 **P C.**

——agent conducting business binds the firm by his action 23 C. W. N 329, 23 C L J 348 **P C.**

——knowledge of the agent not acquired during agency cannot be imputed to the principal. 11 C. W. N. 1109; 6 C. L. J. 674 31 B. 566, 2 M L J 394, **P. C**

——a business does not terminate on the receipt of the money by the agent in as much as there is a subsequent obligation to account for the sum and to pay them. 12 A. 541, 26 C. 715.

——agreement which interferes with the agent's duty is void. 22 C 14, 125, 152, 22 A 220, 27 A 73

——a wagering contract is void and not unlawful, so when a suit is brought by a betting agent to recover a loss on betting paid by agent, the principal cannot escape liability on the ground that the agent's act was unlawful 23 A 165, 14 M. L. J. 326.

——agency extends to receiving of notice on behalf of principal of whatever is material to be stated in the course of proceeding 25 A 1, 17; 19 I. A 203 **P C**

——an honorary Secretary of a school alleged to have been maintained by an association is personally liable for the rent of a house hired by him in his name for the purpose of the school (name of the principal being undisclosed). 22 B. 754; but if the other party knows that the agent is contracting as such the agent is not personally liable 5 B 584, thus the Secretary of a club cannot be sued personally unless he has pledged his personal credit 20 A. 497, and he cannot sue a member on behalf of the club for goods supplied 14 M. 362

——principal may sue and be sued upon a deed even though it may not have been executed in his name. 19 M. 471, 16 B. 568 *Dissent*

——the principal cannot be proceeded against upon a negotiable instrument executed by an agent in his own name 23 M. 597.

——in case of joint Hindu family all the members may be sued for a debt contracted by one, provided it was demanded and contracted for the benefit of the family 23 M. 597.

——an agent cannot recover on a contract if he really acts as a principal 34 C. 628, 11 C. W N. 609.

——when servant is employed on monthly salary both the servant and master are entitled to one month's notice. 35 A. 13?

(7) Principal and Agent, ss. 182—195 and 211—238—*contd.*

Agent's power and authority.

——agent may retain money for his remuneration for the sale of the goods consigned to him for sale 30 C. 202, 8 C. W. N. 831.

——an agent may not be justified in selling the principal's goods without his authorities but when the agent has spent a large sum of money from his own pocket in purchasing goods on behalf of the principal and is in the position of a tacit pledgee, he can recover as much of his outlay as possible by selling the goods in his custody. 1928 Lah 747, 8 Lah 376, *Rel on*

——s 221 does not mean that an agent is in a position analogous to that of a mortgagee in possession i e to remain in possession of the principal's property till the payment of his commission. 110 I. C 23.

...mission on entitled to 1927 Bom.

——a commission agent cannot sell the goods at any place according to his discretion Under s 211 an agent is bound to conduct the business according to the principal's direction and under s 214 the agent is bound to consult the principal when there is difficulty. 1927 M W N 578

Fraud of agent when makes the principal liable

——to make the principal liable for the fraud of the agent the fraud need not be committed for the benefit of the principal 50 C. 258. 1923 C 157

——principal is liable for the fraud of the agent if done within the scope of authority, whether for the benefit of the principal or the agent 20 C. W N 268, 23 C. L J 225

——under s 238 Contract Act, to make the principal liable fraud need not be committed by the agent for the benefit of the principal, 39 C. L J 290 36 C 647 13 C W, N. 619 *Diss.*

Undisclosed principal

...tract when the ...itted 5 C. 71, such will not ...out the presumption. 17 C 449

——a person who contracts for an undisclosed principal where no such principal exists, cannot enforce performance 18 C W. N 643.

——an agent who enters into a contract on behalf of a principal not disclosing the latter's name is entitled to sue in respect of any of those transactions and subsequently hand over the benefit to the principal. 99 I. C. 687 · 52 M. L J 33 : 1927 Mad. 204

(7) Principal and Agent, ss 182—195 and 211—228—*contd*

Liability of agent to principal

liability for defects in a d with reference to the 43 C. L. J 479 : 97 I. C.

Liability of agent to account

——first duty of the agent is to be constantly ready with his accounts, *and he must* further be always ready to explain them and *produce* vouchers, also to be constantly ready to pay the money that *may be found* due by him. 32 C. 719. 1 C. L. J. 232.

——agent must submit and explain account to his principal 6 C. 754 ; 7 C 627.

duty of account written accounts -oducing vouchers 52 C 766 : 1925 *fol*. (13 C. W. N. 696, 24 C. W. N. 110) *not fol*

oney on behalf of his principal must account to the principal . 639, 30 C. 1011 (illegal cesses

——a zeminder who employs a naib and an under-naib has a cause of action against the latter for collections made by him and not paid to the naib. 1927 Cal 917.

——in the absence of special contract the principal cannot sue the agent for one transaction only. 17 C. W. N. 67.

——when a minor sues his agent for account, all sums paid to the guardian of the minor or applied for his benefit should be credited. 34 C. 892.

——*Art*. 89 L. Act, is applicable to suit against *Tasildar* for ...nder account every of the termination al. Mere failure to hile the '*Tasildar*' ants. 30 C. L. J. 90.

For other cases, see under '*account*'

(8) RATIFICATION OF CONTRACT. SS. 196—200

——ratification in the proper sense of the term, as used with *reference to the law of agency*, is applicable only to acts *done on behalf of the ratifier*. 12 C. W. N. 393. 35 C. 420 : 35 I. A. 48 : 7 C. L J. 335 **P C.** and not with respect to acts done for the agent himself. 6 B. 463.

(8) Ratification of Contract, ss 196—200—*contd.*

——an act done by an agent in excess of authority may be ratified. 7 M. I. A. 476, P. C. but it does not authorise the doing of such acts in future. 3 C. 280, 287.

——a transaction which is void *ab initio* cannot be ratified, 3 A. 852.

——ratification of part operates as a confirmation of whole. 19 C. W. N. 56

——acts of the public officers may be ratified by the Govt. 7 M. I. A. 476, 8 M. I. A. 529 P. C.

——*where the agent refers to arbitration without authority* and the principal does not raise any objection, it is ratification by conduct. 24 C. 469.

(9) RESCISSION OF CONTRACT. s 64.

——when a party to a contract refuses to perform or is disabled from performing his part of the contract, the other side may rescind. 4 C. 252

——on failure of the promissor to perform his part of the contract if the promissor can rescind the whole contract, 30 C W. N. 145: 23 A L. J 806 90 I. C. 52 : 1925 P C 188.

——a mortgagor may rescind from a contract not fully performed by the mortgagee. 18 M 126

——where the plff lawfully rescinds a contract he is entitled to the return of his advance and to such further damages as were within the contemplation of both the parties 1923 M 103. 70 I C. 736.

——where the plffs in pursuance of a contract to purchase certain properties paid off a prior mortgage on the same properties and subsequently the sale did not take place owing to default on the part of the purchaser, held that though the plffs were entitled to a refund of the money they were not entitled to charge on the properties 99 I C 687 1927 Mad 204 52 M L. J. 33 24 L W. 826, (21 M. 443, 26 M. 686, 31 M 439, 36 M. 426 *Dist.* 43 C. 69, 40 M. 114) *Rel. on*

——to enable a party to a contract to be relieved from the future performance by the conduct of the other, the conduct must amount to a rescission or absolute refusal to perform the contract. 83 I. C. 260 . 1924 Cal 427.

——where the parties entered into a contract for sale of land but subsequently the title of the vendor was in doubt and the intending [illegible]

I. C. 229.

——to entitle one to rescind a contract on the ground of misrepresentation there must be first a false representation made as

(9) Rescission of Contract. S. 64—contd.

to some material point and secondly there must be a misrepresentation as to statement of fact either by words or by conduct A collateral promise to do some act though it may effectively induce the promisee to enter into a contract is not a misrepresentation. 111 I. C. 797 1928 Pat 600 · 9 Pat. L T. 523

——inadequacy of consideration is not of itself sufficient ground for rescission. 3 C 192, P. C

——contracts which are voidable for want of free consent may be rescinded. 26 C. 381 · 3 C. W N 468

——where the sale of minor's property by his *defacto* guardian is set aside the purchaser is entitled to the refund of the consideration. 10 Lah L J 183 . 1928 Lah. 250 : 1925 B. 9 . 52 P. R. 1904 *Ref*

——when time is the essence of the contract the seller may rescind it on the failure of the buyer to perform it timely. 6 C. 61 · 6 C L. R. 582

——previous contract may be rescinded by new contract 20 C. W. N. 371 : 23 C. L J 26

——parties to a contract may stipulate that one or both of them shall have the power to rescind the contract on the happening of some specified contingency 1923 Bom. 75 75 I. C. 233 : 24 Bom. L R. 877.

——contract does not absorb a prior contract unless it is itself a valid one : so where a perpetual clause is found to be invalid it is open to the lessor to fall back on an earlier clause. 4 U. P. L. R 37.

——a bidding at an auction is merely an offer which can be retracted until it is accepted 43 M L. J. 132 : 1922 M. W. N. 564. 1922 Mad. 486

(10) REVOCATION OF CONTRACT, SS 201—210.

——a power of attorney to present a document for registration is revoked by the death of the principal, *23 A. 233 : 28 I A.* 15 P. C.

——when the agent has an interest in the subject-matter of the agency it cannot be revoked 24 M 130 2 B 311.

——if the authority of an agent to admit execution of a document is revoked before registration, but such revocation is not known to the grantee of the document or the registering officer the document is not invalid if registered. 30 C. 265.

——a contract is concluded when in the mind of each contracting party there is a *consensus ad idem* and a modification or revocation of the contract requires a like consensus. 1925 P. C. 232 P. C

(11) SALE, SS. 76-123.

——a buyer is not bound to accept goods which are not in accordance with the descriptions of goods he bargained for, no matter whether the property in the goods has passed to him or not. 15 C 1.

(11) Sale, ss. 76—123—*contd*

——when by the contract, delivery and payment is postponed, property passes to the buyer as soon as the contract is made. 32 C. 816.

——when deposit in the nature of earnest is paid, a vendor, by ...um 21 B. 827, ... lose it 19 A. ... money on the

——when a buyer refuses to take delivery of goods when tendered to him on the ground that they were out of time, he cannot *subsequently justify the refusal on the ground that the goods* which were offered turned out to be not in accordance with the contract. 49 M. 781 93 I. C 673; 1926 Mad. 778

——where ascertained goods were sold and the buyer agreed to purchase the whole quantity and paid earnest money but took delivery of part refusing to remove the remainder on the ground of inferior quality which were destroyed by fire, ownership having passed, the buyer was liable for the price 4 C. 801

——where goods are not ascertained the sale is not complete. 33 C. 547

——s 96 is not confined to cases of specific ascertained goods. *1928 M. W. N. 25: 108 I. C. 77 1928 Mad 279. 54 M. L J.* 116

——in cases of sale of share-contracts as soon as the seller hands over the certificate and blank transfers and the buyer accepts them and gives the seller the cheque the goods become ascertained goods the sale becomes coplete and the property passes. 50 B. 360 30 C. W N. 890. 43 C L J. 508 24 A. L J. 657. 28 Bom. L. R 777 94 I C 824 · 1926 P C 38.

——shares in a company are "goods" within s 76 30 C. W. N. 890 · 43 C. L J. 508 28 Bom L R 777: 94 I C. 824. 50 B 360: 1626 P. C 38

——in India choses-in-action are "goods" *above case.*

——buyer's insolvency does not operate as a rescission as the benefit of the contract vests in the official assignee 34 C 289.

——... the ownership passes to the buyer, the seller has a ... money authorising his ... Contract Act, and the ...cy in price, 24 C. 124, ... does not pass the sec. ... the damages for ...xpenses incurred ... contract of the ... 283, 23 M. 18.

——the law as to lien is contained in s. 95 and the following sections and unless there is possession there is no lien. 50 B.

(11) Sale, ss 76—123—*contd.*

360 : 43 C L. J 508 . 30 C. W. N 890 : 28 Bom. L. R. 777 . 1926 P C. 38 · 94 I. C. 824 **P. C**

——the re-sale should *not* be hurried on. 15 B L. R. 276, nor delayed to the prejudice of the buyer 19 A. 535

——where a seller is competent to avoid a sale induced by the buyer, yet until he does some act to avoid it, the *property rests* in the buyer 33 C 547.

——where property in the goods passes to the buyer, on a proper rescission of the contract, it revests in the seller enabling him to refuse delivery. 6 C. 64 6 C. L R 582.

——buyer is not to return the goods but is to notify only in case of goods being not properly supplied 35 A. 325.

——the buyer is not responsible for the loss caused by the theft of goods from the Railway goods-shed before its delivery to the buyer 1928 Lah. 481 10 Lah L J 290

(12) STOPPAGE IN TRANSIT SS. 99—106.

——a seller who has taken a negotiable security as an absolute payment is no longer an unpaid seller and cannot exercise the right of stoppage *in transit* 3 M I A 422, **P C**

——mistaken or wrongful delivery of goods by the carrier after notice to stop in transit cannot defeat the right of the unpaid vendor 17 B 62, 88

——railway receipt is document showing title within sec. 102 and 103, and is document of title within sec. 178 of the Contract Act. So where a railway receipt is assigned by way of pledge, the vendor has not the right to stop the goods in transit. 20 C. W. N. 1182 . 24 C. L. J. 320, **P C**

(13) SURETY SS 124—147.

——when a suit is brought against deceased principal debtor and the surety, and after the institution of the suit it becomes barred against the legal representatives of the principal debtor, it can be decreed against the surety alone. 12 C. 330, 5 B 145 *contra.* 11 A 310, 24 A 504, 8 A. 259, 50 A. 211 : 25 A L J. 937 107 I. C. 42

——mere forbearance to sue does not discharge the surety, 22 A. 351, but where forbearance continues until the claim against principal is barred it discharges the surety. 11 A. 310, 24 A 504, 25 A. L. J. 937 : 50 A 211 : 107 I C. 42, 8 A. 259, *contra.* 5 B 145 12 C. 330.

——giving time to principal debtor discharges the surety, 9 B. L. R. 261, 6 C. 241 6 C L. R. 591, **P. C.** 15 B L R 331, *contra.* 17 C W N 695, but surety is not discharged where he consents to the subsequent contract. 23 A 137 : 27 I. A 158, **P. C.**

——stipulation by a surety that his heirs and legal representatives would be bound is a continuing guarantee. 55 C. 154 : 109 I. C 752 1928 Cal. 204.

(13) Surety, ss. 124—147—*contd.*

——where the contracting parties subsequently vary their contract, surety is discharged 3 A. 9.

——a consent decree passed without the knowledge and consent of the surety discharges him. 30 C. W. N. 540: 1926 Cal. 818: 95 I. C. 409, 55 C 91 109 I. C 538 : 1928 Cal. 177

——if the remedy against the principal debtor is allowed to become time-barred the surety is deemed to have been discharged. 25 A L. J. 937, 50 A. 211 · 107 I. C. 42: 1928 All 46

——when the suit against the principal debtor abates on account of his legal representations not being brought on the record the surety is discharged. 106 I C 481: 1928 Lah. 246. 29 Punj L R. 68.

——a surety is not entitled to the benefit of a portion of the creditor's securities until the whole of the debt due to the creditor was paid off 15 B. 48.

——a surety is not less bound though he may have acted on some misrepresentation made by the debtor 33 C 713, 756.

——a surety bond can be assigned. 17 C. W. N. 695.

——a subsequent surety bond was held to be void for want of consideration. 1 A. 487.

——in a suit against a person who stood surety for any loss by the misconduct of the agent, the loss to be recoverable must be shown to have arisen from misconduct of the agent. 12 C 143: 12 I A. 142, P. C

——a surety can by notice be released as regards future *transaction. 29 C. 68, but mere denial of liability by the surety* in a previous suit does not operate as notice. 27 B. 418.

——notwithstanding anything in s. 130 which holds that a continuing guarantee may at any time be revoked by the surety as to future transactions by a notice to the creditor, it is not competent to the surety for a Receiver who has been appointed an officer of the court, to discharge himself merely by such notice to the decree-holder or other person at whose instance or for whose benefit the Receiver was appointed. 30 C W N 266 1926 M W N 493: 1926 P. C. 32.

——when under a decree surety is ordered to pay the deficiency after the sale of the property of the Jt. Dr. but the D Hr. in order [illegible], time, the [illegible] proceed- [illegible] tor, then before proceeding against the surety the debtor must be proceeded against first 55 C. 91: 109 I. C 538· 1928 Cal 177.

——a contract by an accused to indemnify his surety cannot be enforced. 19 C. W N. 329

——when there is contract to indemnify, the correctness of a decree so to indemnify cannot be questioned by the indemnifier. 37 M. 270

——difference between a contract of suretyship and that of indemnity. 1918 Pat 628

(13) Surety, ss. 124—147—*contd.*

——where the surety does not pass the whole of this indebtedness that exists between the creditor and the principal debtor but only a part, he cannot claim all the rights of the creditor under s 140 of the Contract Act. 49 A 640 101 I. C. 513 : 1927 All 538.

(14) TENDER.

——a creditor is not bound to accept a smaller sum than is due and a tender of such sum does not stop interest running 3 C. 468, 16 B 141, nor he is bound to accept payment by instalment. 24 A. 461.

——a tender of debt before due date is not valid and it does not stop the running of interest. 31 C. 183.

——in making a demand for the fulfilment of contract on the deft the plff. is not required to make an actual tender of money, it is enough if he has made preparations with the object of having the money ready in hand in case the contract is fulfilled. 30 C. 865, P. C

——a tender which has been validly made and improperly refused is kept good if the person who has made the tender has always kept the money ready to be paid as demanded. If the tender be kept good it will stop interest and no deposit under sec. 61 B T. Act is necessary. 35 C 34 ; 11 C. W. N 983 · 6 C. L. J 273 F B

——rent which is properly tendered but improperly refused is not 'arrears,' See *above case.*

——valid tender stops interest 34 C. 305 . 5 C L. J 270

——a tender to be valid must be made in the current coin of the realm ; a tender by a cheque is not a valid tender ; but it is waived by the creditor when he rejects the tender on some other ground, see *above case.*

——a tender is not vitiated because a receipt is asked for, see *above case.*

——when the amount tendered as full amount does not cover the interest on rent and interest on cesses the landlord may refuse to accept 37 C. L. J. 222, 6 M. I A. 289 P. C

——a tender must be unconditional or at all events free from any condition to which the creditor 'may rightfully object. 27 C. L. J. 222.

——s 55 B. T. Act does not deal with tender but with appropriation. 37 C L. J. 222.

——where a tenant tendered a reduced amount of rent and interest on the plea that he was entitled to abatement for dis possession from certain portion, but no such ground was made out the tender was not a good tender. 18 C W. N. 66 P. C.

——in order to prove that a buyer is ready and willing to perform his part of the agreement it is not necessary to show that he actually made a tender. 28 Punj. L. R. 351 : 99 I. C. 812 ; 1927 Lah 176 ; 8 Lah 198.

CONTRIBUTION. see "*Contract Act, Contribution*"

COPYRIGHT ACT (Act III of 1914).

——a copy is that which comes so near the original as to suggest [illegible] tator. The court will examine [illegible] always a question of fact. 1928 [illegible] J 230, *Ref.*

[illegible] of copyright in pictures it is sufficient if the main figures have an identical pose. 1928 Cal. 359

——where the plff's work on religious observances was of such a new arrangement of old matters as to be an original work and the defts. had not gone to independent sources for their materials but had pirated the plff's work, they must be restrained by injunction. 13 B. 358.

——under the old law copyright would not be infringed by translation. 19 B 557, 14 B. 586

——"original" in sub sec (1) does not relate to ideas but to their expression 83 I C. 101 1924 P C 75, P. C.

[illegible] clude translation, the author is entitled to copyright as [illegible]

[illegible] of poems can be the subject matter of copyright, the true principle applicable to such cases being that one person is not at liberty to use or avail himself of the labour which another has been at for the purpose of producing his work and so take away the result of the other's labour or in other words his property 17 C. 951

——plff. was found to have no copyright in the almanac 95 P. L R. 1910

——one cannot have copyright in the reports of the judgments of any court of law but he has copyright in the statements of facts of cases. 18 C. W N. 1078.

——when a person does a literary work at the request of or for another with full knowledge that the latter will publish them as a matter of course, and the latter publishes the same, the plff cannot claim any copyright 38 A. 484

——in an action by plff for an injunction and damages on the ground that the deft's. directory infrigned the plff's copyright in his directory it was found that the deft's. publication was a *verbatim* reprint of the substantial portion of the plff's directory, some inaccuracies being identical and there being some identity of information and language Held that the deft's work involved an infringement of copyright The plff in such a case is entitled to claim general damages and also compensation for conversion based on the sale by defts 67 I C 983

——the author of an English grammar, the subject matter of which is arranged in a new way can acquire a copyright and when a large number of pages of this book were copied *verbatim* including the spelling mistakes there was infringement of copyright. 43 A. 412 · 19 A. L. J. 180.

——when the author of certain songs sold the right to publish undertaking to revise some of the songs or to re-write some of them

Copyright Act (Act III of 1914)—*contd*

the sale was complete and the purchaser acquired an exclusive right to publish or refrain from publishing the songs and any one publishing the songs without his consent infringed his legal right 39 M. L. J. 341 · 1920 M. W. N. 426 : 12 L. W. 151 . 59 I. C. 229.

——selection of passages from a non-copyright work was not entitled to protection. Some mental labour, skill and judgment are needed to select passages for the use of school boys but at the same time it must be remembered that by itself is not necessarily sufficient to constitute what one may call original work. 23 Bom L. R 1299, 17 C. 951.

——merely selecting passages and knitting them together does not constitute copyright. Raw Materials or the original work are open to all, it is only use of another's labour and skill only that constitutes infrigement of copyright 1924 P. C 75 P. C.

——what is copyright, compilation with notes of passages from old author 28 C. W. N. 613 . 22 A L. J. 473 : 2 Pat L. R. 137 : 1924 M W. N 309, P. C.

——the originality which is required relates to expression of thought. 1924 P. C 75 P. C.

——the word "original" does not require that the work must be the expression of original or inventive thought, Copyright Acts are not concerned with the origin of ideas, but with the expression of thought; and in the case of "literary work" with the expression of thought in print or writing. 28 C. W. N. 613 : 22 A. L. J 473 48 B. 308 P. C.

——the fact that the copyright in some of the illustrations in the plff's catalogue is vested in other persons does not preclude him from [illegible] f such of the illustrations [illegible] W N. 753

[illegible] give undertaking not to [illegible] admits to be infringements. The deft. ought, on the commencement of the suit to have offered to consent to an injunction, *above case*.

——the title to the copyright is complete before registration which is only a condition precedent to the right to sue. 17 C. 951

——a suit for injunction to restrain the sale of a book published more than a year before suit, is not barred, *above case*.

——a suit to recover damages for infringement of copyright does lie in the court within whose jurisdiction the plff but not the deft. resides. 33 A 24.

——the District Courts have jurisdiction to maintain suit for damages 6 C. 499.

[illegible] for the deft [illegible] subsis [illegible] exper [illegible] on the [illegible]

Copyright Act (Act III of 1914)—*contd*

——the offence is complete as soon as the work, which infringes the copyright is printed 28 P R 1918 Cr

——prosecution for infringements of copyright—old and new Act,—procedure. 51 M 180 · 105 I C 669. 1927 M. W N 772. 1927 Mad. 981 ; 39 M. L T 328

CO-SHARER.

Co-sharer in possession under mutual arrangements

——when by private arrangement amongst the co-sharers of ijmali property, some co-sharer is in exclusive possession of certain property, the purchaser of his right, title and interest is entitled to be put in his position, and such arrangement continues to be good and binding until the co-sharers give it up or any co sharer demands partition 11 C W N. 517.

——co-sharers may amicably enjoy some parts exclusively and it will hold good including leases until some other arrangement. 17 C. W. N 517, 35 C L J 166 64 I. C. 448

——a lease created by co-sharer in exclusive possession with the consent of other is not affected by subsequent partition between co-sharers 35 C L J. 166 64 I C 448, 1 C. W. N 62, *Fol.*

——mutual arrangement to possess separately alone will support suit for separate possession, otherwise the remedy is by partition suit 1925 Cal 272.

——where joint co-owners have agreed to a mode of enjoyment of joint property. it is not open to any one of them to disturb that arrangement without the consent of others and in partition also there will be an equitable division of the property. 39 C. L J. 414 ; 1024 I C. 792

——but an auction-purchase of a residuary share in revenue sale is not bound by an agreement entered into prior to the sale by the co-sharers as to the mode of enjoyment of the holding. 44 C L J 293 ; 1927 Cal. 237 · 99 I C. 177

Dissatisfied co-sharer's remedy lies in partition

——a co-sharer dissatisfied with the exclusive possession of any land by another co-sharer has his only remedy in partition. 29 C. W N. 34 51 C. 631 : 80 I C. 827 26 Bom L. R. 651 35 M L. T 169, P. C , 48 C 460, P C , 39 C L J 414, 18 C 10 P. C.

——when one co-sharer is not satisfied with the exclusive use by the other co-sharer of the joint property in a particular way the remedy of the former is in partition. 28 C 223 11 C. W. N. 143

——co-sharer cannot deal with common land to the detriment of another co sharer, his remedy lies in partition. 3 Pat L R. 193 6 Pat L T 750 , 1924 P C 144 P. C

——co-sharer is not liable to be ejected by his co-sharer except by partition and if he is ousted he is entitled to be restored to possession 1923 A. 446 71 I C 649

——one co-sharer has no justification to change without the consent of his co-tenant the state of the possession as enjoyed by

Co-sharer—*contd*

is unreasonable and obstructs the the joint property, the remed- o take forcible possession to tl W. N. 643 : 1925 Cal. 1027 : 85

C. 766

——when lands are leased out separately by co-sharers exclusive possession, one co-sharer cannot claim joint possessio with the lessee of other co-sharers, his remedy is in partition. 11 W. N. 143, 23 C. 223, 7 C 414 *Dist.*

——where a suit for partition is pending, the court would b slow to disturb the existing possession of the lands by the co-share unless compelled by cogent reasons. 36 C. L J. 155 . 1923 Cal 208

——where some of several co-sharers put up structures on th common land, it does not deprive the others of their rights in th land when general partition takes place. 91 I C. 610 : 1926 Cal 524

——but when a co-owner has in good faith affected valuabl improvements upon the common property at his own cost equit takes that fact into consideration upon a partition and in som suitable way makes on allowance to him therefor, in addition to hi rateable share. 34 C. L J. 432 : 26 C W. N. 65.

When one co-sharer can sue the other for possession

there has bee d materi property L. J. 47, 2

——every co-owner is not liable to render account to others so long as his use does not amount to ouster of others or destructions of the joint property (*per Mookherjee. J.*) ; a tenant in common cannot be held liable to his co-tenant for damages for use and occupation, unless there has been waste or ouster, (*per Harrington. J.*) Where a co-sharer makes proper use of a common property, though he gets the profits he leaves 32 C 837:

ut out of possession ; but ouster and exclusion may be actual or constructive 55 C. 396 : 32 C. W. N. 291 : 1928 Cal 216 : 109 I. C. 747.

by another where n of the 96 101 osharer her was ession tle. 47

Co-sharer—*contd*

——to hold that a co-sharer is in possession of part of the common land to the exclusion of the other co-sharers is much the same thing in the eye of the law as saying that he has ousted his co-sharers, for to enclude is to keep out, to oust to put out of possession. When the separate occupation of a co-sharer is with the tacit or express assent of his co sharers and the co-sharers are dissatisfied with the manner of possession their proper remedy is by partition and not by suit for possession, on the other hand if the separate occupation is continued after objection from any of his co-sharers and in defiance of their claim to joint possession, then the co sharers who are excluded or ousted from joint possession, are entitled to bring a suit for joint possession 55 C. 653 : 1928 Cal. 535.

——it would be subversive of the rights of joint owners to hold that it is open to any co-sharer appearing first on the field to seize possession of any land newly formed by accretion to the joint estate and possess it to the permanent exclusion of other co-sharers. The co-sharer who is excluded from possession can ask for joint possession. 31 C W N. 750 : 104 I C 547 . 1927 Cal. 565.

——when the co sharer remained in possession without denying the plff's title there was no ouster of theplff. 32 C. W. N. 449 : 107 I. C 465.

——co-sharer's possession is generally possession on behalf of all but if there is ouster it will begin to be adverse. 50 C. 487 : 1924 Cal. 45 : 74 I. C 193.

——when in a suit for partition and possession by an alleged co-sharer with the allegation [illegible] finds that he has not been in [illegible] must fail and the court will [illegible] the possession of the other co- [illegible] 1926 Cal. 589 : 92 I C. 908.

——the possession of one co-sharer enures to the benefit of the other co-sharers also and does not, except under exceptional circumstances, amount to an ouster of other co-sharers 82 I C. 822 1925 Cal. 469.

——sole occupation of a part of common estate by a co-owner does not necessarily imply an ouster of others 11 C L J 189, nor [illegible] il injury [illegible] int land [illegible]

——no co-sha[illegible] right. rights of [illegible] can he create a[illegible] 827 : 26 Bom. L. R [illegible] L. T 259 . 1928 P [illegible]

——when the plff. obtained a decree for possession jointly with the deft but failed to obtain symbolical possession or to take any steps to execute the decree and subsequently sued for partition and possession, held that the suit was barred by s 47 C P C. but that

Co-sharer—contd.

the same might be treated as an application to execute the decree provided it was not time-barred. 54 C. 524 : 101 I. C 622 : 1927 Cal 411 : 31 C. W. N. 406

When co sharer in possession is liable to compensate other co-sharers

——a co-sharer in exclusive possession of lands is liable to compensate the other co-sharer. 29 C W. N. 34 : 51 C. 131 : 80 I. C 827 26 Bom L. R. 651 35 M L. T. 169 P. C. 48 C. 360 P. C.

——where a co-sharer is entirely ousted he is entitled to damages 64 I C 465

——co-sharer taking exclusive possession of culturable land more than his share is bound to recompense his other co-sharer 64 I C. 922, 1923 A. 416 . 71 I. C 559, limitation is 6 years 23 C. 799

——when one co-sharer is in exclusive possession by making a profitable use of the joint property but does not make any adverse claim, other's remedy is in reasonable money compensation for their shares 18 C 10, 17 I A 110, P C 19 C 253 : 19 I. A. 48 P. C. 4 C L J. 354, 34 C L J 432 26 C W N. 65 *contra*. they can sue for joint possession 26 C 553, 33 C 1201, 10 C. L. J. 103.

——when co-owner takes exclusive possession of land which had been in the possession of all through tenant, on receipt of rent, he must compensate his other co-sharers 5 C. L. J. 267.

——when some of several co sharer landlords purchase certain holding and are each in occupation of separate portions, one cannot sue the other for his share of rent 32 C 567 : 3 C. L. J. 141.

——when trees are taken by co-sharer, other can sue for damages 15 C L J. 225

Effect of lands being abandoned by tenant.

——on the abandonment of a holding by a tenant if one co-sharer takes possession of the holding the others are entitled to joint possession without seeking for partition. 102 I. C. 143, 26 C 553 *ful*

Whether co-sharer in possession can claim compensation for the improvement he has made

——a tenant in common is not entitled to compensation for improvements effected by him as against the other co-tenants 41 M L J. 43 : 46 M 104 1923 M W N 13

——a co-sharer who had rebuilt at his expense a common wall belonging to him and another co-sharer, cannot obtain an injunction restraining the latter from treating the half belonging to him as his property until he had paid his portion of the cost of rebuilding the wall. 63 I C. 526.

——a tenant in common is not entitled to compensation for improvement effected by him as against the other co-tenants 41 M L. J. 43 . 46 M. 104 1923 M. W. N. 13.

——where some of several co-sharers put up structures on the common land, it does not deprive the others of their rights in the land when general partition takes place. 91 I. C. 610.

Co-sharer—*contd*

——but when a co-owner has in good faith effected valuable improvements ... 'his own cost equity ...ation and in some ... in addition to his

Effect of dispossession of some co-sharers

——dispossession of one co sharer amounts to the dispossession of all the co-sharers including others who were not in possession 1927 Cal. 457 100 I. C 507.

Lease by co-sharer

——where a lessee from a co-sharer erects buildings on the entire property although another co-sharer objected to it, the latter is to file a suit for partition, 1927 Cal 54 97 I C. 441.

——no co-sharer can, as against his co-sharers, obtain any jote right, rights of permanent occupancy in the lands held in common nor can he create any such right 29 C. W N. 34 : 51 C 631 80 I. C. 827 : 26 Bom L R. 651 35 M L T 169 P C. 48 C. 460

——a permanent lease granted by co-sharers without the concurrence of one of them is not binding upon that person and consequently if the property comprised in the permanent lease is allotted to him in the partition, he takes the property without being subject to the lease 43 C L. J 333 · 1926 Cal. 714 F. B

——when a tenant takes settlement from co-sharer landlord the other co-sharer can sue for joint possession with the tenant 1 Pat. 394 : 3 Pat L T. 409 1922 Pat 142 66 I C. 55

——one co-sharer cannot lease out a portion of the joint property affecting prejudically the right of other co-sharers L. R. 3 A. 81 65 I C 577.

——lessee of co-sharer in exclusive possession can sue for possession if he is dispossessed by other co sharers. 1922 Cal 147

——tenant under a co-sharer landlord is not a trespasser. L. R. 3 A 165

——when one co-sharer sues for compensation for taking fish out of a tank, and the deft pleads taking of lease from another co-sharer, *the plea is a good one though the lease is invalid for* non-registration 19 C. W. N 871.

——co-sharer cannot create occupancy right 19 I C. 395, 1 C. W. N. 521 · 25 C 917 n *Ref.*

Suit for rent by co-sharer (B. T. Act)

——a co-sharer landlord cannot sue for his share of rent without making others parties or without proving separate collection or paying for apportionment. A simple suit for rent cannot be converted to a suit for apportionment 28 C W N 967

——co-sharer landlord collecting separately can sue jointly, 20 C. L. J 205, 35 C. 331 7 C L. J. 139 *or for his share only,* 7 C L. J. 512

Co-sharer—*contd.*

——where a co-sharer who under an arrangement betwe whole body of the landlord and tenant sues for his share of th the tenants can claim abatement. 41 C. L. J 330 : 1925 Ca 88 I. C. 654.

——one co-sharer can sue for entire rent of the holding n others parties defts 90 I. C. 673.

——suit for rent by a co-sharer cannot be changed into apportionment of rent. 83 I. C 931 : 1925 Cal. 197.

As to other suits under the B. T. Act. see, "*B. T. Act, s 188*

Transfer by one co-sharer. (s. 44 T. P. Act.)

——where one of several co-sharers who are in possess different parcels of land by mutual arrangement, transfers his in a parcel which is in the possession of other co share transferee can sue for partition of that parcel as against them. L. J. 231 : 33 I C. 17

——this sec provides for partition as a means of mak possessory right available to a transferee from a co-owner. *L. T. 229 : 25 I C 401*

——s. 44 does not override the provisions of Hindu Law. C. 168 . 31 M. L. J 275 1917 M. W. N. 149.

——a stranger purchasing the share of an undivided Hind parcener cannot claim joint possession of the family dwelling He can either ask for delivery of possession by partition in exe proceedings or bring a separate suit for partition. 23 C. L. J. 20 C W. N. 675 . 35 I. C 294

——a covenant among co-owners restricting alienat shares by sale or mortgage to themselves does not extend involuntary transfer. 78 I C. 802. (2)

Right of co-sharer in accretions to joint state.

——to hold that any co-sharer appearing on the field is en to seize possession of any land newly formed by accretion joint estate and hold it to the permanent exclusion of the oth sharers, would be subversive of the rights of joint owners 33 C. 9 C. W N. 87.

——a suit for joint possession of the silted up portion of a leased out by co-sharer-defts. to the tenant-defts within years of [illegible] maintainable, specially [illegible] not in any way improve [illegible] hen the defts. proceeded cultivate it and the plffs. never stood by and allowed the improve the land or to do any thing which would ren [illegible] able for the plff. to obtain khas possession of the lan [illegible] 3. (7 C. 414, 33 C. 1201), *fol* 28 C. 223 *Dist.*

[illegible] *share cannot be declared.*

[illegible] cannot claim a decree for declaration of th [illegible] unkown share. 40 C. L. J. 30, 43 C. 74

Co-shares—*contd.*

Right of a co-sharer to question the possession of other sharer.

——a co-sharer cannot question who should be in possession of other share 13 C. W. N. 1011.

Co-sharer defaulter cannot exclude other co sharers.

——a co-sharer defaulter of Govt. Revenue cannot be permitted, if he purchases the estate at the sale, to hold it to his own benefit to the exclusion of his co-sharer Such is the position of a tenant who in violation of an agreement with his immediate landlord to pay the dues of the superior landlord makes default and brings about the sale of the interest of the landlord 36 C L J. 208. 1923 Cal. 13 : 72 I. C. 698, 44 C 373 : 16 C 194 : 15 C. W N 776 : 12 C. L. J. 336, 20 C. L. J. 11 : 24 C. W. N 201 . 30 C. L J. 475, *Ref.*

Joint tenancy and tenancy in common, distinction between.

——distinction between joint tenancy and tenancy in common. 1929 P C 72

As to cases relating to adverse possession, see 'adverse possession.'
As to cases relating to injunction, see "injunction."

COURT FEES ACT.

(1) General.

——*the Court Fees Act* was passed not to arm a litigant wi a weapon of technicality against his opponent but to secure t revenue of the Govt. 29 L W 42.

——under s. 8 of the Suits Valuation Act the value of the su upon which the court fee has been assessed and paid witho objection is the value for the *purposes of jurisdiction.* 9 C. W. *690 : 34 C. 734, 11 C. W. N* 1133 . 6 C. L. J. 255, F. B., 31 B. 73, C W. N 768 34 C L J 94.

——pltf's valuation of consequential relief decides the court f and forum of the court, 23 C W. N 753 P. C., 35 C L. J 144, I C. 685, 31 C 354, 11 C. W. N. 458 . 5 C. L. J. 400, 19 C L J. 418, C W N. 929, *23 M. 490, 25 M. 34, 27 M. 480, 43 B. 376.*

——the court is to look at the allegations contained in t plaint 21 C. W N. 375 ; 35 I. C. 797, 6 S L. R. 72, 12 C. W. N. 35 C. 202, 12 C. W N. 169, 7 *C. L J. 36, 4 C. L. J.* 403, 87 I. C. 66 1925 M W. N. 272, 5 Pat 631.

——to determine whether a suit is properly valued or not, it necessary that the court should confine its attention to the plai itself and not look to other circumstances which may subsequent influence the judgment as to the true value of relief sought. 40 *L J 150.*

——the court fee to be paid on the plaint for relief as injunction is on the amount at which the relief sought is valued the plaint *above case.*

——the court is empowered under the law to revise the valuati put by the pltf and if on such revision, it is of opinion that th valuation is insufficient or arbitrarily low it has jurisdiction to fix th proper value. 29 C W N. 627 . 86 I. C. 853 . 1925 Cal. 814.

——valuation for purpose of court fees is to be determined fir and that for the purpose of jurisdiction must follow the same. A 501 · 87 I. C. 190 1925 All. 602

——the value for the purposes of jurisdiction is the value whic the pltf sets upon his claim in the plaint as directed in s. 7 para of the C. F Act, 47 A 534 ; 86 I. C. 1055 ; 23 A. L. J. 216 ; 19 *All 376*

—— a suit may be dismissed for non-payment of the necessa court fee only by a court which has jurisdiction to try the suit. B 236 101 I. C. 343 · 1927 Bom. 257.

——provisions in fiscal statutes are not to be so construed to furnish a chance of escape and a means of evasion. 39 C. J. 217, 223

——the valuation should not be arbitrary. 15 C. W. N. 82 14 C L J 47. 17 C. 680. 4 Pat. L. J. 703, 22 B. 315, 40 C. 24 16 C. L. J 94; 17 C. W. N. 591, 19 C. L. J. 15, 36 A. 500, 4 Pa L T. 71 2 Pat. 198 · 73 I. C. 43, 22 C. L. J. 415, 23 C. L. J. 561.

——the court can revise the valuation if it is capricious an arbitrary. 6 C L. J. 427. 11 C. W. N. 705.

(1) General—*contd*

——under the provision of s 80 A. (1), Govt of India Act, amendment of Bengal Court Fee Act is not *ultra vires.* 50 C 597: 27 C. W. N. 812 75 I. C 466.

——valuation for the purposes of jurisdiction and stamp duty are two different things. 4 B 515, 15 C 104, 19 C 96, 11 B. 591, 8 C 757: 11 C. L R 95, 5 C 757

——the Court Fee Act was passed simply to secure revenue and not to arm litigant with a weapon of technicality against the opponent. 24 C. W N 33 P. C.

As to other cases regarding valuation, see "jurisdiction"

——in case of instalment, court fee is to be paid upon the amount claimed. 4 W. R 12

——s. 12 of the Court-Fees Act, (decision of question as to valuation) refers to court-fees and not to jurisdiction 17 C. W. N. 503, 24 C. W. N 33 P. C

——"value of property" in Act. 1 Art, 11 (probate of a will or letters of administration) is the market value of the entire prope[illegible]

[illegible] is by reference to 18 C. W. N 121.

——"where it is not possible to estimate at a money value the subject-matter in dispute" in Art 17, cl vi of Sch. II, it must be established that it is not possible even to estate approximately a money value 13 C W N 815.

——when the suit is for khas possession of zirat lands against several persons holding the same, the suit was based upon a single right and the court fee was payable upon a single cause of action and not upon several subjects as required by s 17 7 Pat 402 110 I. C. 191 · 1928 Pat 274

——when plaint is returned and refiled in another court the latter must give credit of the court fee 35 M 207.

——when the court-fee has been assessed by the executing court upon the amount of mesne-profits, and the excess court fee is not paid within time fixed, the claim must be dismissed. 24 C 173, 33 C 1232

——s 21 C P C. lays down that objection to the exercise of jurisdiction shall be taken at the earliest opportunity even as regards court fee matters 24 C. W N 33, 43 B 507. It cannot be raised afterwards 24 M 398

——an *adtalorem* duty as provided by sch I Art 11 must be paid under s 19 Court Fees Act before letters of administration can be granted to the estate of a Hindu governed by the Mitakshara Law 29 C W N. 372 1925 Cal 627.

——for the purpose of court fee the value of the suit (1) for declaration that a decree is fraudulent (2) for an injunction restraining deft from interfering with plff's possession (3) for consequen-

(1) General—*contd*

tial relief confirming piff's. possession, is the valuation of the decree sought to be set aside. *above case.* 6 C L. J. 427. 11 C W. N 705.

(Refund).

——where an application for review was filed under s. 151 and Or. 47 R. 1 C. P. C. and the court allowed the application with reference to s 151, the applicant for review was entitled to a refund of the court fee under s. 15 C. F. Act. 28 C. W. N. 928; 1924 *Cal. 1054*

——the court has got power to make an order for refund of excess court fee paid by *bona fide* mistake. 107 I. C 320: 9 Pat. L. T. 240.

——a court has got inherent power to order refund of the excess court fee. 107 I. C 825.

——an order refunding court fees when remand is made can only be passed under s. 13 in a case where the remand is made under Or. 41 R. 23 C. P. C., 1927 Lah. 196: 100 I. C. 49.

——where the appellant did not pay the additional court fees with the result that the appeal was dismissed and the appellant applied for refund of the court fees already paid, it could not be refunded. 6 Pat. 602 105 I C. 742.

(2) Account suit

——a suit for administration and account is in essence a suit for account and excess court-fee must be paid before execution 22 C W N. 115.

——in a suit for account, plff. can value the relief as he likes [illegible] before payment of court-fee upon 365, but if the court thinks that relief, it can reject the plaint. [illegible]

——in a suit for account an approximate value is to be given. 31 C 365, 2 B. 219, 17 M. L J 625.

(3) Alternative relief

——in case of alternative relief the largest value determines the amount of stamp, sec. 17 does not apply to such a suit. 13 B 82, 6 B 302, 16 O. C 354

——where a plff. sues in the alternative for one of two reliefs the larger relief determines the stamp. 1923 Lah. 456: 73 I C. 709. 96 I C. 826: 1926 Lah. 467: 8 Lah L. J. 449.

(4) Appeal.

——in a suit for foreclosure of mortgage, court-fee in appeal is [illegible]

decree but only a part of of review court-fee is hat portion alone which J. 143: 1925 Pat. 364

(4) Appeal—*contd.*

——but where the court fees paid in appeal does not cover the whole of the claim the whole appeal will not be dismissed but the appellant may get a decree for the amount covered by the decree. 96 I C. 135 : 1926 Lah. 558.

——when in a suit mesne-profits are directed to be ascertained in execution, memorandum of appeal preferred against the decree should bear court-fee upon the amount claimed antecedent to the suit. 13 C. W. N 815

——in a suit for an injunction it is open to the applicant for leave to appeal to His Majesty in Council to show what the actual value of the subject matter is, notwithstanding the fact that for the purpose of court-fee, the value of the suit was fixed at a sum much less than the actual value. 27 C 301.

——in calculating the Court fee to be paid on memorandum of appeal sometimes the decisions of the courts below are taken into consideration 9 C. L. J. 128, 1 M 40

——s 7 does not apply to appeal in which no amount is claimed. 30 M 96 · 16 M L J. 458

——memorandum of appeal should bear court-fee upon the amount of the mesne profits claimed antecedent to suit 13 C. W. N. 815

——s 4 of the Court-fee Act is not applicable to Letters Patent Appeal from the judgment of a single Judge of the High Court and no court-fee is leviable except rupees two 1923 Lah 275 2 Lah 420, 69 I. C. 428.

——deficit court fee in appeal should be paid before limitation period. 71 I C. 736,

[illegible]

in [illegible]
the [illegible]
the [illegible]
cal [illegible]

——decisions of the Taxing Officer of the H. C. cannot be interfered with by the Bench. 2 Pat 919, 1922 *Pat.* 377, 68 I. C. 316

——the decision of a judge specially appointed in that behalf on a question of court-fee is final and no appeal or revision lies therefrom The judge being a *person disignata* is not a court so as to involve the aid of sec. 19 (i) of the Court-Fees Act. 29 Bom. L. R. 1511 : 1927 Bom 643

——a judge to whom court fee matter is referred cannot refer the matter to a Bench 4 Pat L T 638.

——no court fee is payable to memorandum of cross-objection supporting the decree of the lower court. 44 A. 577 : 1922 A. 280.

——in an appeal from a preliminary decree in a suit for account the *appellant is allowed the option of placing the valuation upon* memorandum of appeal. 44 A. 542.

(4) Appeal—*contd*

——it is not necessary for the application of s. 12 (ii) that there should have been formal decision on the question of sufficiency of court-fees. If the appellant fails to pay the requisite court-fees within a prescribed time the court may dismiss the suit 31 C. W N. 1045 : 1927 Cal. 775

(5) Award.

——the proper court-fee upon an application to file an award' is the court-fee prescribed for application and not the court-fee upon the plaint 10 B 11 13 C L R 171

——in suits dealing with arbitration award, the amount of court-fees payable are Rs 10, and does not depend on the value of the suit 12 C W N 169 · 7 C. L J. 36, 35 C. 202 5 A. L. J 10 . 7 M L J 618 10 Bom L R 1, P C

——in an appeal from or award passed by a Judge on a reference under the Land Acquisition Act *ad valorem* court-fee is to be paid. 1927 Cal 45 97 I C 140

——in an appeal against an order filing an award without the intervention of the Court court fee stamp of eight annas is to be paid 103 I C 315 : 25 A. L J 741

(6) Cancellation of document, suit for

——suit for cancellation of document with prayer *to send a copy to the Sub-Registrar* is a suit with consequential relief and *ad valorem* court-fee is to be paid 29 B. 207, 3 Pat. L. J. 194 . 45 I. C. 238, it is also held that a suit for cancellation of document is not a suit for mere declaration without consequential relief. 23 M 490 : 10 M L. J. 240

——suit for cancellation of a mortgage-deed is a suit for declaration and a court fee of Rs 10 is to be paid 5 A. 331 F. B. (21 W R 340, 22 W. R. 438) *not fol*

——a suit for cancellation of document is a suit for consequential relief and *ad valorem* court-fee is to be paid 38 M. 922 : 1915 M W N 118 F B , 7 C. W. N. 44, 15 M. 294, 29 B. 207, 32 M. 922 : 18 M L J 118, 44 A 629 20 A L J. 587 ; 68 I C. 265.

——in cases falling under sec 7 para IV Cl. (c) of the Court Fees Act, the plaintiff should make verified statement as to the amount at which he values his relief. The court cannot change it, (here the suit was for cancellation of a mortgage-bond for Rs. 4000, it was valued at Rs. 50). 27 M. 480, 23 M. 490, 24 M. 34 *Fol*

——plff's valuation of consequential relief decides the court-fee and forum of the court. 23 C W. N. 733, P. C.

——in a suit for cancellation of a previous partition deed *ad valorem* court fee is to be paid. 26 C. W. 177 : 34 C. L. J. 529.

——where plaint or a memorandum of appeal asks only fo[illegible] pure declaration, the court in computing court-fee cannot go the question whether plff should also ask for consequential that question will be finally decided by the court. 27 C. W. N.

(7) Confirmation of possession, suit for.

——prayer for confirmation of possession is prayer for consequential relief. 19 W. R 18, 39 C. L J. 212, 6 C. L J. 427, 4 Pat. L. T. 71 : 2 Pat. 198, 73 I C 43, 22 C. L. J. 415, 23 C L. J. 561 6 Pat L. J 662 : 1922 Pat 65 . 3 Pat. L. T. 293 ; 65 I C. 294.

(8) Conjugal right

——the value of the suit is as a rule the value which the plf chooses to put upon it, provided it be not unwarrantably undervalued or overvalued from improper motive, a munsiff can try such suits 38 A. 545, 31 A 849, *Diss.* (13 C. 232, 18 C 378, 5 Moo. I. A 81 P.C. 4 Moo. I A 374 P C, (*Dist.*) 15 A. 378, 10 A. 524, 13 A 3[illegible], 16 A. 286, 8 B. 311 *Ref.*

——in a suit for conjugal right court-fee of Rs 10 is payable 33 A 767.

(9) Consequential relief.

——prayer for removal of attachment in execution of decree 4 A 869, or a prayer for protecting property from sale, 2 A 7[illegible], or a prayer for demolition of building, 4 A. 320, is consequential relief

——a prayer for injunction is a prayer for consequential relief 11 C. W. N 705, 32 C 734 9 C W. N. 690, 17 B. 56, 18 B. 2[illegible] 15 M 15, 16 M 31 26 C. 845, 33 B 307: 11 Bom L R 3[illegible], 13 A. 378, 20 M 289, 19 B. 60, 35 C. 202: 12 C. W. N. 166: 10 Bom L. R 1 : 2 M L. T. 506 · 5 A L J. 10. 7 C. L J. 36, P. C

——a prayer for injunction and for confirmation of possession is prayer for consequential relief. 39 C. L J. 212, 7 C. L. J. 427, *Ref*

——a prayer for confirmation of possession has come to be regarded as consequential relief. 4 Pat. L. T. 71 : 2 Pat. 198 73 I. C. 43, 22 C L. J 415 23 C L. J. 561, 19 W. R. 18, 6 C L. J. 427

——consequential relief must be some substantial relief and only plff's assertion for such relief won't do if there cannot be such relief 24 C. 311

——the plff. must pay *ad valorem* court-fee for consequential relief 4 Pat. L J 703.

——prayer for sending a copy of the decree to the Registration Office in a case to set aside a document is a consequential relief. 3 Pat. L. J. 194 : 45 I C 238 27 B. 207.

——suit for assessment of rent and for recovery of specific sum of money damages for use and occupation of land is a declaratory suit with consequential relief. 4 P. L. J. 501.

(10) Declaratory suit.

——a suit for declaration of right to administration of the estate and appointment of an *interim* receiver falls within s. 7 (IV) C. of the Court-Fees Act. 27 C. W. N. 457 : 1923 Cal. 326.

——where three declarations are sought arising from distinct causes of action, rupees 10 should be paid. 1922 A. 306 : 75 I. C. 597.

(10) Declaratory suit—*contd*

——s. 42 Sp R. Act is not exhaustive, 22 M. 270 P. C., 43 M. 410, the scope of the sec has been discussed in 30 C. 704 : 16 C. W. N. 838, 22 M. 270 P. C., 43 M 410, 38 M. 922.

——a suit for reversal of a *putni* sale is a suit for the reversal or cancellation of a sale. Prayer for injunction and for confirmation of possession are prayers for consequential relief. 51 C. 216 : 28 C. W. N 683 . 39 C. L. J 212

——a declaratory suit under Or. 21 r. 63 C. P. C requires a court-fee of Rs 10, 64 I C. 49, 3 Pat. L. T. 832, 26 C W. N 126.

——in an interpleader suit a court-fee of Rs 10 is payable. 2 Pat. L. T 280 61 I C 820.

——suit against a person other than a tenant for possession cannot proceed without declaration of title. 24 C. W N. 151 : 55 I. C 178.

——a plaint for declaration of title and recovery of possession requires *ad valorem* court-fee and not ten times the Govt. Revenue, 1922 Pat 162

——where the deft is a licensee he has no interest and pliff's valuation is sufficient 24 C W. N 167 n

——suit by an adopted son for declaration of title and for possession comes under s 7 (iv) (c) of the Court-Fees Act. 5 Pat L. J. 341 · 56 I C 422, but see 24 C. W. N. 33 . 29 C. L J. 452 P. C.

——in a suit for declaration of title to all the properties and to set aside a deed of transfer in respect of a particular property, *ad valorem* court-fee is to be paid 5 Pat. 496 . 1926 Pat. 453.

——a suit for the reversal of Putni sale is not a suit for a declaratory relief within the meaning of Art. 27 of the Court Fees Act 39 C L J. 212, 6 C L J 427 *Ref.*

——in a suit by a trustee for declaration and possession *ad valorem* fee must be paid. 88 I C. 209 : 1925 Mad. 804 : 48 M. L. J. 571 1925 M. W N 252.

——in a suit for a declaration that the plff. is the sole shebait and for an injunction fo restrain the deft. from interfering with his possession and also for a declaration that the deft. is not the shebait plaint is to be stamped with *ad valorem* court-fees calculated on the valuation of the property. 40 C. 265 : 17 C. W. N. 591 : 16 C. L. J. 194, 19 C L. J 15 : 21 I C 771

For declaratory suit against decrees and orders see "Setting aside decrees and orders"

(11) Deficit court-fee, payment of.

——under s 149 C P. C the court has power in his discretion, at any stage to allow court-fee to be paid in whole or in part and such payment will have the force and effect of payment in the first instance. 24 C L. J 88.

——It is not proper for court to extend time to pay deficit court fee and thereby to extend the period of limitation where there is no mistake of the plff. 24 I. C. 276 : 18 C. W. N. 1071.

(11) Deficit court-fee, payment of—*contd.*

——when after the dismissal of a suit the court ordered the deficit court-fee to be paid by the plff. and on the default, of its own motion ordered the attachment of moveables, held that the court had no jurisdiction. 46 C. 520

——time for payment of deficit may be extended after the expiry of time allowed. 12 C L. J. 62

——once the court has registered a plaint it cannot reject it for deficit When deficit court fee is paid after time allowed and the plaint is registered, it is all right 34 C 20 F. B, 31 C. 75, 27 C 376, 1 C W N 670

——the court has power in its discretion to allow further time to make good a deficiency in court-fee. 45 A. 518 : 21 A L. J 357 · L R. 4 A. 251 1923 A 538 74 I 358

——the provisions of Or 7 r. 11 C. P. C. are mandatory and they require that where a plaint is written on paper insufficiently stamped the court is bound to give the plff. time to make good the deficiency 28 B 41, 2 Pat. L J. 74 *Ref* The fact that the objection is heard at a time subsequent, the registration of the suit is immaterial because the provisions apply to any stage of the suit. 49 C. 880 27 C W N. 566 38 C L. J. 74, 47 C 376, 34 C. 20 *Ref.*

——where a plaint is rejected for non-payment of court fee it operates as decree and the court cannot restore the suit under Or 9, r 9 or under s. 151. The proper remedy lies in review under Or 47 r 11. 2 Pat 504 4 Pat L. T. 261 1923 P 354 : 72 I C. 629

——an order of dismissal for non-payment of court-fee can be reviewed without giving notice to the opposite party because as the suit was not registered there was practically no opposite party. 26 C. W. N 391 . 1922 Cal. 234.

——where a review application was filed with stamps known to be inadequate and the deficit was filed long after the limitation period the appplication was not within time. 98 I. C. 433 (c) 424 W. R. 258, 1924 Cal. 924) Dist.

For other cases, see, "C. P. C. ss 148, 149"

(12) Ejectment suit.

——in a suit for the recovery of immoveable property from a tenant, including a tenant holding over after the termination of the tenancy, and in a suit to recover the occupancy of immoveable property from which tenant has been illegally ejected by landlord, court-fees are to be paid upon the amount of the rent of the property payable for the preceding year under s. 7 cl, xi sub. cl (cc) and (e) respectively. 12 A. L. J. 933 : 25 I. C. 975, 24 P L R 1907

——in a suit for the ejectment of a licensee, value of the suit is the value of the right which the plff. seeks to recover 24 C. W. N. 167 n.

(13) Foreclosure suit.

——in a suit for foreclosure court-fee is payable on principal but on appeal court-fee is payable on the whole amount. 36 A. 49 F. B

(14) Injunction, suit for.

——a prayer for injunction is a prayer for consequential relief. 11 C. W. N. 705, 32 C 734 . 9 C. W. N. 693, 17 B. 56, 18 B. 207, 15 M. 15, 16 M. 31, 26 C 845, 33 B 307 11 Bom L. R 30, 15 A. 378, 20 M. 289, 19 B. 60, 89 I C. 930 1925 Mad. 1143.

——a prayer for injunction and for confirmation of possession is prayer for consequential relief. 39 C L. J. 212 . 51 C. 216 : 28 C. W. N. 683 81 I. C 731 : 6 C. L. J 427. *Ref.* 40 C. L J. 150.

——in a suit by the plff. in possession for declaration of title of [illegible]
va [illegible]
18 [illegible]
Ap. [illegible]
valuation should not be arbitrary. 16 C L J 194.

——in a suit for injunction the court-fee is to be paid not only on the value of the property but on the valuation of injunction also. 19 C. L J 15, 40 C L J. 150

——prayer for injunction is consequential relief 35 C. 202 : 12 C. W. N. 169 : 7 C L. J 36, 10 Bom. L. R. 1 : 17 M L. J. 618 : 5 A. L J. 10 P C.

——plff's. valuation for the purpose of injunction is the valuation for the purpose of jurisdiction 45 B. 567.

——in a suit for declaration of title and for perpetual injunction the court-fee payable for the relief by way of injunction is regulated by s. 7 (4) (d) of the Court-Fees Act read along with s. 8 of the Suits Valuation Act 48 A. 412 : 24 A. L. J. 478 . 1926 All 423 : 94 I. C. 951.

(15) Landlord and tenant, suit between.

——suit against a person other than a tenant for possession cannot proceed without declaration of title. 24 C. W. N. 151 · 55 I. C 178

——where the landlord sued his tenant for assessment of rent and for recovery of specific sums of money as damages for use and occupation of land s. 7 iv (c) applied *i.e.*, the suits were suits to obtain declaratory decree or orders where consequential reliefs are prayed. 4 Pat L J. 561.

——when a suit is for declaration of title as against a tenant and also against a tresspasser the former portion of the relief comes under s. 7 (xi) of the Court-Fee Act but not the latter. 1926 Cal. 504: 91 I. C. 483.

——when the tenancy had been terminated and the suit was one for ejectment of the deft. as a trespasser, the provisions of s. 7 para. xi, sub.-cl. (cc) did not apply. 32 C. W. N. 1113 : 1928 Cal. 753.

——where the tenant sues the landlord, and other tenants under him are parties, the court-fee is to be paid under s. 7 iv (c) on the valuation of the relief which should not be arbitrary. 19 C. L. J. 418 · 23 I. C. 507, 32 C. 268, 15 A. 63, 23 I. C. 964.

(15) Landlord and tenant, suit between—*contd.*

. . . . against by the value

——in a suit for declaration of status of a rayat and for ejectment of the deft. the suit comes under s. 7 cl. (iv), 65 I. C 240

——in an application under ss 105 and 105 A of the B. T Act for settlement of fair and equitable rent and for declaration that the rents were liable to be enhanced and that the tenants were not *makraridars* as recorded in the record of rights, the declaration being valued at Rs. 5, *ad valorem* fee chargeable under Art. I, Sch. 1 as amended by the Bengal Court-fees Amendment Act subject to a maximum of Rs. 20 was payable. 32 C. W. N. 1136.

——a suit under s. 106 B. T. Act is a suit for a declaratory decree within the meaning of Art. 17, cl. iii of Sch. II of the C. F. Act. 12 C. L. J. 638 : 15 C W. N. 110 : 7 I. C. 627, 17 C L. J. 417 : 18 I. C. 275, 48 I. C. 552.

——in a suit for declaration of title and for injunction to restrain the deft. who was declared by the Settlement Officer to be [illegible] , from so realising [illegible] of the property.

——the court-fees payable on a plaint in a suit to eject a tenant from the house or land let out to him is chargeable on one year's rent under s 7 para xi cl. (cc), 24 P. L. R. 1907, 12 A. L J. 933· 25 I C. 975, 1 L B. R. 303, deft's denial of relationship of landlord and tenant does not alter the character of the suit 27 P. R 1910. 210 P. L. R. 1910 : 30 P. W. R. 1910 : 5 I C 910 but the payment of court-fee on one year's rent does not decide the title of the plff. 27 M L. J. 475.

——"illegally ejected" has been explained to mean "ejected [illegible] of the provi- [illegible] 16 C.

——"the year next before the date of presenting the plaint" denotes a period of 365 days reckoning backwards from the date of presentation of plaint. 28 A. 411 : 3 A. L. J. 244 : 26 A W N. 66.

——in a suit to eject a tenant at will the court-fee of 8 annas is to be paid. 11 C L R. 91.

(16) Maintenance, suit for.

——in a suit for arrears of maintenance court-fee is to be paid on the amount of arrears. 42 A. 356 : 18 A. L. J. 328 : 55 I. C 809

——in a suit for declaration of right to receive a periodical payment and for arrears court-fee is to be ten times the amount claimed for one year plus *ad valorem* fee on the arrear. 42 A. 353 : 18 A L. J. 328 : 55 I. C. 809, 6 A. W. N. 228.

(17) Market-value.

——the question of market value is to be determined rather with reference to the commercial value than with reference to any abstract legal right, 24 C W. N. 184, 33 B. 483. 11 Bom L R 674, *Ref.*

——market-value means the price that a person willing and not obliged to sell, might reasonably expect to obtain 24 C W. N. 184, 17 C. L. J. 34, *Ref*

——tenancy at will has a market value 24 C. W. N 184

——a market value of the property in a suit for pre-emption is to be determined with reference to its value at the date of the sale. 69 I C 650

——a suit for the recovery of possession of temple falls under sch. II Art. 17 (B), 46 *M* 782 45 *M* L. J. 274: 1923 *M.* W. N. 550. 74 I C. 198 F B.

(18) Mesne profits, suit for.

——in a suit for mesne profits court-fee cannot be levied in respect of claim for mesne profits *pendente lite.* 24 I C. 232: 13 C. W. N. 815, *Reld.*

——court-fee is payable on the future mesne profits but it can be exacted after the amount has been ascertained by inquiry and the court cannot dismiss such an application for non-payment of court fee in advance. 7 Pat L. T 313. 5 Pat 361: 1926 Pat. 218: 93 I. C. 939. F. B.

——where in a suit for past and future mense profits court-fees [illegible], execution will not [illegible] the excess. (S 11).

[illegible] 17 B. 41.

[illegible] value

[illegible] ion for [illegible] ees in [illegible]

(19) Partition, suit for.

——in a suit for partition of joint property where plff. is in possession of some portion, court-fee of Rs. 10 is payable. Deft's denial of plff's title and possession will not affect, but if it is established that he has been ousted, then he must sue for recovery of possession and partition and pay *ad valorem* court-fee 12 C W. N. 37. 6 C. L. J. 651, 20 C. W. N. 51 p 57, 21 M. L J. 21, 33 B. 658, *contra.* 61 P. L R 1916, 89 P. W. R. 1916: 34 I. C. 857, 2 Pat. 432: 4 Pat L. T. 259 · 72 I. C. 916, 5 Pat L. J. 450.

——it is incumbent on the court, in a suit for partition to come [illegible] title to the property, [illegible] lge on appeal should [illegible] declaration of title and for confirmation of possession *ad valorem* court-fee is to be paid, 6 Pat. L. J. 663; 1922 P. 65: 65 I. C. 294.

(19) Partition, suit for—contd.

——where the joint properties described in two schedules are situate in two different vil . and the plff.'s possession is tute the more valuable , fee of Rs 10 is payable, and not *ad valorem* court-fee. 15 C L 443, 21 C. L. J. 253, 22 C. W. N. 669.

——in a suit for partition after declaration of title, Art. 17 (VI) applies. 29 C. W. N. 76.

——in a suit for partition if the plff. alleges that he is in possession, court-fee of Rs. 10 is payable, 34 A. 184.

——when in a suit for ... the plff *claims* 8 annas share and in of properties representing to be paid as in a partitic L. T. 34.

——the court cannot reject the valuation even if it be an arbitrary one 13 M. L. T 128 : 191 M. W. N. 105 : 24 M L. J. 233 18 I. C 368 F. B.

——according to ... of

Pat. 89.

——a suit by Mahammedan co-sharer in possession of some items for partition, falls under Art. 17 cl (6) and not under s 7 (I) 1923 *M. W. N. 564*, 75 I. C 93, 38 *M. L. J. 92* : 43 M. 396 : 55 I. C. 517, 1920 M. W. N. 124 · 27 M. L. T. 146, 44 I. C. 216 *fol.*

(20) Partnership suit.

——an application for winding up partnership is in the nature of *suit for account* and *ad valorem* court-fee is to be paid 14 C. L. R. 60, 7 B. 125, 6 B. 143, 6 C. 321

(21.) Probate case.

——stamp duty for probate is to be paid only on the amount of *the right, title* and interest of the testator in the property bequeathed. *100 I. C.* 111 : 38 M. L. T, 7, 33 M. 93 *Rel. on.*

(22) Record of rights.

——in a suit for ... and settlement *of fair rent ad va* ... 138, 14 C. L. J. 47 : 15 C. W ... 298.

——in a case ... transferred to the civil court, civil court is to decide the court-fee ; ... case is tried by revenue officer, court-fee of Rs. 10 is to be paid. 17 C L J 416, 12 C. L. J. 638 *Ref.*

——a suit under s. 104 to 104 F of the B. T. Act, for declaration against the entry and for settlement of fair and equitable rent, is a

(22) Record of rights—*contd*

suit with consequential relief and *ad valorem* court-fee is payable 17 C. L. J 426, 16 C L J 383 *Fol*

——a claim before a survey officer or an entry in the Record-of-Rights being an assertion of a hostile title the plff must clear his title and get possession before he can claim partition and such suits come under sec 7 (iv) (c) of this Act. 63 I C 203

——in a suit for declaration that the plffs are occupancy raiyats and not tenure holders [illegible] entries describing them [illegible] on them, the court-fees [illegible] without consequent rel[illegible] [illegible] ts brought a suit for decla-[illegible] ights describing them as [illegible] the plffs. were to pay *ad* [illegible] I C. 352 . 40 I. C. 96, 16 C. L. J. 383.

(23) Redemption suit.

——in a redemption suit plff. is to value according to his own admission and not according to deft's case. 37 M. 420.

——where in a suit for redemption surplus profits are claimed court fee need be paid only on the principal amount due and not on the profits claimed 76 I. C 131, 68 I. C. 226, 3 Lah. L J. 370.

——in a redemption suit Art. 1, Sch. I applies and not cl. (ix) of s. 7, 3 Lah. L J. 370.

——in an appeal against redemption decree on the ground of more being due *ad valorem* court-fee is payable on the excess 74 I. C. 88.

——in a suit for redemption valuation for the purposes of court-fees and jurisdiction is not the same. 28 C W. N 710.

(24) Restitution of conjugal rights.

——in the absence of rules framed under s. 9 of the Suits [illegible] rights the [illegible] plaint with [illegible] J 400, 28 [illegible] L. J. 889 : [illegible] payable

(25) Security bond.

——a security bond filed by a claimant in a claim case is governed by Sch II Art. 6 49 C. 997, 1923 Cal. 169.

——a security bond executed in pursuance of an order of the [illegible] the C. P. C. [illegible] Sch. II of the [illegible] able under the [illegible] 40 or Art. [illegible] [illegible] ct if they fall [illegible] 5 : 53 C. 101 :

(25) Security bond—*contd*

——security bond executed in pursuance of an order of court 53 C. 101.

(26) Set-off.

——deft. claiming set-off must pay *ad valorem* court-fee. 45 . 218 1928 A. 118 : 69 I. C. 921, 10 C W. N. 199, 17 C. L. J 355 F. B.

——where a document of set off is admitted by the tr court it is not for the party to say that the document should b struck off the record for the non-payment of court-fee but the cou is entitled to allow the party to rely on the document on payme of proper court-fee. 28 Bom L. R. 525 : 1926 Bom 343 : 94 I. C 646

(27) Setting aside order or decree.

——in a suit for declaring a decree void to the extent of plff. share, court-fee should be paid on the value of that sha 19 C W. N. 895.

——in a suit for (1) declaring a decree fraudulent and (2) fo injunction and (3) for confirmation of possession, the value of th decree is proper valuation 40 C. L. J. 150, 6 C. L. J. 42 11 C. W. N. 705

——in a suit for declaration that previous rent decree in su is binc . . . C W. N. 375.

— 21 r. 63 (new) C. I

C., the . 169 : 7 C L J 3

12 C . J. 618 : 5 A. L. J

10 P. C.

——in a suit for declaring a decree void to the extent of plff. . 19 C W

it binding

null and influence,

10 and no

ad valorem fee is necessary. 28 C. W. N 1408.

——a suit for declaration that a decree is fraudulent and for injunction comes within s. 7 (iv) (c) of the C F. Act. 40 C. L J. 150 79 I C 98 : 1924 Cal. 969.

property is sought to , the value of the the statutory value C. 171 : 1927 Mad

——where a reversioner seeks to set aside a decree to which he and the widow were parties and which is binding on them so long as it is not set aside and the widow is alive at the date of the institution not under Art 17 r could not be 171 : 1927 Mad.

(25) Security bond—*contd*

——security bond executed in pursuance of an order of court 53 C. 101.

(26) Set off.

——deft claiming set-off must pay *ad valorem* court fee 45 A 218 : 1928 A 118 : 69 I C. 921, 10 C W. N. 199, 17 C. L. J 355 F. B

——where a document of set off is admitted by the trial court it is not for the party to say that the document should be struck off the record for the non-payment of court-fee but the court is entitled to allow the party to rely on the document on payment of proper court-fee. 28 Bom L R. 525 : 1926 Bom. 343 : 94 I. C. 646.

(27) Setting aside order or decree.

——in a suit for declaring a decree void to the extent of plff.'s share, court-fee should be paid on the value of that share 19 C W. N. 895.

——in a suit for (1) declaring a decree fraudulent and (2) for injunction and (3) for confirmation of possession, the value of the decree is proper valuation. 40 C. L. J. 150, 6 C. L. J 427. 11 C. W. N. 705.

——in a suit for declaration that previous rent decree in suit ... W. N. 375.

r. 63 (new) C. P

69 : 7 C L. J 36

I. 618 . 5 A. L. J

10 P. C.

——in a suit for declaring a decree void to the extent of plff's share, court-fee should be paid on the value of that share 19 C W N. 895. 6 Pat L J. 191 · 1918 Pat. 228 : 44 I. C 891.

——a suit for declaring that previous rent decree is not binding requires a court-fee of Rs 10. 12 C. W. N. 375.

——suit for declaration of decree based on *solenama* as null and void and inoperative as having been obtained by undue influence coercion and fraud, may be framed with a court-fee of Rs 10 and no *ad valorem* fee is necessary. 28 C. W. N 143n.

——a suit for declaration that a decree is fraudulent and for injunction comes within s 7 (iv) (c) of the C. F. Act. 40 C. L J 150 79 I C 98 . 1924 Cal. 969

... property is sought to ... the value of the ... the statutary value ... C. 171 : 1927 Mad

——where a reversioner seeks to set aside a decree to which he and the widow were parties and which is binding on them so long as it is not set aside and the widow is alive at the date of the institution ... not under Art 17 ... could not be ... 71 · 1927 Mad.

Custom and customary right and usage—*contd.*

Doctrine of lost grant does not apply to custom

——the doctrine of lost grant is applicable to private rights claimed by prescription. It is inapplicable to a right claimed on the basis of immemorial custom. 36 C. L. J. 280.

Customary Law.

——though judicial decisions are not indispensable the acts establishing Customary Law ought to be plural, uniform and constant. 98 I. C. 43 : 1927 Cal. 177, 45 C. 535. 1 A. 440, 3 M. H C. 53, 17 W. R. 316.

——where the power to will is established under customary law the limits to such power should be looked for in the customary law. 111 I. C. 377 : 1928 Lah. 940 : 29 Punj L. R. 618

Custom supersedes general law.

——a custom when proved supersedes the general law which however continues to regulate all outside the custom. 61 I. C. 964.

——but mere usage cannot amount to custom modifying law 21 C. W. N. 729 : 26 C. L. J. 153 : 40 M. 709 : 22 M. L. T. 1 : 19 Bom. L R. 567 P. C.

——tenant setting up custom in derogation of general law must prove the right. 62 I. C. 417.

Custom must be pleaded by particulars.

——particulars of custom must be given in pleadings. 19 M. L. T. 296 : 31 I C 833

Trade custom.

——trade usage must be shown as a matter of law first that it was a reasonable usage not inconsistent with the law and as a matter of evidence that it was so universally acquiesced in that every body in the trade knew it or could have ascertained it if he had taken the pain to inquire. 1928 Bom. 487 : 30 Bom. L. R. 1317.

Custom of transferability.

——the custom of transferability of occupancy holding on payment of *nazar*. 22 C. W. N. 929.

For other cases of transferability of occupancy holding, see, "B. T. Act, Transferability."

Some other customary rights.

——right of privacy does not depend on the caste, or creed 1923 A. 404 : 73 I. C. 1040.

——right to bury the dead can be acquired by custom if satisfactorily proved 2 Bur. L. J. 186

——the custom of a right to receive emoluments without performing duties is immoral and opposed to public policy. 14 L. W 329.

——essentials of right of passage by boat, legality of custom 1924 Cal. 998 : 84 I. C. 79.

Custom and customary right and usage—*contd.*

——the custom in a Hindu Mitakshara family excluding females from inheritance though not unique or unknown, must be proved to be ancient and the proof thereof must be conclusive. 96 I. C. 836 . 1926 M. W. N. 596 : 1926 P. C. 91

——amongst persons belonging to the Pali caste widow marriage is prevalent in the *nika* form and sons born of such nika-marriage inherit equally with other legitimate sons. 96 I. C. 581 (c)

——under Khoja custom a widow is entitled to maintenance out of family estate 47 C. L. J. 292 30 Bom. L. R. 762 107 I. C. 453 : 1928 P. C 135

CYPRES DOCTRINE.

——the doctrine of cypres should receive as extended an application as possible so as to give effect to the true intent and aim of the donor. His lapses, his ignorance and his failure to understand the situation should not fetter the courts so long as the purposes specified by him are not vitiated. 65 I. C. 820, 37 M. L. J. 489, 23 B. 725, 31 C. 895, 33 B 583.

——where a charitable gift is made upon a condition precedent it fails if the condition is not satisfied and the doctrine does not apply. 48 C. 124 : 25 C. W N. 343 : 32 C. L. J. 453.

——to attract the application of the cypres doctrine an absolute *declaration of intention to give to charity must be established, above case.*

——this doctrine is not applicable where within the four corners

a cypres application of a charitable trust. 37 M. L J. 489 : 47 I. C. 611.

——where after satisfying in full the prescribed objects of a charitable trust, some surplus income remains unspent, a court can, at the instance of the Advocate General acting with the consent of the author of the trust, direct the surplus to some other purpose considered proper under the cypres doctrine. 52 C. 508 : 29 C. W. N. 793 : 88 I. C. 890 : 1925 Cal. 797.

DAMAGES.

Damages for breach of contract.

——a party to a contract cannot put an end to it simply by committing a breach of it. 26 C. W. N. 57. 26 Bom. L. R. 786 : 80 I. C. 807 : 1924 M. W. N. 607 P. C.

——the damage for breach of contract by renunciation thereof, are measured by what the injured party would have suffered by the continued breach of the other party down to the time of complete performance less any abatement by reason of circumstances of which

Damages—*contd.*

——In case of partial loss by fire the market price at the place where the damage is caused at the date of danger is to be awarded and not the market price at the place where the cargo was discharged 53 C. 239 : 1926 Cal. 564 : 75 I. C 1042.

Damage against lessee.

——where sub-tenure holder exacavates a tank not knowing and in contravention of the contract between the tenure-holder and the Zemindar, the tenure-holder is liable for damage to the Zemindar, 20 C. L. J. 551.

——a suit for damages against tenant for wilfully omitting to raise crops is a suit for recovery of rent in as much as the share of the produce of the landlord was to be ascertained in the suit. 16 C. W. N. 89

——a suit for damages for use and occupation was held to be indistinguishable from rent suit where the deft. claimed to be a tenant 2 Pat. L. J. 97 *contra* 19 C. W. N. 204 N.

——after tenancy has ceased the tenant is liable for compensation for use and occupation, 24 M. L. J. 263 : 15 I. C. 415, 30 M. L J. 492 : 34 I. C. 6.

——when a tenant holds over wilfullly and contumaciously courts can award reasonable damages and the penalty laid down in England by statute of double the rent may sometimes be taken as a fitting standard. 75 I C. 1034

Damage against lessor.

——a landlord who seizes or detains the goods of the tenant for some unpaid rent, acts illegally and is liable for damages 63 I. C 41

——failure to execute a properly stamped lease renders the lessor liable for damages. 42 C. 801 : 20 C. W. N. 149 *fol.* 1923 Nag 73.

Damage against Vendee

——where vendor reasonably fixed the final date by which the vendee was required to complete the sale he can claim the market rate on that date and not on any latter date 48 B. 368 ; 26 Bom L R. 105 : 1924 Bom 357.

Damage against the owner of a rival market.

——where by the application of illegal means in the nature of intimidation and physical compulsion by the agents of the owner of a new market, traders are dissuaded from attending the old market the owner of the old market is entitled to civil remedy by way of suit for damages. 47 C. 1079 ; 24 C. W. N. 800

Damage for malicious removal of name from votership.

——a malicious removal of the name of the qualified voter from the roll of any constituency gives rise to a cause of action for damages. 44 A. 202 : 20 A. L. J. 1 : 65 I. C. 984.

Depreciation of mortgaged property.

——damage suit is maintainable for depreciation of the mortgaged property caused by cutting down trees. 3 L. W. 31: 32 I. C. 901

Damages—*contd*

Non-payment of prior martgage debt.

——money left with mortgagee to pay off prior mortgage debt, default of mortgagee to pay, suit for damages, cause of action arises when the mortgagee is damnified. 19 A. L J. 81 : 60 I. C. 829.

Bonafide trespass.

——in case of *bonafide* trespass a nominal damage is to be awarded 20 A. L J 888 L. R 3 A 494

Slight push

——where a person was given a slight push on the assumption that he was a trespasser without any injury to his reputation or person he is entitled only to a nominal damage. 68 I. C. 564 : 1923 Cal 306

Divorce suit

——in a suit for divorce on the ground of wife's adultery with the co-respondent the court can award damages against the co-respondent. 45 M L J 282

Compensation under the Carrier's Act

——in a suit for compensation under the Carrier's Act negligence of the deft in carrying the goods is not to be proved by the plff, burden being on the deft 17 C W. N 970.

Quantum of damages.

——the amount due to the plff either on a debt or for damages for breach of contract or in tort is to be determined according to the *rate prevalent at the date when the cause of action arose* 1928 Lah 949.

——on a question of *quantum* of damages it is not the practice of the H. C. to interfere except on a question of principle. 2 Pat. L. T. 255 62 I C. 72

——where the court finds that the plffs. have grossly and intentionally exaggerated their claim for damages and decrees only a small portion of the claim, the defts. are liable to pay only a proportionate share of the court-fees. 78 I C. 573: 46 M. L. J. 366 : 1924 Mad. 692.

——goods were despatched by steamer from C. to P. under a bill of lading. While the steamer was at G. a fire broke out and damaged the g [illegible] loss. held that the [illegible] of the market pri [illegible] ket price at P. at

When suit for damage does not lie.

——success in litigation in the civil court only does not give rise to a cause of action for damages. 44 A. 637 : 1923 A. 465 : 20 A. L J 636: L. R. 3. A. 408.

——plff. is not entitled to damages if loss could be avoided by him. 19 C. W. N 1311.

Damages—*contd.*

——a claim for damages in prize proceedings cannot be had as an *alternative* to a claim for the release of the vessel and consistently with her condemnation. 84 I. C. 737: *1922 P. C. 371*

——*the Secretary of State is not liable in damages* for the conduct of a Magistrate, acting under the statutory powers though *he may commit an error of judgment.* 97 I. C. 847 : 51 M L. J. 446: 1926 Mad. 1084.

As to the cases of damages for defamation, see "**Defamation.**"

As to the cases of damages for tortious act, see "**Tort**".

DEAD PERSON.

——a suit against a dead man is a nullity and cannot be cured by *bringing his legal representative on record.* 25 Bom L. R. 7, 31 M. 86 *Ref.*

——*decree against a dead person or against wrong heir of a dead* man is a nullity. 22 C. W. N. 283, but it is not so in case of *bona fide* act. 4 C. 342, 32 C. 296: 9 C. W. N. 201: 1 C. L. J 584 **P. C**, 33 M. 6.

——surviving deft. can object to a decree on the ground that *the decree* passed against a deceased deft. is a nullity. 75 I C 321, *(Pat.)*, 32 A 301: 7 A L. J. 238: 59 I. C. 887.

——*in a suit against a dead person no substitution should be* allowed even when the suit is instituted *bona fide* and in ignorance *of the death of the deft.* 1923 Lah. 652, 24 I. C. 112

——an executing court cannot go against a *decree* when it is passed even against a dead man. *1 P. L. T. 425; 58 I. C. 212.*

——execution against dead person is a nullity. 18 C. W. N 1266 20 C. L J 341

——omission to bring on the record the representative of the Jt Dr. who has died after attachment but before sale, vitiates the *sale* 23 *C. W. N.* 608. 29 C. L. J. 411: 51 I. C. 972, 18 C L J. 628, 45 I. C. 699, (C) 23 O. C. 218: 58 I. C. 549, 5 C. W N 10 P. C

DEFAMATION.

——*where words defamatory in themselves and not mere verbal* abuse have been used, a plff. is entitled to *damage, though no special damage* is proved to have been suffered 34 C. 48; 4 C L J. 388, 26 C 653, *Dist/* (12 C. 109. 424, 3 C L. J. 140, 38 M 175) *Appr.* 4 C L. J. 390 *Fol*, 13 C. W. N. 340: 1 I. C. 117, 42 M 131.

——abusive and insulting language,—as calling the plff *sala* (wifes' brother), *haramjada* (base born or bastard) *soor* (pig), *bapet beta* (bastard)—not amounting to defamation is not actionable, *irrespective* of any special damage (*Ghosh, J. contra*) 26 C. 653 3 C. W N. 551, **F. B.**

——mere use of scandalous words imputing unchastity to a woman *is* not actionable by itself. 28 C. 452.

——writing a letter to husband alleging that his wife was a witch and by her sorcery caused the death of certain person,

Defamation—*contd.*

making statements of similar description to their castemen, is actionable as slander and no proof of special damage was necessary. 4 C. L. J. 390.

——statements made [illegible]
by a party or witness is not [illegible]
14 B 97, 2 B 230, 10 A. 42[illegible]
a witness made while going [illegible]
I. C 8; 1926 Mad. 521.

——statement made by the parties to a suit in the pleadings is not privileged, and a charge of defamation is maintainable; but the witness deposing is privileged. 5 C W. N. 293, 3 L. B. R 265, 129 P. W. R. (1908)

——written statement of party containing defamatory matter is not absolutely privileged. 15 C. W. N. 995: 14 C. L. J. 31.

——litigants are not privileged to insert any matter they please into their pleadings, application or affidavits or to make any statement they like in the witness box however irrelevant or insulting they may be. 3 L. B R. 265.

——statements in pleadings are not absolutely privileged. 65 I. C 204.

——a defamatory statement made in an affidavit is not privileged if it is irrelevant to the inquiry to which the affidavit related. 8 C W. N. 292.

——defamatory words used in a complaint in a criminal court are not actionable 40 A. 341 F. B. They are absolutely privileged. 49 M 315. 93 I. C. 8 1926 Mad. 521

——statement by a witness imputing unchastity to plaintiff's sister was not actionable as it was not defamatory of him nor did cause him any injury. The statement of a witness is privileged unless it is wantonly made 32 C. 1060. 9 C. W N. 847.

——no civil action for damages lies against a witness or party for giving false evidence or for any statement made in judicial proceeding But it is otherwise in case of pleading. 39 C. 164: 14 C L. J. 31, 38 C 880, 32 C. 756, 1060, 32 P R. 1917. 38 I. C 678, 42 A. 257, 15 C. 264, 21 O. C. 321: 49 I. C. 58.

——answer by witness as to question on oath is privileged. 43 A. 92.

——advocates and pleaders in India have not an unqualified and absolute privilege in respect of question put to the witness in cross-examination. To make imputation on the character and position in life of a witness is not defamatory if the imputation is made in good faith and for the protection of the client engaging the advocate. 46 C. L. J. 227: 104 I. C. 717: 1927 Cal. 823.

[illegible] in respect of
[illegible] the court ought
[illegible] W. N. 340.
[illegible] y for damages
[illegible] al prosecution
[illegible] the same has

Defamation—*contd.*

——suit for defamation against a vakil for words used during argument is not maintainable. 1922 Pat. 85.

——legitimate comments by pleader was held to be privileged 25 C. W. N. 835.

——describing a journalist's communication as worthless is defamatory 41 I. C. 696. (L B.)

25 M. L J 476 · 21 I C. 16 I. C. 736, 20 Bom L R. 30 : 19 I. C. 98, 8 C. W. N

——when the plea of fair comment is raised in defence facts outside the passage complained of cannot be referred to. 54 C 73: 101 I. C. 565 ; 1927 Cal 297.

——a comment under the particular circumstances of the case was held not to be fair comment and was not privileged 48 C. 304 . 63 I. C 467.

——no damage is recoverable for the mental distress caused by an insult. 28 C. 452 : 5 C. W N. 659.

——any person has the privilege to defend his character against false charges and may retort upon his assailants but if it is not fairly made then it will be malicious and actionable. 32 C 318 8 C. W. N 731.

——communications addressed in good faith to persons in a public position for the purpose of giving them information to be used for the redress of grievances, the punishment of crime or the security of public morals, are privileged. 22 A. L J 65

——an action lies for malicious publication of statements which are false in fact and injurious to another unless they are fairly made in the discharge of one's public or private duty or in the conduct of his own affairs. 9 O & A. L. R 302.

Defect of party *see "C. P. C. party" and "B T. Act, Defect of party."*

Delivery of possession, *see 'possession.'*

DEPOSIT.

Under C. P. C.

——a person who has attached before judgment cannot deposit under Or. 21 r. 89, 17 C W. N. 80. (33 C 639 p. 643 : 10 C W. N 634, 38 C 448 : 15 C W. N 795), *Reld.*

——previous purchaser who is not affected by the sale cannot deposit under Or. 21 r. 89, 16 C. W. N 904.

——conditional deposit is not valid, but if condition is withdrawn on the objection of the D. Hr the deposit is valid. 16 C. W. N. 904

——deposit made one day after the last day of deposit, owing to the Presiding Officer having left the court earlier than usual, is valid 16 C. W. N. 904.

calculating the sum to hat officer had the duty N 283 F. B Dist. in

C. P. C.—*contd.*

——deposit made for partial setting aside of the sale is not valid. 1 C. W N 703.

——the purchaser of a portion of non-transferable occupancy holding is not entitled to deposit. 1917 Pat 169 F. B., 19 C. W. N 176 n. *Foll.*

——Jt Dr selling property after auction sale but before confirmation can deposit 40 B. 557.

——a reversionary heir apparent can deposit 18 C W. N. 778, but not under s 170 B. T Act 26 C. W N. 167.

——payment of money with protest under force of execution proceedings is payment under compulsion and involuntary and is recoverable. 17 C. L. J. 478, P. C., 8 I A. 93 7 C 648 *Fol*

——a person who claims to be a tenant for a period longer than 12 years to the knowledge of the landlord is entitled to deposit. 17 C. W. N. 163

——deposit of money by the D. Hr. in a pre-emption suit within the time extended by the court is valid 20 C. W. N. 860

For other cases see "C P. C Or. 21 r. 89.'

Under B T Act. *(Old)*

——an unrecognised purchaser of non-transferable occupancy holding can deposit under s 170 (3) (before sale). 20 C. W. N. 39, (17 C. W. N. 163 16 C L. J 548, 18 C W. N. 971, F. B.) 18 C. W. N. 219n : 27 I. C. 424, 18 C. W. N 231n. *Ref contra*, below.

[illegible] holding has no [illegible] cl (3), 16 C. [illegible] N. 652, 8 C. [illegible] W. N. 438, 26 C. [illegible] W. N. 175n, 28 C. W. N. 845.

——the lower court has to see if third person has the right to deposit, the order is not appealable. 17 C. W. N 62.

——tender improperly made but being refused, if the tenant keeps the rent good, it amounts to deposit. 34 C. 305, 18 C. W. N. 84 p. 85.

——tender of rent if kept good is valid to disentitle the landlord to any interest. *11 C. W. N 983, 35 C 34* : 6 C. L. J. *273*, F. B.

——deposit in court by a tenant of less than the amount due [illegible]

be incorrect. The landlord should withdraw the money whithin 6 months and he may or may not sue for the balance. 19 C. W. N, at p 1147, 15 C. 166, *considered*,

——no deposit can be made of rent in kind but if money value is stated in the Kabuliyat, it may be deposited. 19 C W. N. 1143 (15 C. W. N. 249 : 12 C. L. J. 649). *Ref.*

B. T. Act—*contd.*

——transferee of a [illegible] holding can deposit under s. 52 of th[illegible] [illegible]2.

——deposit of mone[illegible] has sold away the holding, is a [illegible] 18 C W. N. 175.

——a putnidar who entertains doubt as to who is entitled to rent may deposit 18 C. W N 916 : 24 I. C. 71.

——in case of deposit under s 170 notice to the D Hr. must be given. 18 C. L. J. 142.

——a depositor under s. 171 B. T. Act becomes a statutory mortgagee and that mortgage is redeemable by subsequent mortgagee. 18 C. W. N. 207 n

——deposit of rent under s 153, is not necessary when the deft. admits jama which is more than the jama claimed 19 C. W. N 970.

For other cases "B. T. Act ss 170 and 174."

Time of deposit.

——the period of 30 days runs from the time when the sale becomes final 35 A. 65.

——the period of 30 days for depositing the decretal amount under s. 174 B. T. Act, cannot be extended on the ground of fraud 17 C. W. N 216 n . 18 C. W. N 31

——a deposit under s. 174 B. T. Act is not bad for falling short of the required amount owing to the miscalculation of the officer of the court. 11 C. W N 116, 26 C. 449 **F. B** *Dist* 18 C. 255 *Ref*, 25 C 216, *Fol*

——time fixed by the court ending on a holiday, deposit on the re-opening day is good 10 C. W. N 535 · 3 C. L J. 339

DISPOSSESSION, see '*Possession.*'

DISTRIBUTION OF ASSETS, see '*C. P. C. s. 73.*'

DISTINCTION BETWEEN.

(1) Irregularity and nullity.

——an irregularity is a deviation from a rule of law which does not take away the foundation or authority for proceeding : whereas a nullity is a proceeding that is taken without any foundation or is so essentially defective as to be of no avail. Waiver is one test. If the party can waive, it amounts to irregularity, if not, it is nullity. A provision based on public policy cannot be waived but if it is for the benefit of individual it can be waived 27 C. W. N. 765 · 37 C L. J. 447.

——it is an elementary principle of law that if a court has no jurisdiction over the subject matter its judgments and orders are mere nullities and may not only be set aside at any time by the court in which they are rendered but declared void by every Court in which they are produced 27 C. W. N. 542 : 1923 Cal. 619, 38 C. 639, 9 A. 191, 11 M. 26 *Ref.*

(2) Mandatory or imperative and directory.

——a decree against a minor representing him as major is a nullity. 1921 Pat 100

——the principle to be applied in considering whether the provisions of a Statute or an Act are imperative or directory is this The court must look to the subject matter, consider the importance of the provision that has been disregarded and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory 38 C. L. J. 77 F. B.

(3) Void and voidable

——judgments and orders relating to matters outside jurisdiction are not voidable but void 27.C. W N 542 1923 Cal 619, 38 C. 639, 9 A 191, 11 M 20 *Ref*

——when fraud is practised on court no section of the Code is necessary to nullify the proceeding. 19 C. W. N. 419

33 M. 312, 30 C 539, P C.
or is null and void and

be set aside 17 C. L. J. 233

DOCUMENT.

——in construing a deed the question always is what is in the meaning of what the parties have said and not what did they mean to say. 18 C. W. N. 32n.

——an instrument should be construed according to its natural meaning in the light of the circumstances in which it was executed. 1922 Cal 300 68 I C. 937

——to determine true construction regard must be had to the object and scope of the instrument judged, if necessary, by reference to the surrounding circumstances 48 C 124 : 25 C. W N 343 : 32 C. L. J 453.

——where a charitable gift is made upon a condition precedent the gift fails if the condition is not satisfied. 48 C. 124 : 25 C W. N. 343 32 C. L. J 453

——where a person has two capacities and he transfers his whole interest, he transfers his interest in both capacities 24 I. C. 296, P. C.

——the place and manner of signature of a document is immaterial: where the document is written by the executant and his name inserted in the beginning, it is sufficient. 19 C. W. N. 611.

——signing a blank paper and admission of execution is sufficient. 6 C. W. N. 329.

——a deed purporting to be executed by more than one but executed by one only is not *ipso facto* invalid on that ground. 31 M. 114. *contra*, 25 M. 389.

——distinction between a license and a lease is that by the latter interest is transferred. 17 C. W. N. 166

Document—*contd*

——doctrine of estoppel does not extend to matter or statement or recital which are immaterial for the purpose of the contract and not basis of the action. 13 C. L. J. 271.

——a promissory note must contain an unconditional understanding to pay. 39 M. 360.

——whether a document is a sale-deed or agreement to sell depends upon the intention of the parties. 37 M. 480

——where a deed of grant under which property is claimed to be *debutter* is ambiguous, true character of the endowment may be determined from the manner of enjoyment. 19 C. W N. 542

——where language is clear no evidence of conduct is allowed to interpret the deed 19 C W. N. 1311, 33 C. L. J. 332; 25 C W. N. 308.

——words are to be looked to and not intention of parties if language is unambiguous. 29 C. L. J. 6, 20 C. L. J. 312; 42 C. 536 Ref.

——in construing a document intention is not to be seen but meaning of wordings are to be seen. 21 C. W. N. 707, P. C. Contra 2 Pat L. T 195.

——deeds and contracts in India should be construed literally. 19 C W. N. 110 P C.

——the substance and the real meaning of the parties and not the form of expressions and the literal sense of the transaction are to be constantly kept in view as the basis of decision. 34 C L. J. 323

——subsequent admission as to meaning of the document is not admissible. 12 C. L. J. 378

——after all the deft's witnesses have been examined the plff cannot put in a document to contradict deft's document. 37 B 682

——documents creating title must be filed with the plaint 21 C W. N 553 25 C L J 273, P. C.

——non-production of documents in possession of deft in an account suit gives rise to presumption against him under s 114 (t) Evi. Act. 24 C W N. 110

——inspection of plff's document. 24 C W. N. 302.

——the court may accept a document at any stage under Or 13, r. 1, 23 C W. N 50 P. C.

——a document is admissible to contradict a witness but the witness should be given an opportunity to explain it. 22 C W N. 39n.

——where in grant of land there is a repugnancy between the terms of grant and any plan or diagram, the former will prevail. 66 I C 442.

——where boundaries can be ascertained effect must be given [illegible] ndaries are not certain [illegible] 3 *Ref.* 64 I. C 751 (C)

[illegible] with vitiates a sale [illegible] N 218.

[illegible] wife as "*malik*" but the instrument contains a limitation as regards alienation and also

Document—contd.

provisions as regards final devolution the grant is in effect an ordinary Hindu widow's estate 1 Pat. 295 1922 Pat. 70: 3 Pat. L. T 273 · 65 I. C 977, 1922 Pat. 74

——terms of judicial order should be construed according to law. 17 C. W N. 665, 16 I. C. 74 (c)

——in determining whether a document requires the stamp duty of mortgage or sale deed, the court will look at the substance of the transaction and not merely at the form of it. 28 C W. N. 497

For admissibility of document, see, '*Admissibility*'

For 'mortgage or out and out sale' see, '*Mortgage*'

For construction of document, see, '*Construction*',

Domicile.

——domicile can always be ascertained either by means of a legal presumption or from the known facts When a person having no fixed place of residence expresses his intention to settle at the place of his wife's parents and put up with those parents at times, that place can be said to be his domicile of choice 111 I. C. 762 . 1928 Pat 375 9 Pat. L T. 397

——the question of domicile is one of intention to be inferred from all the circumstance of the person's life, habits, conduct and so forth. 113 I C 782 1928 Lah 419.

——a man should not be considered to have taken up his fixed habitation in British India simply by reason of his residing there in His Majesty's civil or military service or in the exercise of a profession or calling, *above case.*

DOWER see '*Mahamedan Law, dower*'

EASEMENTS

(1) General
(2) Customary right.
(3) Easement of fishry
(4) Easement of light and air
(5) Easement of necessity
(6) Easement of pasturage.
(7) Easement of way
(8) Easement relating to support
(9) Easement relating to water.
(10) Extinguishment of easement by merger.
(11) Implied grant
(12) Procession, right to conduct.
(13) Profits a prendre.
(14) Public right
(15) Release and abandonment of the right
(16) Right in gross.
(17) Suit relating to easement, procedure in.
(18) Tenant cannot acquire the right, of easement against landlord
(19) Ownersnip and easement,

(1) General.

——easement must be associated with two things (1) *Dominant Tenement* and (2) *Servient Tenement*. if there is no dominant tenement there is no easement, 5 C 945 : 6 C. L R. 269, 6 A 437 (*i. e* there cannot be an easement in gross)

——dominant and servient tenements should be in the ownership or possession of distinct person. 10 W. R. 298, 1 C. 422

——unity of dominant and servient tenements extinguishes the right of easement but the unity must be co-extensive in all respects Where there has been unity of possession only and not unity of seisin for estate in fee simple, an easement which has been suspended thereby will revive on severance of the union but in case of unity of seisin for estates in fee simple all easements are extinguished and do not revive unless they are re-created on severance of the former dominant and servient estates. 36 C. L. J. 161 . 50 C. 356 1922 Cal. 8 . 70 I. C 663.

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——when the landlord purchased the right of the tenant in execution of a decree but the tenant remained in possession and the rent was subsequently enhanced, right of irrigation from the landlord's tank possessed by the tenant was not extinguished but momentarily suspended. *above case.*

——servient owner cannot insist on the continuance of the easement right by dominant owner. 17 C. W N 1066 : 18 C L J. 131

——transfer of property takes with it the right of easement which has been suspended for the time being by way of compromise, 38 M 141

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——easement does not impose upon the servient owner to walk wherever he pleases but imposes a passive obligation not to interfere with a special specific way. 7 C. 246

——creation of easement right need not be by writing or by registered deed if the value be not above Rs. 100. 19 C. W. N. 1211 p. 1214 20 C W. N 1159.

(1) General—*contd*

——the rule of English Law known as the doctrine of implied grant of easements upon severance of tenements, being in accordance with justice, equity and good conscience, is applicable to India. 26 C. 516; 3 C. W. N. 409.

——where the partition of tenement is affected by consent of the parties, the court merely recording such consent, the principle of implied grant of easements upon severance of tenements is applicable 26 C. 516 ; 3 C. W. N. 409.

——when servient owner is in possession during the prescriptive period, presumption will be that he had knowledge of this enjoyment, but where he is not in possession the presumption is otherwise 6 B. L R. 85, (appeal from the same case). 12 B. L. R 406, P. C.

——unavoidable interruption caused in the user of easement rights as are limited in their exercise to a particular period or season of the year, such as a right of passage by boats in the rainy season, is not an interruption which is fatal to the acquisition of the easement. 1 W. R. 217 10 W. R. 363 : 20 W. R. 302 22 W R 340, 7 C. 132 : 8 C. L. R. 281.

——where a right of easement is established by immemorial user it is not extinguished by non-user or interruption of user for more than 2 years 62 I. C. 633.

——implication of a grant of easement, upon the severance of tenement extends to way which is a formed or metalled road 8 C L. J 289.

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——an easement which cannot be prevented cannot be acquired. 33 C. 1077.

——a right of way or other easements are not acquired under s. 26 of the L Act necessarily with the knowledge of the servient owner. In this respect there is a difference between the Indian and the English Law. 10 C. 214

——the period of 20 years is applicable against the Crown also. 25 M. 357, 10 C. 214

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——the existence of a public lane between the house of the plff. and the deft would not destroy the right of privacy enjoyed by the former. 50 A. 706 : 1928 All. 717 26 A L J 537

——there can be no prescriptive right to a projection erected for the purpose of ornamentation only. 30 C 503 7 C W N 619 29 M. 511 ; 16 M. L. J. 281

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——no easement can be acquired to hold something in the nature of a musical festival upon another's land, but there may be a custom entitling persons to hold *kirton* 13 C. W N 1002 · 36 C 615 : 1 I. C. 108

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——unavoidable interruption caused in the user of easement rights as are limited in their exercise to a particular period or season of the year, such as a right of passage by boats in the rainy season, is not an interruption which is fatal to the acquisition of the easement 1 W R 217 10 W. R 363 20 W R. 302 - 22 W. R. 340, 7 C 132. 8 C L R 281

——where a right of easement is established by immemorial user it is not extinguished by non-user or interruption of user for more than 2 years 62 I C 633

——implication of a grant of easement, upon the severance of tenement extends to way which is a formed or metalled road 8 C. L. J 289

——user for eight years of a way without objection will not give rise to a presumption of implied grant. 8 C. L. J 289.

——an easement which cannot be prevented cannot be acquired. 33 C 1077

——a right of way or other easements are not acquired under s. 26 of the L. Act necessarily with the knowledge of the servient owner. In this respect there is a difference between the Indian and the English Law 10 C. 214

——the period of 20 years is applicable against the Crown also. 25 M. 357, 10 C 214

——a mere user which is separate from prescription will not give rise to any right 1921 M. W. N. 519.

——the existence of a public lane between the house of the plff and the deft. would not destroy the right of privacy enjoyed by the former. 50 A. 706 : 1928 All. 717 : 26 A. L J. 537.

——there can be no prescriptive right to a projection erected for the purpose of ornamentation only. 30 C. 503 : 7 C. W. N. 649 : 29 M 511 16 M L J 281

——overhanging of beam over other's land does not create any right. 28 B. 428 : 6 Bom. L. R. 356.

——no easement can be acquired to hold something in the nature of a musical festival upon another's land, but there may be a custom entitling persons to hold *Kirton*. 13 C. W. N. 1002 : 36 C. 615 - 1 I C 108.

(1) General—*contd*

——there is no implied reservation of easement in case one transfers a part of his land over which he has previously exercised privilege in favour of the land he retains unless the burden is *apparent, continuous and strictly necessary.* 8 C L. J. 289.

——the fact that the water of a tank is made to flow through a channel does not give it the character of flowing water so as to render it impossible to acquire an easement over it. 8 C W. N. 138

——if one has acquired an easement from a projection of eaves he can raise the hights of those eaves. 38 B. 1.

——the possession of eaves for the discharge of water overhanging the land of another is an easement and not an occupation of property 37 B. 491

——a right to store manure can be acquired as any other similar right. 98 I. C 460 : 1927 All 115.

——it is difficult to say that the right to allow sweepers to pass is a right of easement. 33 C. W. N. 189.

——there cannot be a right to use another's land as latrine 19 C. W. N. 864

——the court will not create a new species of easement specially [illegible] 31 C. L. J. 319.

[illegible] deemed [illegible] rights to [illegible] of the term of easement. *above case*

——a right to bury the dead in land belonging to other person cannot be acquired by prescription. 6 L L. J. 130 : 78 I C. 152 : 1924 Lah 492, 107 I. C. 769, 103 I. C. 678 : 1927 Lah 664.

——transfer of property takes with it the right of easement which has been suspended for the time being by way of compromise 33 M. 141.

——where an easement is granted in favour of a community over a garden which they are empowered to use as a public park but the right of management and ownership rests with the owner of the garden it descends in the ordinary way subject to such charge upon it. 59 I. C. 673.

——in acquiring the right the period enjoyed by the predecessors can be tacked on. 1 Bur. L. J. 99,

(2) Customary right.

——when a customary right is claimed it should be specifically pleaded and all the essential requisites to its validity and binding effect should be stated and proved. 34 C. L. J. 39

——when the plff. sets up a prescriptive right he can be allowed to succeed on the basis of a customary right. 34 C L. J. 33

——when easement claimed is not a customary right, it need not be reasonable. 33 C. 1077.

[illegible] easement or a right [illegible] servient tenement [illegible] 927 Mad 653 : 52 M.

(2) Customary right—*contd*

——the time of ascertaining whether a custom is reasonable at its inception and subsequent inconvenience cannot affect it. 6 Pat. L J. 11 2 Pat L. T. 160 61 I. C 13

——the inhabitants of a village may acquire a customary right of way for worship 6 Pat. L. J. 11 . 2 Pat. L. T. 160 : 61 I. C 13.

——a customary right is not a right of easement in the legal sense of the word It has its origin in grant or presumption but in every case no evidence is required for the prescription of lost grant nor is it necessary that the custom should be traced back for whole time necessary to make it immemorial 36 C L J. 280 1923 Cal 200 70 I C 263

——a customary right for all the villagers is not a case of acquisition by prescription and is not governed by s 26 L. Act. 65 I. C 509 (c), 36 C L J. 280

——no fixed period is laid down as necessary to establish the customary [illegible] ement. 46 M 866 [illegible]

——wh [illegible] t may be wholly ir [illegible] n and *vice versa.* [illegible] L. T. 522 44 I C 419

[illegible]

——taking earth from a ditch for repairing houses is a customary easement and is not unreasonable. 72 I C 431.

——custom defined,—a right of boat-passage may exist over the water of another by virtue of a custom Such rights are to be distinguished from public rights of boat-passage which arise from dedication or grant and private rights of boat-passage which are easements properly so called The customary right is one which may be enjoyed by any member of a body of persons. 39 C L. J. 612.

——there is no easement right with respect to musical festival upon another's land, it may be a customary right. 13 C. W. N. 1002 36 C 615

(3) Easement of fishery.

——'easements' under the Indian Limitation Act. Sec. 3 include [illegible] 6 C

[illegible] ease- [illegible] rofit a

(3) Easement of fishery—*contd.*

prendre which may be either in gross or appurtenant to a dom tenement. The question of acquisition of such right is deter by reference to its nature. If it is a mere right to fish no ... nt and can ... it is an exc ... operty whic be acquired by 12 years adverse possession involving an ous the owner. 3 Pat. L. T. 477 : 1922 Pat. 195 : 67 I. C. 954.

——the right of fishery is an interest in land and falls Art 144 L Act the plff. is not to prove user for 20 years un 26 L. Act 3 Pat L. T 53 : 1922 P. 9 ; 64 I. C. 346.

——right of fishing in another's land is an easement rig C L J 572, 22 M L. T. 527, 6 L. W. 769 : 44 I. C. 419.

——the term *jalkar* includes not only the right of fisher ... W. R. 200.

... or *jalkar* may be either ease ... are or are not appurtenan ... C. L R. 269 *contra*. 3 C

——right of fishery in tidal navigable rivers can be grant private individuals, or to certain classes of persons by the C 11 C 434, F. B

——in the absence of proof of title by prescription, the rig such a fishery cannot be establised without proof of a direct from Govt 11 C. 434 F. B

——the mere use of the word *jalkar* would not ordi include rights of fishery in tidal navigable rivers unless the daries in the grant clearly indicate the contrary. 11 C. 434 (33 C. 1349, 12 C. W. N. 334), *Ref.* 8 M. 467, 2 B. 19.

——a man catching fish in his own land which is lower in cannot acquire a right of easement to restrain the other to ... 21 C W N 599

... other's tar ... 129 C W

(4) Easements of light and air.

——there is no right to the uninterrupted flow of south b as such. 14 C. 839, 7 Bom. L. R. 452

——there is no easement of free access of breeze 36 C 406 : 1923 Cal. 256 : 72 I. C. 576.

——continuous and peaceful user of an easement of light air for a period of more than 20 years gives rise to the pres tion that it existed with the consent of the owner of the ser heritage. 6 N. L. J. 59 : 1922 Nag. 192 : 71 I. C. 831.

——though the plff. may have an easement of light an for all the windows which obtained light over the deft's old b ings he has no cause of action unless the deft. threatens to d his enjoyment of this right. 25 Bom. L. R. 239 : 1923 Bom. 72 I C. 406.

(4) Easements of light and air—*contd.*

——to retain the easement of light and air the building need not be identical. 40 I. C. 752 (Pat).

——the right of air is co-extensive with the right to light. 14 C. 139.

——the only amount of light that can be claimed by prescription by length of enjoyment without an actual grant, is such an amount as is reasonably necessary for the convenient and comfortable habitation of the house 14 C 839, 2 B. 133, 7 Bom. L R. 73, 1923 A. 542 : 73 I. C. 531.

[illegible] is a circumstance [illegible] able when the [illegible] tory. 14 C 839, [illegible] property 35 C.

——the object of and necessities of *light* and *air* are quite reverse in England and in India, but law does not make any distinction 15 B. L. R. 361, 8 B. p 97.

——to determine whether there has been a material diminuition of light and air, the court should take into consideration the light and air afforded by other windows. 13 B 252, but the deft cannot plead that the plff. has windows in other part of his house from which he can get his light and air 3 W R. 29.

——there is no infringement of the light unless it amounts to nuisance, as there is no measurement of light 24 I. C. 300 : 18 C W. N. 933 : 20 C. L J. 353, 42 C 46 : 12 C. L. J. 1166 : 16 Bom L R. 803 P. C 39 C 59 (upheld by P C.)

——where a partition between brothers in respect of a family dwelling-house having windows with ancient lights was affected by means of a decree which made no mention of the rights of easement in respect of the windows that was not claimed in the suit the partitition decree must be taken to have made an implied grant of [illegible]

Cal. 365.

——enjoyment by licensee or with permission is of no effect 1 W. R 230, 13 W. R. 344, 449. 15 W R 401.

——[illegible] of light [illegible] ruction [illegible] ruction [illegible], but if [illegible] ed, the [illegible] N. 543. [illegible] would [illegible] sement.

(4) Easements of light and air—contd.

——an agreement to build a common wall with holes and cst. permission to end the rafters of the next story does not im; consent to close ventilators. 1923 Lah. 249.

——no damage can be claimed for the injury caused to crops of one's land by the shade caused by trees standing on neighbour's land because that would very largely restrict the e ment of the latter's land 19 N. L. R. 191 : 75 I. C. 553, 7 M. L. 247 6 I. C. 600, 16 B 420, 29 M 511 *Dist.*

——obstruction to the right of free access of light and air *prima facie* an injury of serious nature and cannot be compensat in money Injunction is the rule and damages the exception. 1 Lah, . 97 3 Lah L J 457 : 79 I. C 572.

(5) Easement of necessity.

——easements of necessity are to be regarded as rights wh are absolutely necessary for the enjoyment of one's property 11 452, 8 C. 956 . 10 C L R. 577

——s. 26 L Act, does not interfere with the other modes acquiring and easement , it may be acquired by an implied gra which may arise in two ways (1) out of absolute necessity, (2) out necessity at the time of severance of the servient tenement an dominant heritage 8 C 956 10 C. L R. 577.

——it is an easement without which the property cannot b enjoyed, 33 A 467 16 C L J. 417, 8 C L. J. 259, 48 I C. 670 (P.C. 33 A. 467, 16 I C 893 (M), 26 I C. 485 (c), 46 I. C. 337 : 3 C. B (1918) 79 and may be presumed 29 C. L. J. 51.

——easement of necessity cannot be exercised if there is an other means to enjoy the property. 15 A. 270, 19 B. 717, 4 B. 529.

——easement of necessity arising out of a severance by parti arises from a presumed grant, but where the rights of the parti have been definitely settled in the partition suit, no grant can b presumed. 59 I C. 89 (c).

——as regards easement of necessity the general rule is tha there cannot be an easement in respect of right of way if there i an alternative route. But where the alternative route is extremely inconvenient there may be an easement of necessity over the m convenient way. 70 I C. 173 (c).

——it need not be reasonable. 30 C. 1077.

(6) Easement of pasturage.

——right of pasturage can be acquired by prescription by the inhabitants of villages. 14 B. 213.

——tenant may have a right of pasturage on his landlord's waste lands by immemorial user. In such a case of immemorial user the presumption is that the right has a legal origin. The right of past-urage is not a right in gross. 31 C. 503 : 31 I. A. 75 : 8 C. W. N. 401 14 M L. J. 152 P. C.

——right of pasturage cannot be acquired by merely grazing the cattle for more than thirty years. It being a customary right

(6) Easement of pasturage—*contd.*

must be reasonable, and it would be unreasonable to hold that the land over which cattle graze should never be brought under plough. 18 C. W. N. 734

——a custom is a thing of local birth and applies to a particular locality and particular portion of the public and in many cases exists independently of association with dominant and servient tenements. 6 A. 497.

——a custom is a local common Law. 24 W. R. 603.

[illegible] of dominant [illegible] But right [illegible] 676, 10 A.

——the English common law that a custom is not proved if it is shown not to have been immemorial, does not apply to India as an attempt to prescribe any such period would disturb perfectly reasonable and advantageous local usages regarded and observed by all concerned as customs. 17 A 87, 20 M. 389, 23 B. 566.

(7) Easement of way.

N. B.—Rights of way are divided in two classes public and Private. Private rights of way are again divided into two classes. Easements of way and Rights in gross, and an easement of way may arise in India either by grant or by prescription, or by necessity or under the Indian L. Act or under the Indian Easement Act.

——where the plff has used a pathway without interruption, peacefully, publicly and as of right it may be presumed that the user had a lawful origin although it is not known. It may be traceable to a lost grant In case of the existence of an alternative route of convenience easement of necessity cannot be claimed. 70 I. C. 173 (C).

——a tenant who uses a path with leave, cannot acquire an easement right in it 20 C. W. N 1159, 19 C W N. 1211 p. 1214, *Fol.*

——user for any number of years will not confer any right of way if the user is periodically interrupted by the owner as occasion requires the exclusive use of his land, the user in such case will be presumed to be permissive 13 W. R 449.

——where the user is permissive no right is acquired. 1924 A. 59, 21 A. L J. 436. 74 I. C. 481.

——when the claimant proves his enjoyment of a way for a full period of twenty years and as of right and the opposite party pleads that the enjoyment was by violence or by stealth or by leave asked from time to time, he is to establish that case. 96 I. C. 1010 : 1926 Pat 460 1926 P. H. C C. 264, 8 C. W. N. 359 *Diss. from.*

——a way is evidently neither a continuous nor always an apparent easement, implication of grant upon the severance of tenement may extend to way 26 C. 311, 8 C 956, *Dist.*

——right of easement cannot be acquired over a public way unless it was acquired when the public way was a private one. 18 C. W N 378

(7) Easement of way—*contd.*

——long enjoyment of right of way may give rise to a presumption of a grant. 19 C. W N 87n., 1211,

For implied grant, see, **(11) Implied grant**

——when a high way is dedicated to the public, user by them is evidence of dedication and acceptance. 21 C. W. N. 595.

——a private right of way may be common to several persons 25 W R 233.

——right of way common to several persons is not necessarily a public way. 57 I C 151 (Pat).

——distinction between public high way and village road, dedication or grant may be presumed from user. 15 C 640 F. B. 23 C. W N. 91, 19 C. W. N 87n, 18 C. W. N. 92n, 51 I C 324 (C), 17 C W N. 73, 14 N. L. R. 78. 44 I. C. 868, 1917 M. W. N 70. 37 I C 977, 39 C L J. 347

——a public right of way is a right in gross, *i e.* it is unconnected with dominant tenement, and is not an easement. it is acquired by dedication only 7 B 209, 9 C. 945 : 6 C. L. R. 269, 44 M L. J 638 : 1923 M W. N. 315. 1923 Mad. 634 : 74 I C. 25, and user by the public is evidence of intention to dedicate 17 B. 645 Such public rights must not be confused with rights of way over land which are easements acquired by a certain portion of the public such as the occupants of particular houses. Such right can be acquired by grant, actual or presumed or by custom. 9 A. 434.

——the distinction between a private way and public way is important for in claiming or pleading a public way it is not necessary to set out the *termini*, because the public have a right to use the way for all purposes and at all times, whereas in pleading private rights of way it must be shown with reasonable precision the *termini* of the way and the course which it takes. 57 I C 151 p 152 (Pat).

——the party seeking to establish a right of way must prove the particular line between the *termini* over which he claims the right. 7 C 145 8 C L. R, 375

——a right of way is not a right to wander at pleasure, but a right to pass along a particular route between two termini *i e* rights of way must be definite 4 W. R. 40, 8 W. R. 269, 15 W. R 205, *contra*, 22 C W N. 922, See (17) 'suit' below.

——right of way must be definite and the selection of passage should be reasonable 85 I. C 84 : 1925 Nag. 168.

——the servient owner can restrict the width of the way if conveniently and reasonably it can be so done. 1 C. L. R 425, 7 C 145

——trace of path cannot be changed by either party 18 C. W N. 1296.

——the general rule is that a right of way once defined cannot be altered without the consent of the dominant owner. 24 Bom L. R. 437 1922 Bom. 407 : 67 I. C. 413.

——in case of right of way acquired by prescription, servient owner cannot plead that there is another pathway which dominant tenement might use 6 W. R. 222, 22 W. R. 302.

(7) Easement of way—*contd.*

:ustomary right
61 I. C. 13.
1 is reasonable
annot affect it.
above case

——custom defined,—a right of boat-passage may exist over the water of another by virtue of a custom Such rights are to be distinguished from public rights of boat-passage which arise from dedication or grant and private rights of boat-passage which are easements properly so called The customary right is one which may be enjoyed by any member of a body of persons 39 C. L. J. 612.

——there may be right of way by boat in the rainy season over a particular channel, though it may be interrupted in the actual user caused by lack of water. 1 W. R. 217, 7 C 132, 8 C. L. R 281.

——right of passage of [illegible] and the dominant owner's right [illegible] ssing with his accustomed convenie[illegible] [illegible]ly in a particular direction. 7 C 1

——one who has a right of way must not use it in an excessive or improper manner, so as to obstruct the others of their rights. 7 C. 665

——what may not be appreciable and be nuisance if done by one, may become a serious nuisance, if done by many. 7 C. 665.

——ownership of the soil is presumed to rest with the owner or the adjoining lands. 4 C. 206

——easements of way do not confer right to the ownership of the soil. 25 W. R. 218. 1 C. 422.

(8) Easements relating to support

——there may be right of easement of support for a building by a building 13 B 79

——where joint property is divided it carries under the law such [illegible] reasonable use and enjoyment of the right of support and it is . which belongs entirely to one *nent or right in the other* to have it maintained as a dividing wall between the two tenants. 51 C. 789; 1924 Cal 844 78 I C 908.

(9) Easements relating to water.

——a riparian owner is entitled to the flow of water without interruption and without substantial diminuition caused by the upper proprietor 24 C. 865; 24 I. A. 60 1 C. W. N. 401, P. C., 28 M. 236, *Fol* 11 C. W. N. 85 4 C L. J. 370, *Apr.*, 35 C. 851, *Ref.*

(9) Easements relating to water—*contd.*

29 C. 100, *Dist.* The last case was based on custom and user prevail

ound the water of a natur
only be acquired by virtue c
1 C. W. N. 401, P. C. 18 W
R. 525.

——the right to water flowing to a man's land through an *artificial* water-course constructed on a neighbour's land, must unlike the natural right to the flowing in a *natural* channel, rest on some grant or arrangement, or on some other legal origin 4 C 633 · 6 I. A. 33 P. C.

——where, through one opening in a tank water flowed in, and through another opening water flowed out of it, for time immemorial the presumption arose that this enjoyment had an origin, conferring a right to the use of the water. 30 C. 281.

——easement right to passage of water cannot be interfered with in any manner. 8 C 468 : 10 C. L. R. 396.

the surface drainage
s at a lower
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lower lands
0 M. L. J. 377
, 1 Rang 427

——every owner of land has a natural right to collect and retain upon his own land surface water not flowing in a defined channel and to put it to such use as he desires and to allow it to flow away
lands 107 I. C.

over low land
. C. 91, 12 C.
W. N. 34, 36 M. 149

——an owner of land is entitled to protect himself against water which he has not brought on the land himself, likewise his neighbours have a right to protect themselves against water which threatens to do damages to their properties. 23 Bom L R. 1107 · 59 I. C. 391.

——the discharge of foul effluent into a drain through which there may be a presumed grant of running water is not permissible in law as it imposes an overburden on the servient heritage 33 C W N. 189.

natural stream no one
o divert or interfere

will of the owner of
the adjacent land can be acquired only by user or prescription which the claimant must prove. 1923 M. 674 : 1923 M. W. N. 454 : 73 I. C. 66.

Easements relating of water—*contd.*

rater flowing in a a right of ease- ras available only , C W. N. 1169: I. C 422.

——there may be right of easement to discharge rain water on another's land from a wall or roof of a house. 2 B 174, 20 B. , 15 M. 286, the servient owner is not bound to keep his land n, by not building on his land, it is sufficient if he makes essary arrangements to receive the water discharged and carry way. 20 B. 788.

——where an artificial water course was contracted on the t's land and enjoyed for more than 20 years, there will be a legal sumption of a grant or agreement between the original owners. . 394. 7 C. L R. 529: 7 I. A. 240 P. C.

through defined N. 336, F B.,

ent modes, does

ting some lands h regard to which he has no right to take water, the deft's

——user of intermittent nature unaccompanied by assertion of . 4 Lah. L. J 461.

physical possession by he usurper cannot prove *above case.*

——s 26 L Act does not govern a claim to take water from a nt, it only applies to cases C. 244.

. Act, is not equivalent . of a right (right of way boats in rainy season only) may not exercise it for months. 7 C. : 8 C. L. R 281.

——what constitutes a continued injoyment is a question of time . 26

can and merse idols in a tank based on long user is not unreasonable. C. 1016. 1926 Cal 507 91 I. C. 712

(10) Extinguishment of easement by merger.

——there must be complete unity of seisin or the absolute ownership of the dominant and servient tenements must vest in the same person in order that easements may be extinguished. 81 I. C. 739.

(11) Implied grant.

——implied grant can be presumed on severance of tenements 19 C. W. N. 1211, 21 C. L. J. 51, 1924 Lah. 724.

——grant can be presumed from a long user. 19 C. W. N 1211

——implication of a grant of easements upon the severance of tenements extends to way which is a formed or metalled road 8 C. L. J. 289.

——the rule of English Law, known as the doctrine of implied grant of easements upon severance of tenements, being in accordance with justice, equity and good conscience, is applicable to *India* 26 C. 516 . *3* C. W. N. 409.

——where the partition of tenement is effected by consent of the parties, the court merely recording such consent, the principle of implied grant of easements upon severance of tenements is applicable. 26 C 516 . 3 C. W. N. 409.

——user for eight years of a way without objection will not give rise to a presumption of implied grant. *8 C L. J* 289.

——from long continued user of a tank by the public the court can presume dedication for the use of the public. 53 C. 1016 : 91 I. C. 712 . 1926 Cal 507.

(12) Procession, right to conduct.

——every sect has the civil right to conduct procession along [illegible]

the exclusive use of highway for their worship is [illegible] distinction between indictment and action in regard to what is done on a highway is a distinction peculiar to English Law and ought not to be applied in India. 29 C. W. N. 486 : 47 All. 151 6 Pat. L. T. 115 : 23 A L. J. 179 : 86 I. C. 236 , *27 Bom. L. R* 170 : 48 M. L J. 23 : 52 I. A *61 P. C. (6 M. 203 F. B* , 5 M. 304, 26 M 376, 34 B. 571, 24 C. 524) *approved* (26 M. 554, 2 B. 437, 18 B 609) *Disapproved.*

(13) Profits a prendre.

——a customary right of the locality to cut wood for fuel [illegible] right of customary easement [illegible] duals and is called under the [illegible] right of pasturage or fishery [illegible] B. 213, 5 C. 945), *Ref.* 9 C. 69[illegible]

expl.

(13) Profits a prendre—*contd.*

——an easement under the extensive meaning given to the word by the L. Act. s. 3, *embraces* what in English Law is called *profit a prendre*, *i. e.* a right to enjoy a profit out of the land (meaning also land covered by water) of another, so as to include a right of fishery. 5 C. 945 : 6 C. L. R 269.

——the legislature of this country has not used the term easement in the restricted sense in which it is used in English Law so as to exclude *profits a prendre* 23 C. 55.

(14) Public right.

——a public right of way is a right in gross, *i. e.* it is unconnected with dominant tenement, and is not an easement, it is acquired by dedication only. 7 B 209, 9 C. 945 6 C. L R. 269, 44 M L. J 638 : 1923 M. W. N 315 : 1923 Mad 624 74 I. C. 25, and user by the public is evidence of intention to dedicate. 17 B. 648. Such public rights must not be confused with rights of way over land which are easements acquired by a certain portion of the public such as the occupants of particular houses. Such right can be acquired by grant, actual or presumed or by custom. 9 A. 434.

——dedication can be presumed only in favour of the public generally, there can be no dedication in favour of a portion of the public such as the inhabitants of a parish 25 W R 233, 44 M. L. J. 683. 1923 M. W N 315 74 I C 25.

——when a road has been the boundary between two properties, the presumption is that each party sacrificed one-half of the right for the benefit of the public. 4 C. 206 2 C L. R 446

——exclusive right of fishery in tidal navigable rivers can be granted to private individuals, or to certain classes of persons, by the Crown. 11 C. 434, F B.

——the distinction between a private way and public way is

——from long continued user of a tank by the public, a court can presume dedication for the use of the public 91 I C. 712 1926 Cal. 507

(15) Release and abandonment of the right.

——where the dominant tenement (house) remained unoccupied for six years, this showed an intention to abandon the right. 14 W. R 79

——non-user may be, under the circumstances of the case, accepted as evidence of abandonment 16 W R 277, 20 W. R. 188.

——non user attributable to some cause over which the dominant owner has no control cannot be ground of abandonment, viz.—excessive dryness of season or excessive rains, as the case may be, causing discontinuance of right of way 1 W R. 217, 10 W R 368, 22 W R. 302, 22 W. R. 340, 7 C 132, 8 C. L. R. 281, 29 C. L. J. 421.

(15) Release and abandonment of the right—*contd.*

——where the owner of a building who is in the course of acquiring a right of easement by prescription, has his house burnt down but rebuilds the house placing the windows in the same position, he can be regarded as enjoying the access and use of light and air continuosly. If however there is any delay in rebuilding then that might be evidence of an intent to resume the user. 46 B. 448 : 24 Bom. L R. 83 ; 1922 Bom. 3 : 67 I. C. 250

——when dominant owner opens a new window or enlarges the *old one, the servient owner can obstruct the new or enlarge opening* if he can do so without obstructing the old. 7 C. 483.

——where a new house is erected in place of old one whether right is extinguished or not depends upon the consideration of the question whether the right claimed imposes a different or greater burden on the servient tenement. 3 C. W. N. 28, *contra* 20 W. R. 185

——easement cannot be in abeyance and at the same time continuous. What constitutes a continuance of enjoyment is to be determined upon the circumstances of each case and the nature of the right claimed. 26 C. 593 : 3 C. W. N. 610.

——an easement can be extinguished by the dominant owner [illegible] there [illegible] 269 [illegible] could [illegible] ment.

——a person may be said to be in enjoyment of a right of way during a period when he does not actually use the way every moment. Cessation of user is not an invariable indication of abeyance of enjoyment of a right. 29 C. L. J. 421, (26 C 593, 1 C. 422, 7 C 132, 6 B L. R. 287). *Fol.*

(16) Right in gross.

——right not appurtenant to any land of the person claiming such right, is called right in gross and a prescriptive right of fishery is such right and can be acquired on an uninterrupted 'use' for *20 years* under s. 26 of the L. Act. 5 C. 945 : 6 C. L. R 269. 9 C. 698.

——a tenant may have a right of pasturage on his *landlord's* waste land by immemorial user, it is not a right in gross and the landlord may cultivate or execute improvement on such a land *so* [illegible] Principles of English Law on [illegible] conception not altogether in [illegible] be applied to Indian cases, [illegible] C.

——in the L Act. incorporeal hereditaments were *reduced to* the position of easements, not only for the purpose of *limitation* but also in regard to their nature and mode of *acquisition*. 19 C. 544, F. B

——a private right of way, not appurtenant to a dominant tenemant like public rights of way are not easements but *rights* in gross and can be enforced as such 59 I. C. 319 (c).

(17) Suit relating to easement, procedure in.

respective right may be actionable if caused by a trespasser. 10 A. 153.

——if one claims by virtue of ownership he cannot turn round and claim by virtue of easement. 16 B. 592, 25 W R 228, 1 C. 422

——but alternative claim of easement and ownership is maintainable. 34 C 51 11 C. W. N. 202 : 4 C. L J. 437, F B 4 C. L. J. 357, 8 C. L. J. 289, and plaint can be amended making alternative prayer 10 C. L J. 538 : 3 I C. 346. So also deft. can set up in his defence alternative claim of ownership and easement. 8 C L J. 189.

——court will not grant relief for an obstruction caused in pursuance of an agreement preventing the acquisition of easement. 24 B. 156, P. C.

——to constitute on actionable claim of ancient light and flow of air the test is whether the obstruction is a nuisance one. 9 C. W. N. 543.

——the dominant owner has a right to sue for the declaration of an easement right though the land is in the possession of tenant. 8 C. W N. 158.

——user must be as of right under s 26 L Act 6 C. W. N. 197.

——in places where the Easement Act has not been extended, cases will have to be decided on general principles and on case-law. 29 C. 363.

——all the servient owners must be made parties 14 C W N 15, 25 C. W N. 249, but who has not obstructed or challenged the right of way is not a necessary party. 19 C. W. N 1211, 69 I C 183, 85 I. C. 739.

——it is not necessary to implead a servient owner against whom no relief is claimed 88 I C. 664 1925 Cal 1138

——servient owners who are not in possession and who have done nothing to interfere with a plff's right of easement are not necessary parties to a suit for declaration of an easement right. 88 I. C 970 (c).

——decree may be obtained of a village road without proof of special damage. 17 C W. N 73 15 C 460, F B *Fol* 33 C. 905 10 C. W. N 867, *not followed*

——servient owner cannot insist on continuance of the easement right by dominant owner. 17 C W. N. 1060 : 18 C. L. J 131

——in case of public path special damage is to be proved, 18 C W. N. 92 n special damage means the damage affecting the plff. individually. 25 C W N 95.

——particular easement right must have been enjoyed within 2 years. 40 B. 401.

——in a suit for public way, permission under Or. 1, r 8, C P. C. may be obtained subsequent to the filing of the suit 21 C. W. N. 1144, 23 C. W. N. 11 n

(17) Release and abandonment of the right—*contd.*

——express permission need not be taken if that can be gathered from the proceeding. 21 C W. N. 180.

——implied grant can be presumed on severance of tenements. 19 C. W. N. 1211, 21 C. L J. 51.

——grant can be presumed from long user 19 C. W. N. 1211, 91 I. C. 712 : 1926 Cal. 507.

——no minimum limit of time can be laid down which would justify the inference as to immemorial user, it depends upon the evidence and the circumstances of each case User over a period of thirty-five years was considered to be sufficient to give rise to the presumption of immemorial user 45 B. 1027 ; 23 Bom. L R. 422 : 62 I. C. 65.

——the enjoyment by the tenant in possession of the dominant tenement in respect of a dominant heritage may give the owner (the landlord) a prescriptive right. 19 C. W. N. 1211.

——owner of higher land is entitled to discharge water through lower land but when owing to silting up of the stream into which the water ... [illegible] ... icea- sible ...

[illegible]

——definite track or exact position of the way is not to be shown ; if the plff. establishes the *termini* he will be allowed a right of way as the servient owner points out ; if he does not point out, nearest route will be allowed 22 C W. N. 922, 71 I. C. 309.

——the law of limitation does not put a bar of time to any defence in any case except where a suit falls under s 26 or s 29 of *the L. Act.* 45 B 45 : 22 Bom L. R 1082 : 59 I. C 118 ... before

——the plff. is n [illegible]
the date of the suit [illegible]
of a right of way duri [illegible]
use the way every mo [illegible]
indication of abeyance [illegible]
C. 593, I. C. 422, 2 C 132, 6 Bom. L. R. 287. *Ref*

(18) Tenant cannot acquire the right of easement against landlord.

——a tenant cannot acquire right by prescription against his landlord. 6 C. L. J. 218, 74 I. C 703, 1924 P. C. 65 : 19 L W. 259, P. C

——although a tenant cannot acquire a prescriptive right of easement he may claim a right of easement based on immemorial user as the landlord can grant any privilege he pleases to his tenant. A tenant can establish his right to irrigate his field from landlord's tank by the proof of open and continued user from the time immemorial 50 C. 356 : 1923 Cal. 8 : 35 C. L. J. 161. 29 C 353. 38 *M. L. J.* 28, 6 C. 394, 30 C. 291 : 4 C. 633, *Ref.*

——the user of the easement right before the commencement of the lease is not affected by the lease, unless it is shown that the

(18) Tenent cannot acquire the righf of easement against landlord—*contd.*

landlord upto the time of granting the lease was ignorant of the claim of such right. 36 C L. J 161

——a tenant cannot acquire right of easement over the land of his landlord except a way af necessity. 1 C. W. N 151, 14 A. 185, it does not make any difference if the tenant has permanent right. 29 C 363 : 9 C. W N 856, (17 C 826, 14 A 185) *Ref. contra.* 19 C. W. N. 1211.

——in India unlike in England a tenant with permanent right can acquire an easement by prescription against tenant having the same right 70 I. C 173 (c) : 19 C. W. N. 1211, *Fol*

(19) Ownership and easement.

——claim of easement and ownership is maintainable. 34 C. 51 : 11 C. W. N. 20 4 C L J 437 F B, (16 B 592, 15 C 684) *Dist.* 18 A. 125, 16 W. R. 198, *not fol* 4 C L. J. 357, 8 C L J. 289 and plaint can be amended making alternative prayer 10 C L. J. 538 3 I. C. 346. But the Madras H C, has held that alternative claim for ownership and easement is not maintainable as the case is inconsistent. 49 M. 829 F. B. 1928 M W N. 74.

——the mere claim of the higher right of ownership does not prevent a person from acquiring the lesser right of easement provided he can show that he asserts the right of enjoyment for the benefit of another land belonging to him. 62 I C 633

——evidence of ownership cannot prove easement 19 B. 592.

EASEMENT ACT (V of 1882)

——The Indian Easement Act is not in force in Bengal. 30 C. 503 : 7 C. W. N 649. nor it is in force in the Punjab where cases relating to easements are decided by general principles of English law. 102 I. C 447 1927 Lah 492

S. 2.

——before finding that a customary easement exists the court must be satisfied of its reasonableness, certainty as to extent and application and open enjoyment without permission for such a length of time as suggests that the usage had become customary There is no statutory period prescribed for enjoyment 90 I C 976.

S. 4.

——right to go on to a neighbour's land to gather fruits falling thereon from certain portion of a pltf's tree is not an easement within sec. 4 Such right cannot be acquired by a prescription 1922 Mad 398 - 43 M L J 152 - 31 M. L. T. 78 - 68 I C 968

——the right to go upon the neighbour's land and raise a scaffolding there for the purpose of plastering one'sown wall is an easement within this sec. but it cannot be treated as an easement of necessity simply because for a period of less than one year the properties were owned by a common owner. 94 I. C. 673 : 1926 Bom 328 : 28 Bom. L. R. 403.

S. 4—*contd.*

——a person can acquire a right of way for the use of the sweeper who is a Municipal servant. 28 Bom. L. R 601: 95 I. C. 170 · 1925 Bom. 282

——the public right of passage over the road does not come within the definition of easement under the sec. 48 A. 560 : 95 I. C 1030 ; 1926 All. 538 ; 24 A L. J. 682.

——it is not consistent for a plff. to claim certain property as his own and in the alternative a right of easement over the same 41 C. L. J. 379 1925 Cal. 788 : 87 I. C. 19.

S 7.

——the right of riparian owner does not depend on the ownership of the soil of the stream. It is natural incident to the right of the soil. It is not based on prescription or presumed grant. 2 U. P. L. R. 103 ; 7 O L J. 268 ; 59 I C. 364.

——riparian right is a natural right and is not lost by non-user until some other person acquires a right of easement to substantially diminish water available to the riparian owner. 104 I. C. 781.

——every one has a natural right to collect and retain upon his own land the surface water not flowing in a defined channel and put it to such use as he desires. He may also allow such water to flow away in the usual course of nature upon the lower lands of his neighbour and cannot be bound to prevent it from so doing, but he cannot do it by artificial discharge upon his neighbour's land unless he has acquired a right of easement 4 Pat. L. T. 81 ; 2 Pat. 110 ; 1923 P 65 : 69 I. C 947, 1922 Pat. 305 : 65 I. C 84.

——an easement exists for the benefit of the dominant tene- ... cannot insist on its continuance ... I C. 947, but if water ... neighbour's land has ... t is open to the plff. to ... of a lost grant or old arrangement. 65 I. C. 84

——where the water of a river during its course is largely increased in volume by percolation it cannot be said to be a stream with channel. 3 Lah L J 555 : 64 I. C. 158

——every one may build upon or otherwise utilise his own land though his doing so involves an interference with the light which would otherwise reach the land and building of another person. 36 C. L. J. 406

——the ownership of air and water and of all wild animals living therein is obtained by occupancy or appropriation. It is an ... I. C. 346.

... to sec. 7 is not to be understood ... ill. (a)—Each of these rights is, ... r so long as there is no conflict. ... T. 333.

S. 13.

——there is a distinction between cases falling under s 13 cl. (e) and cl. (1). Under the former the plff. has to prove that the

S. 13—*contd.*

——where the owner of an entire tract or of two or more adjoining plots employs a part thereof so that one derives from the other a benefit or an advantage of a continuous and apparent nature, and sells the one in favour of which such continuous and apparent quasi-easement exists, the easement being necessary to the reason-

——s. 13 (b) relates to continuous easement which a right of way is not, and under s. 19 it is only when dominant heritage is transferred, the easement passes to the transferee 6 Lah L J 176: 1924 Lah. 488

——where a portion of a land is sold, an easement apparent, portions, severed from the unless a contrary inten- transfer. 1924 M. W. N.

——easement to take water from a well extinguishes by non-

——when the necessity of an easement of necessity terminates, the easement also terminates. It is an easement which is not merely necessary for the reasonable enjoyment of the dominant tenement but one without which that tenement cannot be used at all 60 I. C 504.

——where both rain water and sewage water joined and flowed into a masonry drain passing through the deft's house, held that the drain was a continuous easement in so far as the flow of the rain water was concerned, no act of man being needed for the purpose But so far as the flow of water from the latrine went, it required the act of man and to that extent the easement to the flow of such water was not a continuous easement 80 I. C. 896: 1924 All. 748 · 22 A L J. 425.

——where prior to a family partition water from one part of a house flowed to the other part, but there was no particular spot where alone it could flow and subsequently a partition wall was put up

S. 13—*contd.*

and one party claimed an easement to collect all the water at one spot and left it out into the other party's portion at that spot, held it would impose a burden different from what existed before and cannot be claimed as a quasi easement. 1925 M. W. N. 282 : 90 I C 900 : 1925 Mad. 680.

——a customary right of pasturage on landlord's land can be established by proper evidence. *106 I. C. 195 : 1928 Mad. 799.*

S. 15.

——s. 15 does not exclude or interfere with other titles and modes of acquiring easement. Where user is proved the presumption is that it is of right till the contrary is proved. There is no presumption of a license. Where for over *3 years* the pltf's privy had been cleaned by scavengers passing through the deft's. house the user must be presumed to have been as of right and the pltfs. acquired such a right of way 45 M 633 : 42 M. L. J. 417 : 1922 Mad. 5 : 31 M L. T. 150, 1926 788 : 96 I. C. 317 : 1926 M. W N. 404.

——all that a person whose *eaves project* over his neighbour's land can acquire after 20 years is an easement right but no title to the land of the latter. 24 Bom. L R 305 : 1922 B 83 : 67 I. C. 356.

——where a sweeper uses the lane on the land of another openly and as of right [illegible] right of way. 24 Bom. L. R. 298. 28 Bom. [illegible]

——to acquire an eas [illegible]

that such enjoyment was right. [illegible] I. C. 509.

——w [illegible] his own land interfering

with the r [illegible]

be grante [illegible]

——w [illegible]

years but [illegible]

by prescri [illegible]

——th [illegible]

only an [illegible]

elapsed. [illegible]

——al [illegible]

land might acquire the right to drain his water on to [illegible] another, it would be more natural in the districts where it concerns cultivation for the owner of the lower land to acquire a right to receive water which either falls or flows into the higher land. 23 Bom. L. R. 1004.

——the mere fact that the land is waste does not necessarily show that no right can be acquired over such land. If that were so the right of user over almost every pathway in the muffassil would be lost. 65 I. C 509 (c) 18 C. W. N. 735 *Ref.*

——interruption for more than 2 years destroys the benefit of user for 20 years. 39 M. L. J. 574 : 12 L. W. 713 : 60 I. C. 171 : 72 I. C 909 · 1923 Oudh. 29.

——mere non-user for not less than two years *before suit* independent of any adverse act on the part of the owner of the

S. 15—*contd.*

servient tenement does not amount to cessation or abandonment of the right of easement. 1927 Mad. 238 . 98 I C. 886.

——where the owner who, in the course of acquiring a right of easement by prescription, has his house burnt down but he immediately rebuilds his house and places the windows exactly in the same position as the old ones, he will be regarded as continuously enjoying the light and air but if there is delay in rebuilding, that may be an evidence of an intent of not to resume the user. 46 B. 448 · 24 B L. R. 83 67 I. C. 250

——the right of way or other easement must be definite, and it must be so when it is claimed for cattle to pass across a forest and the burden of proof is on the claimant. 43 A. 345 : 19 A L. J. 126 . 60 I C. 990.

24 : 74 I. C. 922

——there can be no prescriptive right to projection which has been erected merely for the purpose of ornamentation. 30 C 503 7 C. W N 649, 3 B L R. 18, 47, 29 M. 511 : 16 M L J 281

——in order to establish a right of easement over land belonging to Govt a plff. must prove user of the kind mentioned in s 15 for a period of 60 years. 1924 All 724.

——plff purchased a house and a wall from deft in which deft. claimed easement in respect of certain niches and pegs and to support of some rafters After 20 years plff. filed a suit claiming to demolish and rebuild the wall, held that the deft's user of the wall was not permissive, for when user is proved presumption is, it is of right. 26 Punj. L. R. 110 · 88 I C 595 . 1925 Lah. 344, 69 I. C. 11 . 15 L. W. 266 . 15 L W. 266 : 1922 M. W. N 143, *fol.*

——to create an easement there must be a dominant and servient heritage and the right acquired must be for the beneficial enjoyment of the dominant heritage. 92 I. C 465 . 1926 Mad 625.

——where customary user is set up, but the custom is unreasonable an easement cannot be acquired in respect of it. 92 I C 465.

S. 17.

——s. 17 intended to apply not to rights of irrigation in natural stream but to rights in the nature of profits *a prendre* which do not include a right of water 1926 Pat 187 94 I. C. 929 : 7 Pat. L. T. 547.

S. 18.

——custom of privacy was proved by evidence with respect to the roofs of houses in the city of Larkhana in Sindh. 66 I. C. 833.

S. 18—*contd*

——a customary easement is not limited to easement of a kind which could not be recognised at all apart from official customs 74 I. C. 703.

——a tenant can acquire as against the *landlord* a customary easement to draw water from a particular well to irrigate his land 1928 All. 591.

——a private nuisance caused by the overhanging boughs of the trees of a neighbour to the owner of the land does not create a "right" within the definition of "easement." 27 Bom. L. R. 663. 89 I. C. 191 : 1925 Bom. 446, 19 B. 420 *fol.*

——to give right of suit either *for compensation* or for an injunction, there must be a *substantial diminution.* 1926 All. 731: 97 I. C. 500, 29 A 571 *not fol.*

S 20

——there can be no easement as *regards light and air* in the case of joint property. 97 I. C. 691 . 1926 *Bom.* 545 : 28 *Bom.* L. R. 1000.

S. 22.

——this sec. does not deal with the *question* whether the servient owner can substitute a new way *and recourse* must be had to the common law. The general *rule is in the negative.* 24 Bom. L. R. 437 67 I. C. 413.

——a dominant owner cannot impose any additional burden on the servient tenement. 69 I. C. 406.

——under s 22 the dominant owner must exercise his right in the mode which is least onerous to the servient owner. Under s 27 the servient owner must not do anythig tending to restrict the easement or to render its exercise less convenient. 87 I. C. 693: 1925 Nag. 389.

——right to take water from another's tank for irrigation is recognised in law and the order that plff. can cut opening in the tank *bund* and take necessary water and close the *bund* afterwards is correct. 41 C. L J. 379 87 I. C. 19 : 1925 Cal. 783

S. 23.

——a dominant owner may from time to time alter the mode and place of enjoying the easement, if he does not thereby *increase* the burden on the servient tenement 97 I. C. 169 : 24 *A. L. J.* 810.

S. 27.

——*plff.* having acquired a right of easement to the *supply of* water through the *subterranean channel, could restrain* by injunction any attempt to *divert* the *underground* channel or diminish the water supply 25 *Bom. L.* R 789.

——so long as the owner of a servient tenement did not restrict the easement or render its exercise less covenient, he was not precluded from otherwise dealing with the property. 85 I. C. 603: 1925 All. 348 : L. R 6 A. 122.

S. 28.

——servient tenement cannot be saddled with more burden than proved But when the particular way of user is not heavier than the mode of user proved, such user may be allowed, *e g.* the user of a way for the horses may include the right to lead smaller animals as well but not larger animals or loads. The user of a path as the passage of men, carts and palanquins, may also entitle the dominant owner to take cattle, procession and corpses as the latter user does not add to the burden on the servient tenement 65 I. C. 579 (c).

——the owner of the servient tenement could reduce the access of light and air to the widow of a dominant owner provided he did not so diminish it as to make it less than what the owner of the dominant tenement required for the ordinary purposes of inhabitancy or business according to the ordinary notion of mankind having regard to the locality and surroundings. 79 I C. 349 : 1924 All. 816.

S. 30.

——when the owner of two parts transfers one part he discharges the part so transferred from any burden upon it during his joint occupation, the condition of such land is thenceforth determined by the contract. When an owner grants a part of his land he may claim that "all easement of necessity" without which no enjoyment of all would be possible should be retained by implication in favour of the part retained. 34 C L. J 518

——when a dominant heritage is divided between two or more persons the easement becomes annexed to each of the shares, provided it is consistent with the term of the division 1923 M. W N. 454 ; 1923 Mad 674 : 18 L W 404 73 I C 66

SS. 33. 35.

——where the easement disturbed is a right to the free passage of light passing to the openings in a house no damage is considered substantial within the meaning of sections 33 and 35 of the Easement Act unless it materially diminishes the value of the dominant tenement and interferes materially with the physical comfort of the plff. or prevents him from carrying on his accustomed business in the dominant heritage as beneficially as he might have done. previously. 78 I C 563 : 22 A. L J. 314 1924 All 394

——grazing rights include right to have sufficient pasturage left. 92 I C. 403

——extent of damage depends on the mode of life and nature of the place of living, 97 I. C. 500 : 1926 All 764, 1924 All. 392 *Rel. on.*

S 52.

——license may be implied from circumstances. 1925 All. 203.

——a license is ordinarily only a personal right and carries with it the incident of non transferability. The mere fact that the license had become irrevocable by the erection of buildings does

S. 52—*contd.*

not necessarily imply that the licensee acquired a right to transfer the license or the building. 1924 All. 825 : L. R. 5 A 532.

——a *license makes* an action lawful and does not pass any interest in immovable property to the licensee. 103 I. C. 43. 1927 All. 633.

——licence to use privies in a dwelling house,—duty of the licensor to disclose defects. 29 Bom. L. R. 78. 51 B. 274 : 1. I. C. 210.

S. 59.

——a licensee cannot by *enjoying for* any length of time acquire right adverse to that of the licensor. 20 A L. J. 608 : L R. 3 A. 390 : 44 A 726 : 1923 A. 140.

——where a licensee erects buildings of a permanent character *on the land*, it is not open to a transferee from to grantor of the license to revoke it. 39 A 91 : 1924 All 750 : L. R 5 A. 400 : 84 I C 264, 97 I. C. 337 : 1926 All. 714, 39 A. 91 *fol*. 1923 All. 140 *Dist.*

——the transferee can neither revoke the license nor claim compensation if in pursuance of the license a work of a permanent character has been erected. 20 N. L. R. 60 : 79 I. C. 173 1924 Nag 254.

S. 60

——a license is of a personal character both as regards the grantor and the grantee. 18 N. L. R. 76 : 1922 Nag. 161. 69 I. C 107.

——a licensee in possession does not, like the tenant, by denying *the grantor's title*, forfeit the license and become liable to ejectment. 1923 A. 403 : 75 I C. 596.

——denial of licensor's title *is no ground* for forfeiture or revocation where licensee had executed a work of a permanent character. Thatched house *may* be a work of permanent character 1925 All 203.

——a licensor cannot be allowed to revoke the license on *condition* of payment of compensation. 98 I. C. 814 : 1927 All 197

——whether a building *is of a permanent* character depends on the nature of the building 97 I. C. 337 : 1926 All. 714.

——where a license is granted to build houses on the site and the licensee erects a work of a permanent character the license cannot be revoked 100 I C. 479 : 1927 All. 342.

EJECTMENT.

When co-sharer can maintain a suit

——a decree for partial ejectment and joint possession can be made in favour of a co-owner of *property*. 2 C. W. N. 229, 44 A 611. 20 A L J 603.

——but, when a tenant has been originally put into possession by all the co-sharers, unless the tenancy is terminated by *all of them* a single co-sharer has no right to take separate and independent

When co-sharer can maintain a suit—*contd.*

action even as regards his own share. 31 C. 786 : 8 C. W. N 325 *contra*, 2 C. W. N. 229.

——when the relation of joint landlords continues, the tenancy of the lessees cannot be put an end to except by all the lessors acting together. 35 C. 807 . 7 C L J 483

——when plff. sues jointly with the co-owner and the latter compromises with the deft the former cannot proceed with the suit which should be dismissed. 17 C W. N 669 P C.

——a civil court partition does not divide the holding 12 C. W N. 568

Proof of title.

——in an ejectment suit the onus is on the plff. to prove his title. 32 C. W. N 650 : 48 C. L J 1 , 30 Bom. L R 1343 : 55 M L J. 56 : 1928 P. C 130.

——in a suit for ejectment plff must recover on the strength of his ow
28 C. V
N. 60
I. C. 2
43 : 1928 Cal 343.

——plff cannot succeed on ground of deft's. want of title. 1925 Cal. 140 84 I C 91

——where the plff in an ejectment suit claims by assignment from a certain person and the deft pleads that the plff's assignor was not entitled to the property but that a third person was preferentially entitled, but the deft fails to prove his case, the plff is entitled to a decree. 1925 M. W N. 738 : 1925 P C. 234

——where plff sued to recover immoveable property on the ground of inheritance and where other members of the family also sued to recover the property on the ground that they were the heirs and where the other suits f
without title, were in possessi
possession by establishing her
of what had been determined
R. 192 . 6 Lah. 117 . 1925 P C. 99

——when the plff seeks to eject the deft on the ground that *the latter is his tenant whose tenancy has been terminated, he must* prove both the facts. 82 I C. 623 : 1924 Mad. 907 45 M L. J. 558 : 1924 M W N 553.

——plff is to prove the termination of tenancy 39 M L J. 629 : 28 M L. T 389, 61 I. C 597.

——when rent suit is dismissed for want of proof of relationship

M. L. J 641.

Proof of title—*contd.*

—where the plff ... tenancy alleged

—when tenant has been in long and peaceable occupation of land as part of his admitted tenure the landlord is to prove that it is his khas and not included in the tenancy. 6 C. W. N. 105, 3 C. W. N. 763. *Ref.*

—when the zemindar sues for ejectment and the deft sets up *Shikim* which is admitted and proved, the burden of proof as to whether the land is included within the *Shikim* is on the zemindar 3 C. W. N. 763.

—but it has been recently held by the Calcutta H. C. that because the defendant in an ejectment suit is found to be a tenant of some land under the plff. the burden of proof is cast on the plff to ... recover is outside the tenancy of

land is his zerati land 13 C

—in a suit for ejectment the tenant must give *prima facie* evidence that he is entitled to remain in possession L. R. 3 A. 31

—where the title of the plff. is proved or admitted, the deft. is to prove his right to retain possession 9 C. W. N. 144, 8 C. L. J 170, *Ref*, 13 C. W. N. 661. *Dist.* 7 C. L. J. 553, 25 C. W. N. 495 P. C., 6 P. L. T. 514 : 3 Pat. L. R. 50 : 86 I. C. 771 : 1925 Pat. 739, 8 C. L. J. 170, 513.

—deft. is to prove his right of occupancy. 8 C. L. J. 170, or that his tenure is permanent. 32 C. 51 : 18 C. W. N. 895 : 31 I. A. 149, P. C.

—deft. is to prove his permanent right (when it may be presumed is shown in this case). 8 C. L. J. 513, 10 M. I. A. 183 3 W. R. 1 P. C. *Fol.*

... tenancy is to be proved. 32 C. ... 10 C. W. N. 503, 34 C. 902 : 11 C. L. J. 570 : 17 M. L. J. 337, P. C., 31 I. A. 149 P. C.

Proof of possession

... ejectment suit, plff. must prove not only title but also ... I. C. 707 ... 253 : 81 ... side is ... will be found to be in possession within 12 years, ... 1921 Pat. 119 : presumed 5 P. L. J. 724 : 2 Pat. L. T. 55 ; 58 I. C. 773.

Proof of possession—*contd.*

——where the deft. has no title and the plff. has been found to be in possession, though not for the full statutory period the plff. is entitled to succeed on the strength of his possessory title. 41 M. L. J. 78 : 1921 M W. N. 243 : 62 I C. 396 *contra*. 1923 All. 117 : 72 I. C. 924

——the principle of the English Law to the effect that possession is good title against all but the true owner and entitles the possessor to maintain an action for ejectment against any other [illegible] 97 I C 369.

[illegible] ie for ejectment 45 [illegible]

[illegible] under s 145 Cr. P. C. to prove possession and also in survey proceedings, the onus of proof that the defts. were not in possession by virtue of any title, heavily lay on the plff. 45 M. L. J 578 33 M L. T 233 . 25 Bom. L R. 1259 : 28 C. W N 277 : 4 Pat L. T. 447 : 3 Pat 676 I Pat L R 345 P. C.

——where evidence of possession on both sides is equally strong, possession goes with title 6 Pat. L J 478 2 Pat L. T 481 · 1921 Pat. 305 F B. 2 Pat. 1, 3 Pat L T 460 1922 P. 432 67 I. C. 631.

——the mere fact of previous possession is not enough to support title in a suit in ejectment even against a trespasser 89 I C. 180 : 1925 Cal 1225

Suit against trespasser.

——when a person in possession is disposessed by another the onus is on him to show that he had better title 64 I C 243 (Pat) 2 Pat. L. J 61 *Ref.* 1932 M W. N. 439 15 L W. 430 69 I. C 237.

——in an ejectment suit all persons who are actually in physical possession of the property should be made defts but not persons who receive rent only 72 I. C. 1038 3 Pat L. T. 429 · 6 Pat L J. 604 : 1922 P. 352 · 67 I. C. 597.

——it cannot be said as an abstract proposition of law that where land was in the occupation of tenants, the landlord has no right to maintain a suit for possession against a trespasser or if land is in the occupation of the trespasser's tenants he cannot bring a like suit against him alone The question whether a suit for possession is maintainable by a landlord against a rival claimant depends very much on the status of the tenants The tenants of the latter [illegible] 1924 Cal 977

Suit against trespasser—*contd.*

——suit for damages against a trespasser is not maintainable 62 I. C. 635.

——in a suit for ejectment a trespasser is not entitled to claim compensation for improvement made by him. 69 I. C 573, 97 I. C. 394. 1926 Lah 694, but he is entitled to remove the building constructed by him. 97 I C 394: 1926 Lah. 694, 21 A 496, 20 B 2.., 1917 P. H C C 273.

Nonjoinder of party

——the mere nonjoinder of a party in a suit for ejectment is not fatal 92 I C 899: 1926 Cal. 592

——but all parties in possession, whether tenant or trespasser, should be made parties in a suit for ejectment otherwise the decree will not be binding against the person not made party and sometimes the decree may appear to be infructuous because the person ejected as being bound by the decree can come in under the person who remains in possession. 46 C. L J 433 · 1928 Cal. 138: 106 I. C 261

Under B. T. Act.

——non-occupancy raiyat can be ejected only on grounds enumerated in sec 44 B. T. Act, and not for denying the landlord's title. 1 C W. N 158

——a raiyat by his subsequent conduct, may become a rent receiver and create occupancy right under him. 5 C. L. J. 522

——suit to eject a purchaser of non-transferable occupancy holding must be brought within 12 years unless protected by sec. 14 of the L Act. 17 C. W. N. 1088 *contra* 17 C. W. N. 1459

——merely the transfer of non-transferable occupancy holding raises the inference that the raiyat has abandoned the holding 17 C W N 1105.

——unless there is a custom of accepting fixed nazar the landlord is not bound to recognise the transferee on accepting the nazar 17 C W N 1105.

——the transferor is not a necessary party in a suit for ejectment against the transferee 17 C. W. N 1105, 7 C. L. J. 72 p. 75

——the transferee may apply to be made party. 11 C. L J. 425

——a suit for ejectment alleging that the tenant of a n. t. transferable holding sold it to the deft. and has abandoned the land is not a suit under B. T. Act and so the presumption under sec. 50 B. T Act does not apply. 15 C. W N. 752, 10 C. W. N. 4A (6 C. W. N 181) *contd.*

——the mere usufructuary mortgage with delivery of possession does not amount to forfeiture. 40 C. 870, (20 C. 590, 31 C. 1219, 13 C. W. N. 590), *Ref*

As to other cases under the B. T. Act. see, B. T. Act, Abandonment ss. 49, 66, 86, 87, and 155.

Under Tr. P. Act.

——under s. 111, cl. (f) of Tr. P. Act, to eject a tenant for forfeiture the landlord must show his intention to determine tenancy

Under Tr. P. Act—*contd.*

before suit, otherwise there is no cause of action. 22 C. W. N. 312, 33 C. 339 : 3 C. L. J 274, 34 C. 57 ; 11 C. W. N. 225 ; 5 C L. J. 181.

——where neither party sets up tenancy, no notice is necessary. 9 C. W. N. 460 : 1 C. L. J. 116.

——a notice addressed to a tenant not as a tenant but as a trespasser, giving him six months' time is good notice 7 C. L. J 107.

——when the tenancy has not been terminated by a valid notice to quit, no suit for ejectment lies 11 C W N. 107 n.

——when a service tenure-holder renounces the title of his landlord and executes a kabuliyat in favour of third party, a suit for ejectment lies under s 111, cl (g) of the Tr. P Act, but the landlord must show his intention to determine the lease before suit. 33 C. 339 : 3 C L. J. 2

——whether a mere demand for possession is enough in a particular case, or whether a notice to quit verbal or written, is necessary, depends upon the status of the tenant 34 C 57 11 C W. N 225 ; 5 C L J 181, 4 C. W. N. 792, *expl.*

——but if the deft is a tenant from year to year he is entitled to a reasonable notice to quit 34 C 57 : 11 C. W. N. 225 : 5 C. L J. 181, 8 C W. N 774, *Fol.*

——if, on the other hand, the deft is a tenant at will a verbal demand for possession of the land would be sufficient. Where there is neither statutory provision nor contract to determine a tenancy by notice, verbal notice, by the tenant or the landlord is sufficient 34 C. 57 : 11 C. W. N. 225, 5 C. L. J 18, 1 C. W. N. 792.

——the question as to the nature of the tenancy whether the tenant is a tenant at will or yearly tenant is a question of law. Tenant who pays annual rent is entitled to a reasonable notice before suit for ejectment, 8 C W. N 774 F B.

——before the Tr P. Act tenancy from year to year was non-transferable 7 C. L. J 107.

[illegible] ansfers the land in [illegible] tled to eject the [illegible]

[illegible] non-payment of rent on the expiration of a year, he cannot be ejected for the rent of two consecutive years, as the right is waived 22 C. W N 312, 22 C. L. J. 546, 14 C 33, 2 C. L. J. 540, 16 C W. N. 104

——in case of a conditional ejectment decree, time may be extended. 21 C. W. N 776

——where the tenant erected pucca buildings without the permission of the landlord and inspite of landlord's express prohibition, he is not entitled to any compensation on eviction, but he may remove the buildings before the decree is executed. 5 C. W N. 846. (22 B. 1, 20 B. 1), *Ref*

For other cases see "*T P Act. ss. 105—117.*"

[illegible] *o and Mahomedan law,*

[illegible] *T. Act. ss. 29 and 30.*

ESCHEAT.

——on failure of heir permanent tenures escheat to the Crown 1 C. 391 · 15 W. R. 549.

——to entitle the Govt. to claim by escheat three things are necessary, (1) heritable grant to certain individual, (2) the extinction of his line, (3) Govt. has the right to claim by escheat on the happening of those two events. 28 B 276.

——a tenure might by chance fall to the landlord if it does not escheat to the Govt 7 C W. N 812.

——the burden of establishing title by escheat is on the asserting party Lands granted by the zemindar under an absolute hereditary *mukarari* tenure, do not, on the death of the grantee without heirs, revert to the zemindar, but the Crown by the general prerogative will take the property by escheat. 72 I. C. 401.

——the Govt is to prove at least *prima facie* that the last owner died without heirs and then it is open to the claimant to prove his own title or to set up the title of a third party. 95 I C 789 1926 Mad 921, 12 M. I A. 448, P. C *Rel. on.*

——delay in establishing the right to an escheat does not make the Govt guilty of laches 95 I. C. 789: 1926 Mad. 921, 20 L J d8 *Dist*

——land does not escheat to the Crown unless it is a permanent interest, otherwise it reverts to the landlord. 6 P. L. T. 237: 84 I C 293 · 1925 Pat 57

——the effect of Lord Canning's Proclamation of the 15th March 1858 was to divert all the landed property from the proprietors in Oudh and to transfer it and vest it in the Crown. 1925 O. 35 273: 10 O & A. L. R 1424

ESTOPPEL, see, *Evidence Act ss. 115-117.*

EVIDENCE ACT.

Scope of the Evi, Act

——the Evide nce Act is a separate statute and its provisions are independent of the rules of procedure contained in the Criminal Procedure Code 94 I. .C. 901 . 1926 Lah. 88: 27 Cr. L. J. 709, 57 Punj. L. R. 583.

S. 3. (*interpretation clause*)

Court

——the definition of the word "court" is framed simply for the purposes of this Act. 12 B. 36.

——the word "court" includes both the Judge and the Jury. The definition is not meant to be exhaustive. 4 C. 483 F. B

——a M holding a preliminary inquiry under s 164 Cr P. C. in a Police investigation does not exercise the function of a Court 11 B 702.

——it includes Commissioners taking evidence under the Civil or Criminal Procedure Code, 15 M. 138.

Fact.

——the only sense in which in intrepreting the Statute the word "fact" can be understood is that given by the definition. 7 A. 385 F. B

Relevant.

——relevant means admissible 3 C. W. N. 268 (note).

Evidence.

——it is so defined for the purpose of the Act only. 4 C 492 and it is exhaustive for that purpose 2 L. B. R 272.

——statement of accused is not evidence within this definition, L. B. R. (1893-1900) 368.

Proved.

[illegible] 6 C W. N.

[illegible] objection [illegible] 9 M L. A.

——the meaning of the expression "proved" as defined in s 3 is in no way affected by the incidence of the burden of proof 50 C. 318

——"proved" means that it is so probable that a person should, as reasonable man, act upon it, a fact need not be proved with anything like mathematical certainty. "Disproved" is converse of "proved" "Not to be proved" indicates a state of mind between the [illegible]

S. 5. (Evidence may be given of facts in issue or relevant facts).

——under the Evi Act admissibility is the rule and exclusion is the exception 16 B 661

——it is clearly the duty of the Judge apart altogether from any objection by the parties to exclude all irrelevant evidence. 5 Pat. L J 410 - 1921 Pat. 17 : 57 I C 561.

[illegible] from [illegible] of [illegible] '69; [illegible] of [illegible] heir [illegible]

S 6. (Relevancy of facts forming part of same transaction).

——where a prisoner, a booking clerk committed criminal breach of trust in respect of certain sums, his confessions before the Traffic Manager would be admissible under this s. 9 B. H. C. 358.

S. 6. (Relevancy of facts forming part of same transaction)—*contd.*

——a certain witness in a case of abduction gave evidence that he had seen 3 women who were sleeping in the same barn as complainant and his wife that night searching for something at dusk These women were not examined as witnesses and when the witness was asked as to what reply one of the women gave and the witness was not able to answer and the *Sessions Judge* excluded [illegible] treated as part of [illegible] and that ss. 6, 8, 9 [illegible] C. 433 · 26 C L. [illegible]

——statement of a woman raped is not admissible in evidence under s. 6 but may be admissible in evidence as complaint under s. 8, 4 Lah. L. J 491.

——hearsay evidence of the statement of a by-stander as to an occurence would be admissible as a part of the *res gestæ* only if it was made at the time the transaction was taking place or so shortly before or after it as to form the same transaction. 4 C. W. N. 263 5 Cr L. J. 71, 10 C. 302 *Dist*

——statement by injured person to a third person in the presence of the accused who did not deny it, is admissible. 10 C 302

——this S. gives statutory recognition to a well known rule of law, that facts which form part of the *res gestæ* are admissible in evidence. 34 P. R. Cr. 1914 : 27 *Ind. C.* 664 : 16 Cr. L. J. 184

——where the offence under trial is filing a false complaint, what happened of the complaint at the *subsequent* Police investigation, forms no part of *res gestæ*. 48 M. 640 : 86 I. C. 209 : 1925 M W. N 63

——the statement of a person not examined as a witness through [illegible] part of the *res gestæ*, [illegible] was not [illegible] *which* [illegible] rent. Nor [illegible] *hearsay* [illegible] 272

S. 7. (Facts which are occasion, cause or effect of facts in issue).

S. 8. (Motive, preparation, previous or subsequent conduct)

——answer given by an accused person to his superior in explanation of an official irregularity can be proved against him, if subsequently ascertained to be false. 4 Bom L. R. 234

——a motive is that which moves a man to do a particular act 62 I C. 545.

——evidence of motive only can never supply the want of reliable evidence, direct or circumstantial, of the commission of the crime 94 I. C. 901 : 1926 Lah. 88 : 27 Cr. L. J. 709 : 27 Punj. L. R. 583.

S. 8. (Motive preparation previous or subsequent conduct)—*contd.*

——the signs cannot be regarded as conduct, within the meaning of this sec. as the signs taken alone without the questions, cannot be connected with the cause of the death 7 A. 385 : A. W. N. 1885, 78 F. B.

——the conduct and acts of the accused are not dealt with in S 27 and are admissible under this sec 6 A, L J 839 : 31 A. 392 : 10 Cr L J 212, 12 Cr L J. 119 9 Ind C 718 . 4 S. L R 209.

——the gesticulations of deaf mute at the place where the dead body was found during Police enquiry cannot be admissible against the accused as conduct under this sec , 5 O. C. 246

——a first information report against an accused is admissible in evidence under this section as part of the informant's conduct 54 C. 237 : 44 C. L. J. 253 1927 Cal 17 . 99 I C. 237 : 1927 Cal. 17 : 28 Cr. L. J 99.

S. 9. (Facts necessary to explain or introduce relevant facts)

——a comparison of thumb impressions is admissible under this sec if the similarity of those impressions can establish the identity of a person who is charged with forgery 1 C W. N 33, 3 N. L. R 1 · 5 Cr L J 220, 9 C W N 520.

absconder is concerned in to explain his conduct is

ting identification parade witness's evidence. 47 A

S. 10. (Things said or done by conspirator).

——the application of the sec is strictly conditional upon there being a reasonable ground to believe that two or more persons have conspired to commit an offence 37 C 467 14 C W. N 1114 . 10 C. L J 453 *7 Ind. C 359, 30 C 983.*

——a conspiracy consists not merely in the intention of two or more but in the agreement of two or more to do an unlawful act or to do a lawful act by unlawful means So long as such a design rests in intention only it is not indictable 37 C 467 14 C. W. N. 1114 10 C L J. 453 7 I C. 359.

——although to establish the charge of conspiracy there must be agreement there need not be proof of direct meeting or combination, nor need the parties be brought into each other's presence *the agreement may be inferred from circumstances raising* a presumption of a common concerted plan to carry out the unlawful design *above case*

——where several persons are charged with the same conspiracy it is a legal impossibility that some should be found guilty of one conspiracy and some of the other Association for music, gymnastic exercises and lathi play amongst young men living in the same village or attending the same school are ordinary incidents

S. 10. (Things said or done by conspirator)—*contd.*

of village or school life and could hardly with propriety be proved as forming elements in any alleged scheme of conspiracy to wage war against the King-Emperor and all the more so, when they are shown to have been accompanied by a complete absence of secrecy and rather by a courting of publicity. •38 C. 559: 15 C. W. N 593.

——where the accused is charged with an offence of conspiracy and acts of cheating in presence of conspiracy, the charge is not bad and it is open to the prosecution to prove such acts in order that from these the existence of the conspiracy may be proved 35 C. L. J. 279, 25 M 61 *Dist*

——the criminality of the conspiracy is distinct from and independent of the criminality of the overt acts. When persons have been taken into custody and are in a condition which makes it impossible for them to act in aid or in furtherence of the conspiracy the acts of persons who were members of the conspiracy and who are still free to act in presence thereof, are not admissible as against them, these acts can no longer be deemed as the acts of co-conspirators, 15 C L. J. 517

——when no conspiracy was proved the self incriminating statement of one was not admissible against the other accused. 18 C. L. J 590. 14 Cr. L J. 586: 21 Ind. C. 378.

——the object of this sec is to ensure that one person shall not be made liable for the acts of another until some bond in the nature of agency has been established between them and the acts of another which it is proposed to attribute vicariously to the person charged must be in furtherance of the common design and after such design was entertained. 1929 Pat. 145 F. B.

——this sec. is intended to make evidence communication between different conspirators while the conspiracy is going on with reference to the carrying out of the conspiracy 33 C. 159 15 C. W N. 25 · 11 Cr L. J. 710: 8 Ind. C. 770.

——a letter of a person cannot be admissible in evidence without proving that he is a party to the conspiracy. 25 Bom L R. 248.

——where there is reasonable ground to believe that two or more persons have conspired together to commit an offence, anything said, done or written by any one of such persons in reference to their common intention may be proved both for the purpose of proving the existence of the conspiracy as also for showing that any such person was a party to it. 28 C. 797.

——a conspiracy within this sec. contemplates something more than the joint act of two or more persons to commit an offence. 4 C. W. N. 528, 25 B. 230.

——what has to be established under this sec. to make a document, found in the possession of one of several persons accused of conspiracy, admissible against the other accused, is that there is reasonable ground to believe in the existence of condsiracy amongst

S. 10. (Things said or done by conspirator)—*contd.*

such persons. It is not necessary for this purpose to establish by independent evidence that they are conspirators. 16 C. W. N. 1105 ; 16 Ind. C. 257.

——where a letter written by a stranger to a conspirator is not shown to have been received or replied to or otherwise acted upon by the latter it is not sufficient to establish the former's connection with the conspiracy so as to make his acts done in pursuance of the conspiracy, *above case.*

——overt acts may properly be looked at as evidence of the existence of a concerted intention and in many cases it is only by means of overt acts that the existence of the conspiracy can be detected. But the criminality of the conspiracy is independent of the criminality of the overt act. *above case*

— statement of accused after arrest and not amounting to a
er under s. 10
J. 255 (38

th conspiracy
be convicted
similar case

41 C 754

——but where three persons were charged of criminal conspiracy and two were acquitted, it was held that the third also must be acquitted 30 C. W. N 94 · 91 I C 883 ; 1926 Cal 345

——when the proof of a conspiracy depends upon proof of the participation of the accused in an overt act which itself amounts to an offence the proper course is to put the accused on their trial for that offence However the accused may legally be charged merely with the offence of criminal conspiracy The mere association of an accused with any of the conspirators is not enough by itself to commit him of being a member of the conspiracy 39 C. L J 151 83 I C 513.

——there is a considerable inconsistency between the provisions of s. 10 and the illustrations attached thereto 11 P. W R 1915 Cr 37 C 507, 28 C 797

S. 11. (When facts not otherwise relevant become relevant.)

——this sec is controlled by s. 32 where the evidence consists of the statements of persons who are dead 110 I C 521 1928 Cal. 893

——the words of the sec are very wide 16 B 414.

——this sec must be read subject to the other ss of this Act : so, if the tenor of a deposition made by a person since deceased does not fall within the provisions of s. 32, the provisions of s. 11 will not avail to make such deposition evidence 34 A 341

——when the question is whether a man is a habitual cheat, the fact that he belongs to an organisation formed for the purpose of habitually cheating in concert, is relevant under this sec., 37 C 91 . 14 C. W. N. 49, and it is open to the prosecution to prove against each person that the members of the gang are cheat *above case.*

S. 11. (When facts not otherwise relevant become relevant) —*contd.*

——all previous statements made by the accused having bearing on the question of his guilt are admissible. 4 Pat. L T. 391 : 73 I. C. 963

——'facts' do not include judgment, so a judgment in which one of the parties was not a party in the previous suit and which is not admissible under secs 40 and 43 Evi. Act. cannot be admissible under this sec 6 C. 171 F. B. (11 C. 562, 12 C. 207, 13 C. 352, F. B. 11 M 116, 12 A. 1 F. B.) *Fol.*, (12 M 9, 10 A 585, 15 M 19, 18 M. 73, 23 C. 623) *Dist.*

not party
33 P C.
C. W N

——though the recitals in a judgment cannot be used as evidence, still the judgment is evidence as a relevant fact or as transaction Evidence of custom in the connected families may be evidence of custom in the family in question. 53 *C* 370 : 37 C. L J. 233 : 1923 *Cal.* 485, 29 C 343 *Ref.*

——judgment of prior forfeiture proceeding is admissible in subsequent case under s. 153 A., I. P. C., 104 I. C. 225 : 1927 *All.* 631 : 28 Cr L. J 785 : 25 A. L. J. 846

——'highly probable' points out that the connection between the facts in issue and the connected facts sought to be *proved* must be so mediate as to render the co-existence of the two *facts* highly probable. 6 C. 665, 25 C 210 . 2 C. W. N. 91, 47 C. 671 F. B.

——taining boundaries of other . 1022 : 63 I. C 954, 14 C. 314, 329, 1923 Nag. 22 35 N. 469 : 86 I. C 674 : 1925 25 Cal. 1034, 84 I C 421 : N 761 ; 97 I C. 265 ; 1926 101 I. C. 542, 44 C. L J C. 688 : 1926 Cal. 479, 1927 Cal. 918, 29 Punj L. R. 74, 109 I C 728 : 1928 Lah. 423, 1927 Lah 448

——in the case of a dispute as to the right to the possession ——lating to lands on the persons who were in ssible in evidence. 91 ab. 448, 101 I C 42

45 C L. J. 105.

——recitals of boundaries in a sale certificate relating to adjoining lands are not admissible to prove the facts stated therein 110 I C. 521 : 1928 Cal 893.

——document not *inter partes* containing recital that particular land belongs to a particular *howla*, is admissible in evidence 5 C L J. 53 *contra* 10 C W. N. 468, which holds that 5 C. L. J. 53 is only an *obiter*, but see 23 C L. J. 578.

S. 11. (When facts not otherwise relevant become relevant) —contd

——but such documents may be admissible in evidence under s 32 (3) Evi Act, 1923 Cal 299, 1928 Lah. 428 · 10 Lah. L. J. 370: 109 I C 728 *See cases under s 32 Evi. Act.*

——*ex-parte* decree of rent proves the existence of the tenancy, at the time. 1923 Cal 270 . 67 I. C. 787, 3 Pat. L. T. 570 · 192? P. 557 : 65 I. C. 856.

——entries in Batwara papers, admissibility of 1926 Cal. 115.

——a comparison of thumb impression is admissible under this sec. 1 C. W. N. 33.

——a mortgage executed by the son in which the father is described as dead is admissible when death of the father is in question 1923 Cal 378 : 72 I. C 985.

——when a document is admitted in evidence recitals therein are not evidence especially if they are merely assertions by a person who is alive and who might have been brought before the court as a witness 1923 Cal 290 : 68 I C. 282.

——the fact that a deceased, after an alleged *nika* marriage, has executed a will in which her name was not mentioned is a relevant fact to disprove the marriage 7 C. W N 665 27 B 485 P C

——neither under s. 11 nor under s 145 Evi. Act is the prior deposition of a third party admissible to contradict the evidence or impeach the credit of a witness in the case. 34 M L T. 355 · 78 I C 176 1924 Mad 537

——in a suit for rent, a statement contained in an order for delivery of possession as to the rent payable is not admissible in evidence 87 I C 512 (c).

——self-serving statements are admissible where they make relevant fact highly probable or improbable or where they are *res gestæ* 1925 Pat. 68

S. 12. Facts tending to determine amount of damages are relevant).

——a party cannot be allowed compensation for losses which might have been reasonably avoided 47 C. 1027 33 C L. J 72 : 61 I C. 14

——measure of damages in anticipatory breach of contract. 32 C. L. J. 168.

——measure of damages for breach of contract to deliver goods within a specific time when the vendor gives previous notice to the purchaser of his inability to perform the contract. 30 C. 477.

S. 13 (Facts relevant when right or custom is in question).

——"right" in s. 13 only applies to incorporeal rights both private and public, and the word transaction does not include a judgment 6 C 171. F. B., 8 C. 483, F. B., 10 B. 439. *Fd Contra*, 15 C. 233 · 12 A. 1, F. B

S. 14. (Facts showing existence of state of mind &c.)

——this sec. applies to cases where a particular act is more or less criminal or culpable according to the state of feeling or mind of the accused and it cannot be extended to cases where the question of guilt or innocence depends upon actual facts 6 C 659

——in a case under s. 106 I. P. C other fraudulent transfers on the same day and apparently with the same intention may be proved. 16 B. 414

——where certain speeches form the subject matter of a charge for sedition and when such speeches form part of series of speeches or lectures in one topic, any of such speeches is admissible under this section 32 M. 3

——where a particular transaction is one of a series of similar frauds, evidence of other frauds is admissible under this section 9 C. L J 610

——but where a person is charged of one offence, evidence of guilt of another offence cannot be given except to prove the elements mentioned in this s., 18 C. L. J. 578 · 47 C. 671 F B.

——where an accused person is charged with belonging to a gang of persons associated for the purpose of habitually committing dacoity under s. 400 I. P. C. evidence showing that he has been previously convicted of a charge of theft or has been ordered to give security for good behaviour is not admissible under this s., 46 B 958 (32 M. 179, 47 C. 671, 36 C 573) *fol.*

——Exp —(1) and illus. (o) to s. 14 renders facts showing the existence of a state of mind relevant only if they establish that such states of mind existed in reference to the particular matter in issue 36 C 573 47 C 671 · 24 C. W. N. 501 ; 31 C. L J. 402 F. B

——in a trial under s 235 and s 243 I P. C evidence of the possession of counterfeit coin and instruments for their manufacture is admissible. 61 I. C. 647.

——in a trial under s 420 I. P. C. evidence as to any previous act of fraud is not admissible. 29 C. W N. 483 : 86 I C 970 1925 Cal. 674

——where the intention of the accused is relevant fact, evidence of similar transactions both prior and subsequent to the alleged offence is admissible as evidence of intention. 83 I. C 849 25 Cr. L. J. 185.

——former judgment more than 25 years old and convicting accused of dacoity is admissible in a case under s. 401 I. P C for showing criminal tendency to commit theft and not habit committing theft. 89 I. C. 527 : 1925 Bom 195

S. 15. (Facts bearing on question whether act was accidental or intentional.)

——this sec. is an application of the general rule laid down in sec. 14 and the words of the sec. as well as illn. (a) shows that it is not necessary that all the acts should form parts of one transaction, but that they should be parts of a series of similar occurences. 36 C 573, 47 C. 671 : 24 C. W. N. 501 : 31 C L J 402 F. B.

S. 15. (Facts bearing on question whether act was accidental or intentional.)—*contd.*

——in construing a newspaper article its meaning must be taken from the article as a whole and not from isolated passages. 38 C. 523.

——an open user continued without interruption for a long time raises the presumption that the user is of right 95 I. C. 269 : 1926 Lah. 522.

S. 16 (existence of course of business when relevant).

——a court cannot take as matters of public notoriety time of train between two places on a particular day, the number of mail trains within a given time and other like facts involved in such an enquiry 20 C L. J. 455

——in a suit by a firm against another for the recovery of the balance of an account between them, it was held that it was reasonable to presume that the ordinary course was pursued in this case 6 M I A 80, 90 P. C.

Ss. 17-21 (Admission, admissibility of).

——the deposition of a witness in a former suit is admissibe as an admission in a subsequent suit in which such witness is a deft 36 C L J 186. 4 U. P L R 19 65 I C. 345

——a party can show that the previous statement was untrue. 1922 Nag 67 : 65 I C 368

——a party may show that admissions were misken or true 5 C. L. J. 115, 11 C. W. N 321 4 C. L J. 102 29 A 184, P. C. but very clear proof is necessary to escape. 18 W. R. 280.

[illegible] proved untrue 49

[illegible] not binding upon

——under s 21 a court is bound to receive the admission of a party in evidence but this rule does not apply to denials of a party. 49 A 482 1927 All. 383 28 Cr L. J 323 100 I C 707 25 A. L J 327.

——recital in a will cannot be proved by the persons who made it or his representative in interest 26 C W N. 273 15 L W. 404 · 100 I C 835 1927 P. C 102

——statement of an accused to police officer is admissible as admission against the accused under ss. 17 and 18 but it is not admissible in his favour 44 C L J 253 1927 Cal 17 54 C 237. 28 Cr. L J 99.

——statement made by an accused on oath before the coroner at an inquest is admissible at the trial as a statement made by a party to a proceeding 50 B 111 93 I C 690 1926 Bom 151 27 Cr. L J. 466 . 28 Bom L R. 111

——the admission made by a deft, in a former proceeding cannot be used against a co-deft unless it was made by him in his character of a person jointly interested with the co-deft. The requirement of

Ss. 17-21. (Admission, admissibility of)—*contd.*

the identity in legal interest between the joint owners is of fundamental importance. 30 C. W. N. 254 : 1926 Cal. 705 : 93 I. C 115

——the statement that a document is a copy of the original is admissible when it is made by a person deceased in a document relating to ... P. C.

——ta ... of the deft, may ... J. C. ... W. N. 20 C. W. N. ... 254 : 1926 Cal 705 : 93 I C. 115. 45 C. 159, *contra*, 24 W. R. 214 P. C. 16 C. 627 P. C., 28 B. 248, 12 W. R. 39, 2 C. W. N 166

——the requirement of the identity in legal interest is of fundamental importance, to make the admission of the co-defendant admissible. 30 C. W. N. 254 : 93 I. C. 115 : 1926 Cal 705

——admission of one party may be given in evidence against another when they have joint interest. 25 C W. N. 89 - 61 I C 514

——an admission or even a confession of judgment by some of the defts. is no evidence against his co-deft, 1928 Lab. 769, 10 Lah. L J. 339, 23 W. R. 214 P. C. *fol.*

——admission must be taken as a whole or not at all and in taking the admission as a whole if any portion is found to be in favour of the person making the admission it will operate in his favour. 41 M. L J. 525 : 1921 M. W. N. 639, 2 Pat. L. T 658.

——the admission must be read as it stands, one part cannot be taken rejecting the other. 49 A. 707 : 100 I C. 1037 : 1927 A. 385 . 25 A. L J 572.

——an admission of a reversioner is evidence against another person claiming reversionary interest under the former 61 I C 334 (C).

——but the statement of one reversioner is not ordinarily admissible against another. 68 I C. 566

——admission of father does not bind the son. 24 I. C. 311. P. C., nor of the brother does. 25 C W. N. 89 P. C.

... suit when there was ... 12 C. W. N ... relevant, the fact ...

——if the agent is authorised to write a letter, it matters not whether he signs the name of the principal or his own. 6 C. 340, ——principal can repudiate agent's act. 31 C. 357, but not always. 6 C. W. N. 57 P. C.

——evidence of one's agent in the absence of principal's deposition is legal. 15 W. R 157,

——principal is not bound by the bye-transaction of the agent, 6 W. R. 57, P. C.

——an agent's admission of acting in that capacity is admissible. 2 W. R. 190.

——one partner is the agent of the other. 11 C 588

——receiver is not an agent. 10 C. W. N. 959.

Ss. 17-21. (Admission, admissibility of)—*contd.*

——where a party to a proceeding agrees to abide by the statement of a third person the statement made by the latter is admissible within s. 20 and such admissions are as conclusive and effectual as admissions by the parties in their written or oral pleadings 103 I. C. 34 : 1927 All 659

——a general statement by a witness that a number of persons admitted having committed crime, is valueless without some indication as to which of the persons made the commission in question with some particulars of what was actually said. 7 Lah. L. J. 259 : 26 P. L R. 601 1925 Lah. 418

——every admission which a party makes is evidence against him and may properly be acted upon without necessarily accepting other statements or admissions which he has made 90 I C 487.

——where one of several defts, took part in *batwara* proceedings and therein a map was prepared and certain measurements were made which supported the pltf's. title, held they were admissible in evidence though not binding as admission on the defts. who claimed under an independent title. 90 I. C. 643.

——client is bound by the admission of his pleader. 6 C W. N. 82, 21 M 274. 25 M. 36, 5 C W. N. 353, 13 A. 272 F B, 13 C. 115, 27 C. 428, 7 C W. N. 351

——an erroneous admission of a pleader on a point of law cannot bind his client 3 C. W. N. 222 26 C. 250, 28 B 468, 24 B 369, 9 C W. N. 636. 33 C 257, 6 C W. N 82, 31 M. 274, nor the erroneous omission to object to the reception of evidence makes it admissible. 34 C. L J. 107.

——it is not open to a party in appeal to try to go behind the admission of the pleader who represented him in the Lower Court, by the statement of his counsel engaged in appeal. 102 I C. 283, 1927 Lah 748, 9 W R. 465, 11 M I A 253, 21 M. 279, 22 M 538, 6 C. W. N 52

——counsel possesses general authority to make a binding compromise 27 C 428, 13 A. 272 F B *contra*, 6 C W N 82, 24 M. 274

——acknowledgment of a gurdian cannot bind the minor and save limitation 26 B. 221, 26 C 51, 13 C L R. 112 22 C. 545, 13 C. 292 *contra*, 12 C W. N. 256, 26 B 221

—— [illegible] ish evidence against the othe [illegible]

—— [illegible] te, except by a document.

——guardian cannot bind his minor ward by personal covenant. 34 C. 892 : 7 C. L J. 87.

——acknowledgment of liability of the mortgagor binds the purchaser of mortgaged property. 32 C 1077 9 C W N. 868.

——when the mortgagor admits the execution of a mortgage deed he must prove the non-passing of consideration. 47 C. L. J. 222, 24 N. L. R 40 1928 P. C. 39 : 107 I. C. 113 30 Bom. L. R. 296 P. C.

Ss. 17-21. (Admission, admissibility of)—contd.

——an erroneous omission to object to the reception of evidence of an admission by party irrelevant within sec. 21, does not make it relevant. 19 A. 76 P. C.

——objection not taken before the lower court, cannot be taken before the High Court 12 C. W. N. 345 : 7 C. L. J. 250 : 10 Bom L. R. 126 P. C.

——entries in road-cess return is evidence as admission 30 C. 1033 : 8 C W. N. 1, 3 C W N. 343.

——when a party has altered a deed he cannot fall back upon it 10 C. W. N. 788 : 33 C. 812 · 3 A. L. J. 363.

S. 23. (Admission in Civil cases when relevant.)

——admission to a person to whom the parties went for compromise are admissible in evidence unless there was an express agreement that no evidence of those statements would be given. 95 I. C. 363 : 1926 Lah 548

——the evidence as to negotiations of compromise and the statements made during such negotiations are generally without *prejudice*. It is generally against public policy to admit such evidences and statements. 11 C. W. N. 26 *(note)*.

——where there was admittedly no express condition that evidence of the interviews should not be given and it could not be inferred from the circumstance that the parties had so agreed the evidence could not be excluded under this sec 44 C 130 : 20 C. W. N 1217 : 34 I. C. 571.

——this section precludes the Court from making use of admissions [illegible] 83 P. R. 1877.

[illegible] is admissible although

it [illegible] attach whatever weight

it [illegible]

S. 24. (Confessions caused by inducement, threat or promise when irrelevant.)

S. 25. (Confession to Police officer not to be proved.)

S. 26. (Confession by accused while in custody of police not admissible.)

S. 27. (How much of information received from the accused may be proved.)

S. 28 (Confession made after removal of impression caused by threat etc.)

S. 29. (Confession otherwise relevant not irrelevant because of promise of secrecy etc.)

S. 30. (Confession of co-accused.)

[illegible] confession before a Magistrate af- [illegible] the truth by the Sahib who told [illegible] released, held, that the confes- [illegible] Evi. Act, 45 B 1086. 3: C L. J. 204

——proving of admissions before the police officer vitiates the conviction. 26 C. W. N. 48 (note).

S. 30. (Confession of co-accused)—*contd.*

——the evidence of police officer with regard to statements made to him by certain person is inadmissible. But statements made to the investigating police officer by a relative of a person whose property was stolen, can be used to contradict or corroborate as the case may be, the statement made by him in the court of the trying Magistrate. 34 C L. J. 53.

——a merely moral exhortation to tell the truth is in no way objectionable. 4 Pat. 646 : 89 I C 961 1925 Pat. 772.

——statement by accused during police inquiry regarding [illegible] but involving an admission [illegible] missible under s 25. 46 B.

[illegible] deposed to as discovered in [illegible]

——in determining a case from the point of view of sec. 24 Evi. Act, the court will have to perform a threefold function. (1) It will have to determine the sufficiency of the inducement, threat or promise as affording certain grounds. (2) It will have to clothe itself with the mentality of the accused to see whether grounds would appear to the prisoners reasonable for a supposition that is mentioned in the sec (3) It will have to judge as a court if the confession appears to have been caused in consequence of the inducement, threat or promise The sec. does not require positive "proof," as defined by s. 3 of the improper inducement to justify the rejection of the confession and the word "appear" indicates a lesser degree of probability that would be necessary if proof would be required. 52 C. 67 29 C W. N. 300 86 I C 414 : 26 Cr L. J. 782.

——when confession was made to a zemindar of a village who was also the Magistrate and was regarded as an important person in the village the Zemindar must be regarded as a person in authority. 101 I C 881 · 1927 Pat. 257 : 28 Cr L. J. 497, 8 Pat. L. T. 566.

——where the accused made a statement to the police that the weapon with which the crime was committed was concealed in a prickly pear bush which was excluded by the lower court on the ground that the effect of sec. 162 of the *Amended Cr. P C* was to supersede s. 27, held that if the statement had led to the discovery of the weapon with which the offence was committed, it was not rendered inadmissible by the *Amendment* 86 I. C 664 : 1925 Mad 574 . 21 L. W 199.

——to reject a confession it is not necessary that there should be positive proof to establish that the confession had been obtained by use of threat, persuasion etc. Anything from the barest suspicion to positive evidence would be sufficient for a confession being discarded. 23 A. L J. 821 : 89 I. C 903 : 1925 All 627 F. B.

S. 30. (Confession of co-accused)—*contd.*

——*Abkari* officers are not Police officers for the purpose of sec. 25. 82 I. C. 151 . 25 Cr. L J. 1223 : 1925 S. 70 *Contra*. 51 B 78 : 99 I. C. 380 : 1927 Bom. 4 F. B

——excise officer is not a police officer and a confession made to him is not admissible. 54 C 601, 31 C. W. N 667 : 1927 Cal. 537 : 28 Cr. L J 579, 102 I C 547, 22 C. W. N. 834 *Rel.*

——Police Patel in Berar is not included in the term "Police Officer" in s. 25. 101 I. C. 599 : 28 Cr. L J. 471 : 1927 Nag. 222.

——merely because a cofession by one of the accused is not a complete and detailed confession up to bilt, it cannot be rejected against the accused 1924 All 511, 75 I. C. 701 : 25 Cr. L. J 13. 1924 Nag 27

——s 27 is overridden by. s. 162 Cr. P. C. 100 I. C. 820 : 1927 Nag. 203 · 28 *Cr.* L. J. 340.

——the fact deposed to as discovered in consequence of information received or confessions made to the police by an accused must be a fact relevant to the case 105 I. C. 683 : 6 Pat. 611.

——when the same fact is discovered in consequence of information received from several persons it should be considered to have been discovered from the information of the first informant 101 I C 488 . 28 Cr. L. J. 456 : 28 Punj. L. R. 187.

——confession in an inquiry under s. 476 Cr. P. C is confession within sec. 30. 26 Bom L. R. 614 : 1924 Bom. 445.

——s 30 only provides that a court may take into consideration the confession of co-accused It is not made on oath and its evidentiary value is very low The statement of even an accomplice has a higher and more probative value. It must be supported by cogent corroborative evidence of the *corpus delicti*. 83 I C 859 · 25 Cr. L. J 185.

——a retracted confession is not the testimony of an accomplice within s. 133 Evi Act. 40 C. L. J. 551.

——a retracted confession cannot be used against the co-accused without substantial corroboration. *101 I. C.* 881 : 1927 Pat. 257 : 28 Cr. L. J 497.

——conviction based on the confession of a co-accused only is bad. 101 I. C. 881 : 1927 Pat 257 : 28 Cr. L. J. 497.

For other cases under ss. 24 30 see rulings under the heading "Confession" of the Criminal Reference.

S. 31. (Admission not conclusive proof, but may estop).

——mistake of law as to certain liability should be allowed to be proved. 29 A. 184 : 11 C. W. N. 321 P. C.

——estoppel binds only parties and privies and not strangers 11 C W. N. 321 : 29 A. 184 : 5 C. L. J. 115 : 17 M. L. J. 103 P. C.

——former statement may be proved to be false. 13 M I. A 551 15 W. R. 14 P. C., 5 C. L. J. 115, 11 C. W. N. 321 : 4 C. L. J 102 : 29 A. 184 P. C , 1922 Nag. 67 : 65 I. C 368, but very clear proof is necessary to escape. 18 W. R. 280

S. 31. (Admission not conclusive prove, but may estop)—*contd.*

——admission made in execution proceedings must be held to be true if the unsuccessful party proceeds to a suit. 1927 All 659 : 103 I. C 34

——when reliance is placed upon an admission of the witness of opposite party, the whole evidence must be taken into consideration. 60 I C. 483.

——a pleading by two defts against the suit of another (plff) cannot amount to an estoppel as between them 13 M I A 551. P C

——it is difficult to base a conviction on admissions as they are on a somewhat similar footing to a retracted confession 102 I C. 492 : 1927 Lah. 549 · 28 Cr. L J. 556

Ss. 32,33 Statements of persons who cannot be called as witnesses

S. 32.

——statement must be of relevant facts 7 A. 385 F B.

——the statement is admissible under Cl. (1), only in cases in which the cause of the *death* of the person who made it, comes in question. 10 C 147

——the first information report against an accused is admissible under cl. (1) of the section as to the cause of the informant's death. 44 C. L J 253 : 1927 Cal 17 . 54 C 237 : 99 I C. 227 28 Cr L. J 99.

[illegible] the time the plaintiff closed [illegible]tements in writing by such [illegible] of the plaintiff's case were [illegible] of deceased person 25 A. [illegible]

——chowkidar's diary is admissible if it was written by the chowkidar himself or any authorised person. 1922 P 111 · 67 I C. 57 · 20 A L. J. 601

——the statement must be proved in the ordinary way by a person who heard it made If the M be called to prove it he may refresh his memory with writing made by himself at the time when the statement was made. 8 C. 211 10 C. L. R. 11, 6 C. W N. 321.

——where objection was raised in appeal as to the mode of [illegible] C in remand- [illegible] the contents [illegible] down in 8 C. [illegible] J 1244.

——statements made by a deceased long prior to the occurrence resulting in death are not dying declarations 4 Lah 451.

——statement of a deceased person as to who would be his successor on his death in case of his not having a son is not admissible in evidence. 42 C L J. 280 93 I C 385 , 1926 Cal. 1

——witness present may prove dying declaration 49 C 358 : 1923 Cal 382.

——s. 32 (1) unlike the English law is not confined to cases of statements relating to the cause of a person's death but extends "as to the circumstances of the transaction which resulted in

S. 32—*contd.*

death," so a statement made even before the deceased received any actual injuries is admissible. 50 B 683: 28 Bom. L. R. 1013: 27 Cr L. J. 1140: 97 I. C. 660: 1926 Bom. 513.

——dying declarations made to a police officer in the course of an investigation are not affected by sec. 162 Cr P. C and are admissible in evidence if reduced to writing and signed by the declarant. 7 A. 385

——a dying declaration stands on a different footing from the testimony of a witness in court. It cannot be accepted in part and rejected [illegible] if there is absolut[illegible] state-ment. [illegible] it de-pends [illegible] e of its truth, but upon the circumstances of and surroundings under which it was made and upon the nature of the record. Where it is composed of mixture of questions and answers, the form of the record should be such that it would be possible to see what was the question and [illegible] how much was suggested by th[illegible] of the person making the s[illegible] 1000: 42 C. L. J. 247: 52 C. [illegible]

——where a person making a dying declaration chances to live, his statement cannot be admitted in evidence as a dying declaration under this s but it may be relied on under s. 157 to corroborate the testimony of the complainant when examined. 4 Bom L R 434

——declaration in disparagement of title is admissible 64 I. C 685

——statement against interest is admissible 1925 All. 130 [illegible] the mortgagor is [illegible] ded as evidence [illegible] 136.

——statement of a deceased witness in a mutation proceeding is admissible in a civil suit between the same parties 65 I C 339

——where a Hindu widow made a statement in a prior suit that she had mortgaged the property for raising a loan to meet the expenses of her husband's sradh ceremony and other necessary expenses and that statement was admitted in evidence under cl (3) of s. 32 in a suit by the reversioner to recover the property from the possession of the mortgagee who purchased the property in execution of mortgage decree, held that the whole statement should be taken as one and cannot be split up. 94 I. C. 13: 1926 Pat 255: 5 Pat. 168.

—— a petition of complaint and the examination of the complainant on oath under s 200 Cr. P. C. are admissible as dying declarations under s 32 Cl. (1), 36 C. 659.

——the statement admissible in evidence, when made in the absence of the accused, is the oral statement of the deceased, and not the record of it. And such oral statement must be proved by

S. 32—*contd.*

the person who recorded it or heard it made 36 C 659, 8 C. 211, 6 C. W. N 72.

——signs made by a dying man in answer to questions, may be regarded as verbal statement within the meaning of s 32 26 C. W. N. 414. 49 C. 600, 3 Pat. L. T. 771, 7 A. 385 *Fol*

——'person' does not mean 'persons', 3 C. W N 88 · 26 C 236

——in a suit for dower-debt, a register of marriage kept by a kazi is admissible under this s. 19 C 689 . 19 I A 157, **P. C**,

——statements of a deceased relative, servant or dependent, who had special means of know[illegible]
when there was no controvers[illegible]
27 I. A 238 ; 23 A 37, **P C** [illegible]
49 · 27 I A 183 ; 2 Bom L [illegible]
C. W. N. 270, 1923 Pat 266

——statement as to relationship made in a previous suit in [illegible] 105 I. C 26
[illegible] eeping family
[illegible] r custody 25

——*s 32 cls 4 or 5, do not admit of hearsay evidence as to* whether particular person survived another, or whether a man was living separate or joint, or as to the existence of a custom 25 A. 143 **P. C**, 19 A 1 **P. C**, 23 A 37 **P C** 20 C 758, 24 C 265

——personal knowledge and belief of the deponent must be found or presumed in any statement of the deceased person, which is to be admitted in evidence 7 C W N. 209 · 25 A 143 **P C**

——opinion as to the reputation of the accused is inadmissible in a Excise case. 30 C W N 854 . 1926 Cal 1163 · 53 C 706

——the Indian Law differs from the English Law with regard to evidence on matters of pedegree 110 I C 428 1928 Pat. 539.

——the statement in a pedegree, made by a deceased member of one branch of the family regarding another branch, before any dispute arose, is admissible 32 C 6, 46 B 753

——where the oral evidence as to relationship is based on pedegree prepared by the deponent's father but the pedegree is not put in evidence nor there is any ground for letting in secondary evidence, the evidence was inadmissible 91 I C. 462 1926 Mad. 475

——clause (5) is inapplicable to statements made after the dispute had arisen. 25 A. L J. 861

——cl 6 does not require that all the witnesses of the pedegree should have special means of knowledge 63 I. C. 968

——out of the two confusing pedegrees, the one though brought to light later in point of time, but which was supported by verbal evidence and accepted by competent authorities was accepted in preference to that which was originally produced many years ago and contained the statement that it was all the pedegree that was then known, made by the person who was the person most likely to have knowledge. 1925 **P. C** 199

S 32—*contd.*

——pedegree table if corroborated in material parts by t evidence is to be presumed to be genuine. 105 I. C. 81

——where the appellants contended that document relie by the respondents, had no claim to be called a family pede it was not within the words of the Privy Council decision i 510, "an ancient family record handed down from genera generations and added to as a member of the family dies or l held, a family pedegree as used in s 32 (b) is not strictly con the description of the term in the Privy Council case. In a such a document is admissible as the declaration of the w deceased father who must be taken to have adopted it. 8 29 . 1925 Nag 271 . 86 I. C 847.

——a geneological table purported to have been mad [illegible] as it was mad [illegible] . 209 P. C., 5 C [illegible] W. N. 1 : 3

——a recital as to the date of birth in guardianship appl is not by itself admissible unless the person making the state dead, etc. 38 C. L. J. 213.

——a statement made by a deceased sister as to the brother is admissible in evidence. 25 M. 183, 20 C. 758, 13 C. 4

——pedegree may be proved by the statement of kins Hindu boys are taught the names of their peternal and m ancestors up to the seventh (or higher) degree as a ma necessity. 32 C. 84 : 9 C. W. N. 16 P. C.

——a hear-say statement of a deceased as to relation inadmissible. 26 C 581 9 C. W. N. 105

——statement of a deceased person is relevant if it is con In any deed, will or other document which relates to a tran as is mentioned in s. 13 cl (a). 11 C. W. N 703.

——though an unprobated will is an evidence of title ment contained therein as to the relationship of parties can be on. 7 Pat 733 : 1928 Pat. 459 : 9 Pat. L. T. 484.

——entries in account books are relevant under s 34 l not alone sufficient to charge a person with liability w corroboration but if they are written by dead persons th [illegible] and [illegible] 19

——*Jamawa* [illegible] papers can be admi evidence under [illegible] made them are [illegible] course of busin [illegible] distinguished from other entries therein as not made in the or course of business. 90 I. C. 564 : 1926 Cal. 359.

——writer of the *Jama wasil baki* papers proved to be 45 old may be presumed to be dead at the time they are tender evidence. 55 C. 1216.

S. 32—*contd.*

——entries made by an Amin in the *khatian* and *chitta* must be presumed to have been made in the ordinary course of business and are admissible in evidence under s. 32 (2), 32 C. W. N 759 55 Cal. 1070 1928 Cal. 448 : 108 I. C. 585

——statement of deceased person as to relationship is not admissible 68 I C. 566.

——papers, books and statements of a family priest of *Hardwar* are admissible in evidence to prove relationship under s 32 Evi. Act. 6 Lah. L. J. 550, 84 I. C 912, 1925 Lah. 281

——in considering the evidence as to the date of birth of a plff horoscopes are not proof in themselves but they could be used for refreshing the memo[illegible] s. 32 Evi Act. 10 O[illegible]

——a plaint for [illegible] that the landlord did [illegible] but not to prove state[illegible] and the conditions in [illegible] N. 1033 80 I. C. 357.

——in the absence of the condition prescribed by s. 32 Evi Act a plaint filed in a prior litigation is not admissible to prove a statement by a superior landlord 28 C W N. 1033 39 C. L J 90 : 80 I C 357.

——a family pedegree as used in s 32 (6) of the Evi Act is not strictly confined to the description of the term in the Privy Council case in 30 All 510 8 N L. J 29 · 86 I. C. 847.

——where the persons who gave the names of the relatives to the witness who compiled the pedigree table are not proved to be [illegible]

——entries in the register (*purohit book*) was not held under the circumstances of the case to be evidence as to the date of death 26 Bom L R 563 · 46 M L J. 541 P C

——recitals as to the boundary or identity of lands made in documents of third persons are admissible in evidence under this section when the executants are dead 44 C L J 582 99 I. C. 907 : 1927 Cal. 230, 44 C. L J 597 1927 Cal. 234 99 I C 910, 1928 Cal. 63

For other cases on this point see cases under s 11 Evi Act

——recitals of boundaries in a sale certificate of adjoining lands are not admissible to prove the facts contained therein. 1928 Cal. 893 : 110 I. C. 521.

S. 33.

——for a former deposition to be admissible it must be proved that proceedings were between the same parties and issues were the same 23 C. 441.

S. 33—*contd.*

——where the only evidence that a witness could not be f was the statement of a Police officer, and it was stated th could not be found on search and that a warrant was also is held that sufficient ground was not established for the adm of the previous deposition of the witness under s. 33. 41 C. 19 C. W N. 729

——the evidence given by an attesting witness in a mort bond in an inquiry by a Sub-Registrar is admissible in a re suit in the civil court if the witness was duly cross-examined C W N 605

——but the evidence in the ejectment proceeding before revenue authorities cannot be legally relied upon in a suit in Civil Court against that proceedings 106 I C 313 : 1928 Lah 4

——the deposition of a witness is not admissible under unless one or other of the requirements of the sec. is sati The mere fact that the witness did not appear as a witness cited on behalf of the plff. or that he appeared as a witness cited on behalf of the deft. on one occasion but was not exam will not be ground for admitting the prior deposition 30 C N 254.

——the deposition given in proceeding under s. 145 Cr. P. C one of the defts. as a witness for the other deft. cannot be adm as the deft. had no opportunity to cross-examine. 30 C. W. N

——the affidavit of a person who has died subsequently wi being subjected to cross-examination is not admissible in evide 52 M. L J. 477. 102 I. C 243 . 1927 Mad 507 : 38 M. L T. 275.

——where a witness died after examination-in-chief and ... on could not be admitte 3 : 1928 All. 14 : 107 I C

still alive may be admis in evidence with the consent of the parties 104 I. C. 518 · 33 L. T. 198.

——where the committing M recorded the statement o ... his right of cross-exam , the S J. L J. 495 :

cted by

Cr P. C., 101 I. C 481 : 1927 Lah 332 : 28 Cr. L. J. 481.

——the expression "representatives in interest" must inc privies in estate, 5 P. 777 : 8 Pat. L. T. 510 : 101 I. C 289 · 1927 61, 102 I C. 713 : 1927 Mad. 733

——whether a person is the legal representative of an or not for the purpose of recording the evidence admissible un this section must be determined from the state of affairs w the evidence is sought to be admitted Deposition in the pre suit in different capacity is not admissible. 51 M. 893 : 55 M L

S. 34 (Entries in books of account when relevant.)

——account books regularly kept are corroborative evidence 6 C. W N 401 : 29 C 334, P. C.

——the entry need not be made at the time of occurence It is sufficient if it is made within reasonable time 4 C W. N 147 : 27 C. 118 P. C 9 C W N 421 · 32 C 582.

——entries should not be made from day to day or from hour to hour to make them admissible under s 34 E Act. 4 C. W. N. 147 : 27 C. 118 P. C 4 B 576 *overruled*, 5 Pat. 777 · 95 I. C. 128 . 1926 Nag. 407.

——an account need not be written from day to day 25 B. 616.

——but accounts prepared at considerable intervals from memory or possibly inadequate materials cannot be treated as proof of the actual state of things though they may be used as corroborative evidence 51 M 291 : 109 I C 153 · 54 M L. J. 703.

——books of account even if not corroborated, are admissible in evidence but unless corroborated they are not sufficient to charge any one with liability. Difference between s. 32 cl. (2) and s 34 shown 55 C. 1167 108 I C 833 32 C. W N 580 · 1928 Cal 854

——plff's own statement on oath in support of entry can be sufficient to support the entries in plff's account books to fix the deft. with liability 84 I C 909 ; 6 Lah L. J. 504 1925 Lah 242.

——entries in books of account are admissible not only for refreshing witness's memory, but also as corroborative evidence. 6 C W N 401, P C

——books of account recording a particular transaction are less reliable than books containing miscellaneous matters. 6 C. W. N 401, P C

——absence of entry is relevant, not under s 34 but under s 9 and 11 Evi Act 19 C. W. N 612.

——every entry in account must be proved. 13 C. L. J. 139 : 15 C L J 621, 96 I C 429 1926 Mad 955

——account books must be proved by clerks who kept them or some person competent to speak to the facts. 6 M. I. A. 88 P. C 1922 Lah 388, 100 I C 863 1927 Nag. 177.

——*jama washil baki* papers are themselves no evidence and they must be produced by person who collected rent with the assistance of those papers 8 C 926 . 8 W. R 328. They are only corroborative evidence 10 W. R. 291, 10 C. L R. 545. They may be used to refresh memory and to prove rent. 10 C. 248, when filed at the citation of the tenants they are good evidence. 10 W. R. 193, 14 I A 142 9 A. 718 P. C.

——*jama washil baki* papers may be admissible as statement of deceased persons under s 32 (2) Evi. Act. 90 I. C. 564 (c) but when they are not admissible under s. 32 they are merely corroborative evidence under this section. 46 C. L. J 253 : 104 I. C. 733 : 1927 Cal 855

——jumabandi paper forming part of the record of a . . of settlement is corroborative evidence and not substantial . 9 Pat L. T. 679 . 109 I. C. 136 : 1928 Pat. 429.

S. 34. (Entries in books of account when relevant)—co

——*talab baki* papers are not sufficient evidence to char person with liability, they may be proved as evidence un 32 cl. (2), 31 C. L. J. 68.

——absence of entry in account book is evidence. 19 *N. 612.*

——s 34 does not limit in any way at all the nature material upon which the court may rely to support the state in a book of account. Such material may take the share of temporary vouchers, receipts or other documentary evider sworn oral testimony. 88 I. C. 383 : 1925 All 743

——if certain number of entries are proved to be bogus by pendent evidence which precludes the possibility of err accident account books are sufficiently discredited thereby L. R 40 - 47 C. L. J. 222 : 30 Bom. L R. 296 : 1928 P. C. 39 10 113 P C.

Ss. 35-39 (Relevancy of entries in Public records, plans, Acts, Law books, etc)

——entries in *batwara* papers are valuable pieces of evi 29 C. W. N. 333 86 I. C. 835 1925 Cal 635

[illegible] evidence against stra 87 I C. 694 : 1926 Cal ssible. 68 I C 676 a repared under the prov of the Estate Partition Act it is admissible as a public docu 7 Pat. 85.

——the *batwara chittas* and maps prepared under s. 51 E. P. Act VII of 1871 are admissible in evidence independent s 35 where some introductory evidence is given 59 I. C. 963 (

——entries in *batwara* papers are admissible but it is fo court to decide whether they rebut the presumption of Reco Rights 63 I. C. 226 : 36 C. L. J. 389.

——like the maps and surveys in India, for Revenue pu an entry in the Record of Rights operates between land'or neighbouring estate as between *landlords and tenants* of the estate or between tenants and tenants 5 Pat 1, J 681 : L T. 81 : 59 I C 298.

——Settlement Reports or District Gazetteers may be re to, though not strictly under s. 35 47 C 979 ; 25 C W N 39 A. 37 *Ref*

——entries in the Settlement Khawat is admissible Cal. 116.

——record of rights is admissible under s. 35 and a record have a presumptive value of correctness. 30 C. W. N. 659, 96 959 : 1926 Cal. 862

——a village note prepared by a settlement officer is on piece of evidence and no presumption of correctness is attac to it 3 Pat. L. R. 225 : 90 I. C. 579 : 1925 Pat 754.

——*hissawari* papers are not admissible. 59 I. C. 8.

Ss. 35-39. (Relevancy of entries in public records, maps, plans, Acts, Law books, etc.)—*contd.*

——the thak and survey maps are valuable evidence of the state of things at the time they were made but they do not show conclusively what was the state of things at the time of Permanent Settlement *34 C L J. 141, 36 C. L. J. 336 : 65 I. C 182, 30 C 291 · 65 I. C 866 Ref. contra 9 Pat 919*

1929 P. C 50.

——a Revenue Survey map is more reliable than thak map. 96 I. C 1027 : 1926 Pat. 385.

——there is no inflexible rule that survey map should have the preference over a thak map 34 C. L J. 465 : 35 C 621

——Thak authorities had nothing to do with title and possession ; therefore nothing can be legitimately deducted from the thak map as to title or possession. 31 C. W N 473 ; 1927 Cal. 403 . 46 C. L. J. 322 : 103 I C 13.

——much weight cannot be attached to a partition paper in the absence of detailed information as to the history of the document, when it was prepared, by whom, in whose presence and for what purpose. 1923 Cal 261 : 74 I C. 383 36 C L J. 389

——a map made for the purposes of a partition which affected the public revenue is admissible in evidence for what it is worth, though it may be for a limited purpose only 90 I C 643

——a Quinquennial Register of 1795 kept under the Bengal Regulation 48 of 1793 is admissible in evidence to rebut the presumption under the B T Act s. 50 (2) 86 I. C 538 1925 Cal. 1037 ; 1926 Cal. 290.

——where a certain map was referred to in the commissioner s report but the map was not produced, the report of the commissioner is admissible in as much as no objection was taken to the report and the Commissioner himself was not examined or cross examined 50 C. 446 : 45 M. L J. 444 1923 M. W N. 511 . 32 M L T 162 P C.

——*thakbust kashra* has no evidentiary value. 3 Pat L R. 605 : 36 C L J 499 · 1922 P. C 272

——*kistuari* maps are evidence of possession 3 Pat L. T. 140 . 64 I. C. 326

——the entry from the books of the Collectorate not having been shown to have been made by a person in the discharge of an official duty or in the performance of a duty enjoined specially by law was inadmissible in evidence. 28 C W. N. 679 39 C L J. 389 : 78 I. C. 719

——Road Cess Returns are admissible only against the maker of them 42 C. L. J 14 89 I C. 747 1925 Cal. 1159, 39 C. 995 : 39 C. 1005, 18 C. L. J 633 *Ref.*

——maps prepared under the Calcutta Survey Act have great evidentiary value as regards title 31 C. W. N. 419 1927 Cal. 315 45 C. L. J. 474 ; 102 I. C. 370.

Ss. 35-39. (Relevancy of entries in public records, maps, plans, Acts, Law books, etc.)—contd.

——statements contained in public documents are received to prove the facts stated on the general ground that they were made by authorised agents of the public in the course of official duty and respecting facts which were of public interest or required ... 20 C. W. N. 101

... luable and ... L. J. 150 ... 51 P. C

——a certified copy of the entry in the Register given by authorised officer must be presumed to be correct under s. 39 E. Act 22 A. L. J. 690 : 46 A. 637.

——Death Register kept in Police station is official book. I. C. 938 : 1925 All 79

——register of death and birth is admissible 41 M. 24: C. W. N. 22.

——a Death Register is a public document and will in ordinary circumstances be bound to be accepted as conclusive of the date of the death recorded. 1925 M. W. N. 232 : 88 I. C 249 : 19 Mad. 1005.

——a sale certificate is not a public document, so a certificate of guardianship 1928 Cal 893 : 110 I. C. 521.

Ss. 40-44. (Judgment when relevant)

——s. 40 deals with estoppel. but many judgments may be evidence *inter partes* which are not estoppels. 6 C. 171, F. B

——the above case has been dissented from in a recent Full Bench case where it has been held that s. 40 applies to a case in which the ... party objects ... Cal 374 F. B ... 171 F. B., Diss ...

——a judgment is conclusive proof of its correctness 192 Cal 194.

——s. 41 deals with judgment *in rem*. 6 C. 171, P. C. 1 A 1 F. B.

... by a court in the exercise ... diction ... J. 79 ... em (as the ... cannot be ... force ...

C. L. J. 451 ... the civil court in matters ... 6 n. ... lating to evidence ... party is competent ... by fraud. If the ... ground of his own

Ss. 40-44. (Judgment when relevant.)—*contd.*

fraud, he is precluded not by any *rule of evidence* but by the general principle of justice which prohibits a person to plead his own fraud. 27 C. 11 : 3 C. W. N 660.

——the words not competent in sec. 44 refer to a court acting without jurisdiction 21 B. 205

——competency of a court and its jurisdiction are synonymous terms. 21 B. 205.

——a finding not essential to a probate action does not operate as a finding *in rem*, finding as to the execution of the will binds at any rate the parties and privies to probate proceedings 5 P 777 : 101 I. C 289 1927 Pat. 61.

——judgment of the Insolvency Court operates as judgment *in rem*. 16 R L. R 201.

the judgment ubsequent suit rtain purposes

——previous judgment is sometimes admissible even against strangers. 1925 Cal 194

——it was held by the Full Bench (Mitter, J dissenting) that a judgment in a former suit which is neither a judgment *in rem* nor ... at all admissible in ... 171. 6 C L R. 439 ... F. B In 20 C. W. N. ... is well settled that although a judgment not *inter partes* may be used in evidence ... relevant fact, or ... P. C. 1 C. W. N ... P C 25 C. 522 ... it cannot be used as evidence in a litigation between other parties The principle is ...

privies or strangers of its own existence, date and legal effect, as distinguished from the accuray of the decision rendered.

——the rule in 6 C. 171 F B and 13 C 352 cases has been materially qualified by the privy Council in 22 C 533 P C 25 C. 622 F. B. The judgment not *inter partes* is admissible under s. 13 to show conduct of the parties or instances of exercises of a right or admissions of parties or to identify property or to show how it has been previously dealt with 24 B 591, the following are the cases on the same princip... 23 C. 693, F. 697, ... 25 A. 546 23 A. ... N. 657 : 7 C. L ... not *interpartes* was held to be evidence to show that the landlords recognised the plaintiff in *Koshtkar* and that the rent-receipt

Ss. 40-44 (Judgment when relevant)—*contd*

——under s. 40 the judgment in prior suit is relevant to determine if it operates as *res judicata* under s. 11 C. P. C Such judgment in rent suit concludes the trial of the question as to what was the rate of rent at the date of the suit, if the decree shows that that point was decided. 43 C. L J. 135, 1926 Cal. 698 : 95 I C 130.

——a judgment though not *inter partes* may be admissible as evidence of title. 89 I. C. 663.

——a judgment or decree not *inter partes* is not admissible under s 43 unless as a fact in issue or as a relevant fact under other sec of the Evi. Act it is admissible. 87 I. C. 849 · 6 P. L. T. 634 : 4 Pat 510 · 1925 Pat 625, 97 I. C. 282 1926 Pat 577

——recital in a judgment not *inter partes* is not admissible in evidence 45 M. 332

——judgment not *inter partes* is admissible to prove assertion of title. 65 I. C. 699.

——the production of a judgment in a previous suit proves its existence, but it does not prove the correctness of the previous decision 36 C. L J 9

——a judgment as to the validity of an adoption is not admissible in a suit between third persons. 71 I C. 929.

——when a decree is put in, any person not a party to it may impeach it although it relates to the property. 21 C. W. N. 591

——decree obtained by a co-sharer landlord may be evidence in a suit brought by another co-sharer. 22 C. W. N 304

——judgment as to the title between rival landlords is a very strong piece of evidence againt the tenant as to who is the landlord. 87 I. C. 753 1925 Cal. 1218

——remarks made incidentally about another plot which was not then in suit are not admissible. The proper way to prove it, is to produce the witness who made it. 85 I. C. 795 : 1923 Lah 384

——collusive decree binds the parties and is not a nullity, it cannot be avoided by the parties themselves. 101 I. C. 765 . 1927 All. 494, (11 B. 708, 20 M 333. 31 Mad. 485), *Rel*

——the principle that a party to a fraudulent transaction is entitled to relief in a court of equity as against his fraudulent confederate so long as the fraud contemplated has not been carried into effect is not inapplicable merely because the party suffers a decree to be passed against him in a fictitious and collusive suit which is only part of the fraudlent suit. 19 C. W. N. 1151. (1 A. [illegible] 18 C. W. N. 1331 : 18 C. L. J 616) *Fol.*

——where one or two defts. were prevented from making a proper [illegible] of the plff that the [illegible] against him, the [illegible] a declaration that [illegible] W. N. 1151. 11 F [illegible]

[illegible]

——a suit for declaration that certain proceedings in court held at plff's instance were fictitious and was of no effect against him is maintainable. 18 C W. N. 1331.

Ss. 40-44. (Judgment when relevant)—*contd.*

——if a decree is obtained by fraud the plff can show that it was thus obtained by the deft. and it is not necessary to have it set aside by a separate suit. 42 C. L J. 428

——a fraudulent decree cannot be used and it need not be set aside before but circumstances constituting the fraud must be alleged 1923 Cal. 79 70 I C. 548

——*objection may be taken in defence and need not be set aside* by suit. 24 A. 242 (26 C 891. 3 C. W. N 670, 27 C 11: 3 C. W. N. 660) *Fol.* 20 A 379 *Dist*

——an inferior court can declare a decree of a superior court to be a nullity on the ground of fraud 11 C. W N 579, 26 C 891: 3 C W N 670, 5 C W. N 559, 1921 Pat. 209

——the fraud must be fraud which the court can explain and define upon the face of a decree 21 C. 612.

——gross negligence on the part of a next friend or guardian-ad-litem amounts to fraud and a decree may be impeached on that ground. 33 M. L. T 46 1923 M. W. N. 452 74 I C. 218

——grant by probate-court can be attacked in another proceeding as fraudulent 25 C W. N 207.

Ss 45-46 (opinions of experts when relevant).

——in case of an expert witness there exists a tendency to support the view which is favourable to the side which employs him, so that it is difficult to get from him an independent opinion. 29 C. 323 6 C. W N. 495 p. 501, 2 Lah L J 110. 59 I. C 220, 2 A L. J. 444, 23 M L J 270, 39 C. 606, 13 I C 979, 5 I. C. 855

——there is no reason why a scientific witness should not be a witness of one or more or all of the parties to a legal proceeding. To a professional man it matters not which party calls him as a witness 41 C. L J 300. 87 I C. 534: 1925 Cal 768.

——the court should be very chary in accepting the opinion of the Finger Print Expert as to the age of a thumb mark which it is opposed to the date in the document 1926 Pat 575 97 I. C. 335.

——evidence of *experts* or *men in* the trade cannot be given to show that a combination is such as to deceive the purchaser, it is for the judge to decide 10 C W. N. 107: 4 C L J 268, p 285.

——but expert opinion as to colourable imitation of trade-mark is admissible *case above*

——similarity of the trade-mark is a matter to be decided by the court, opinion of witness on that point is inadmissible 49 A 92, 99 I C. 353 1927 All. 81: 24 A L J. 975.

——expert opinion on a question of Hindu Law is not admissible. 16 M. L. J. 178: 29 M 437.

——the opinion of an expert formed by comparison of the thumb-impression of an accused taken in court under Act 33 of 1920 s. 5, with the thumb impressions on deeds is admissible in evidence. 43 C L J 79 30 C W N. 373 93 I. C. 73; 1926 Cal 521: 27 Cr. L. J. 409, 59 M 462 98 I. C. 99, 27 Cr. L. J. 1251: 1927 Mad. 696

Ss. 45-46. (Opinions of experts when relevant)—*contd*

——though it may require an expert to say whether any two finger impressions are identical, yet the reasons which guide him to this conclusion are such as may be weighed by an intelligent person with good power of eyesight. 9 C. W. N. 520 : 32 C. 759.

——the court can compare the thumb-impressions and test the correctness of the opinion of expert. 9 C. W. N. 520 : 32 C. 759.

——evidence of an expert should be approached with considerable care and caution, specially where much depends upon such evidence. 1 C. L. J. 385, 64 I. C. 234.

——the opinion of an expert not based on any well-defined inexhorable laws of nature cannot be conclusive specially where direct evidence is opposed to it. 96 I. C. 641 : 1926 Lah. 313 : 27 Cr. L. J. 977.

——where in a criminal case the prosecution tenders in evidence a certificate granted by the Professor of Anatomy in a Medical College as regards the bones submitted to him for examination, the certificate by itself is not admissible in evidence. It must be proved by persons who gave it as a witness in the case. 84 I. C. 643 . 25 Cr. L. J. 339 . 1923 Bom. 183.

——the certificate of a professor of the medical college as regards the bones submitted to him is not admissible without his examination. 24 Bom. L. R. 803 . 47 B. 74. 1923 Bom. 183.

S. 47. (Opinions as to handwriting when relevant).

——the mere fact that there is a resemblance between the signature alleged to be false and signature admitted to be genuine does not carry great weight. 64 I. C. 234, 26 C. W. N. 113.

——opinions of expert on handwriting are useful in so far as the appearance on which they rely are disclosed and can thus be supported or criticised whereas an opinion formed by the judge in the privacy of his own room is subject to no check. 14 C. W. N. 1114. 37 C. 467.

——the opinion of a handwriting expert when he is not called as witness and subjected to cross-examination, is inadmissible in evidence. 15 C. W. N. 728.

——evidence of expert is not admissible if the proved or admitted handwriting is not compared in open court 33 C. 665 16 C. W. N. 812.

——in order to prove the handwriting or signature of another person one must show th[illegible] handwriting or signature of that person. [illegible] intance

——person proving [illegible] at. [illegible] with the handwriting [illegible] 7 Pat. L. T. 507.

——a court of law ought not in the absence of any evidence take upon itself the duty of comparing handwriting and pronounce judgment based merely on its own inspection. 78 I. C. 668 (C), 1923 Cal. 485.

——comparison of handwriting is hazardous and inconclusive proof and in the absence of expert evidence regarding the same

S. 47. (Opinions as to handwriting when relevant)—*contd.*

should not ordinarily be the basis of decision. 29 C. W. N. 75 : 1925 Cal 145 : 85 I. C. 525.

—the word "habitually" means "usually," "generally" or "according to custom" It does not refer to the frequency of the occasions but rather to the invariability of the practice. 27 Bom. L. R. 1031; 89 I C. 1042 . 1925 Bom 429

Cal 768

—opinion of dead person cannot be proved save under s. 32. 1925 Cal. 116

—the witness need not state in the first instance how he knows the handwriting , opposite party is to explore the sources of knowledge 28 B. 58 p. 62 5 Bom. L. R 663

—evidence of mere similarity of handwriting is extremely weak in its probative force, but when it is strongly supported by other facts, the judge should consider it. 13 W. R. 191, 64 I. C. 234 66 I C 774.

—ordinary methods of proving handwriting are (1) by the admission of person concerned (2) by calling the writer or one who saw it written or one

signature a court may legiti-

experienced judge to discriminate between the false and the true. 26 C W. N. 113 34 C L J. 373.

S. 48. (Opinion as to existence of right or custom when relevant)

—the statements made by persons who are in a position to know of existence of a custom or usage in their locality are admissible under this sec. 36 C 184, 43 C. 427 *Fol*

—mere evidence of opinion as to cust m is no evidence : custom must be proved by specific evidence 20 B 53 p. 59, 3 B 34

—it must be his own opinion that he expresses although that opinion may be found on information which he has obtained from others. *above case*

—opinion recorded in *Wazil-ul-urz* or village papers are admissible in evidence to prove family custom of inheritance. 5 C. 744 : 6 C. L. R. 593 P C , 10 C W. N. 730 3 C L. J. 594 : 28 A. 488 : 3 A L. J. 415 : 8 Bom. L. R 402 P C

S. 48. (Opinion as to existence of right or custom when relevant)—*contd.*

——evidence of custom of exclusion from inheritance. 12 C W N. 74 : 6 C. L. J. 766 P. C.

S. 49. Opinion as to usage, tenets, etc, when relevant

——opinion on the existence of a family custom and the ground of that opinion are admissible in evidence and the weight of the opinion depends upon the *position* and character of the witness and of the person on whose statement he has formed his opinion. 5 C. W. N 33 ; 27 I. A. 238 23 A. 37 P. C.

——if the opinion of persons are relevant under *this sec.* the entry of such opinion in the official record is also relevant 5 C 744 7 I. A. 63 . 6 C. L. R. 593 P. C., 3 C. L. J. 594 : 10 C W. N 730 . 28 A. 488 : 8 Bom. L. R. 402 P. C.

——opinion of dead person cannot be proved except under s 32 1925 Cal. 116

——to prove custom, opinion of persons having special means of knowledge is relevant 12 C. L. J. 571 : 6 C. W. N. 872.

S. 50 (Opinion on relationship when relevant.)

——that the proof of the opinion expressed by conduct may be given, seems to imply that the person himself is not to be called to state his opinion, but that, when he is dead or *cannot* be called, his conduct may be proved by others 9 M. 9, 93 I. C 705 : 1925 Mad. 497.

——long recognition or legitimacy by member of the family or other person is evidence under this sec 14 M. I A. 67 : 15 W. R 41 P. C.

——the above rule applies in proving adoption. 14 M. I A. 67 15 W. R 41 P. C.

——conduct of parties is very strong evidence *regarding the* factum of adoption. 25 M. L. J. 373, 19 I. C. 740.

——conduct of the parties is admissible to *prove* the legitimacy of the marriage. 48 M. 1 . 1925 Mad. 497.

——where the question is whether one person is related to another in any decree, the fact that according to the *religious* usages the names of particular persons are usually recited or omitted during the *performance of ceremonies*, and the observance of pollution are instances of conduct. 26 I. C. 110. 48 M. 1 : 1925 Mad. 497

——every presumption ought to be made in favour of marriage where there had been a lengthened cohabitation, specially in a case where the alleged marriage took place so long ago that it is difficult to get a trustworthy account of what actually occurred. 21 C 666 P C. (27 C. 801, 9 C. W. N 352) *Dist.* 2 C. 184 P. C., 3 M. I A. 295, 10 C L. R 203

S. 50. (Opinion on relationship when relevant)—*contd.*

——under the English law general reputation is admissible to establish the fact of marriage but under this section opinion as expressed by conduct only is admissible and there is no other provision making general reputation admissible 91 I. C. 469 ; 1926 Mad. 475, 33 C W. N. 645 . 1929 P C 135 : 27 A L J. 465 P. C.

——character and conduct of relatives are not relevant in proof of marriage. 33 C. W N 645 : 1929 P C. 135.

S. 51. (Grounds of opinion, when relevant).

——in all valuation judicial or otherwise, there must be room for inference or inclination of opinion which being more or less conjectural, are difficult to reduce to exact meaning or to explain to others; so it would be unfair to require an exact exposition of reasons for the conclusion arrived at 28 A. 121 (128) P C

Ss. 52-55. (Character when relevant)

——general evidence of bad character cannot be given for the prosecution and against a prisoner 7 W. R Cr 7, 6 W R. Cr. 72.

——in mitigation of damages the defendants can give evidence of the plaintiff's bad character 37 C 760 : 14 C. W. N. 713.

——except under exceptional circumstances, the proper object of using convictions is to determine the amount of punishment to be awarded. 11 Bom H. C 92

——a previous conviction is relevant on the question of punishment and is also relevant with reference to the question whether the provisions of s 562. Cr P C would apply to the case 39 B. 326.

——evidence of previous conviction is not admissible unless the accused produces evidence of his good character 5 Pat L. J 706, 60 I C 331.

——the character of the accused not being a fact in issue in the offence of belonging to a gang of persons associated for the purpose of habitually committing theft punishable under s 401 I. P. C evidence of bad character or reputation is inadmissible for the purpose of proving the commission of the offence. 1 C. W N 146

——but a previous conviction of dacoity has been held relevant under section 14, 97 C 139

——evidence of previous act of dishonesty is admissible to prevent the accused to plead that the act under consideration was committed without a dishonest intention 102 I. C. 492 1927 Lah 549 28 Cr L. J 556 . 28 Punj L R 313.

——evidence of bad character is not admissible to prove that the accused were of such a disposition that they were likely to commit the crime, but there is no bar to adduce evidence which proves a motive for the crime or which is otherwise relevant 93 I. C 881 . 27 Cr L. J. 481 . 1926 Pat 232 7 Pat L T 396

——where certain persons were accused under s. 400 I P. C. the evidence of the commission of other offences than dacoity was only evidence of bad character and was inadmissible under sec. 54. 32 M 179.

Ss. 52-55. (Character when relevant)—*contd.*

——a *man's* guilt is to be established by proof of the facts alleged and not by proof of his character; such evidence might create a prejudice but not lead a *step towards* substantiation of guilt. 42 C. 957.

——where the judge in the Lower Court had stated that the general reputation of character *enjoyed by the two identifiers* of a party registering a will tended to throw a cloud of doubt on the transaction, it was held by the P. C. that such evidence of the *general reputation* of the character of those persons, who were both dead, ought not to have been admitted. 10 C. W. N. 522 : 3 C. L. J. 349 P. C.

——in a case of damage for libel charging the plaintiff with *seditious acts* it was held that the deportation of the plaintiff was evidence as throwing light on the character of his agitation previous thereto and as thus affecting damages. 37 C. 760 : 14 C. W. N. 713

Ss. 56-58. (Facts which need not be proved).

——the court is to take judicial notice of the gazetted holiday 16 N. L. R. 198.

——an unregistered lease set up in the plaint and admitted in written statement need not be proved. 2 Lah. L. J. 253.

——the court is to take judicial *notice* of the signature of the Chief Secretary of Government 44 M. L. J. 557 : 1923 M. W. N. 290 · 32 M. L. T. 300 . 72 I. C. 515, 42 M. 885, 56 C. 135.

——the court can take *judicial notice* of the signature of a Sub-Registrar 105 I. C. 422 : 47 C. L. J. 118 : 1928 Cal 154

——the Court can take judicial notice of the fact that the transit of a registered letter takes 24 *hours* longer than ordinary letter. 99 I. C. 622 : 1927 All, 215.

——the court cannot take judicial notice of a Government Notification under s. 57, but the production of a gazette is sufficient ... 78 1928 All, 355 : 107 I. C. 573

... be proved under s. 78 ...
... by copies purporting ...
... ject of judicial notice ... 37 C

discussed, and the meaning of sec. 57 Evi. Act, explained. 37 C. 760 · 14 C. W. N. 713.

——reference of Portuguese work "India Orientalis Christiana" ... History of Christianity in India" ...

... Act XVIII of 1875 (Law Reports ...
... looking at an unreported judg-
ment ... of the same court. 29 C. 289.

... to divorce cases ...

... statements of facts ...
... expense at a trial. ...

——s. 58 applies to criminal trials as well as to civil suits. 91 I. C. 233 : 1926 Oudh, 245.

Ss. 59-60. (Oral evidence).

——part of the oral evidence may be disbelieved and part believed 4 C. W. N 18 P C., 5 C. W. N. 858

——discrepancies often trifling in themselves should not be *made the ground for disbelief.* 27 C. 639 4 C W. N 429. 2 Bom. L. R 562 P. C

——hearsay evidence should be disregarded. 2 C. W. N. 193 · 20 A. 209 P. C, 6 Lah. L. J 575 : 1925 Lah. 733.

——if oral evidence refers to an opinion or the grounds on which that opinion is held it must be the evidence of the person who holds that opinion on those grounds. But it must be the expression of independent opinion based on hearsay and not repetition of hearsay 5 C. W. N. 33 23 A 37 10 M. L. J. 267 P. C.

——under s 60 the court is entitled to consider and act upon the opinion of experts contained in treatise to which it is referred. 25 M. L J. 54 F. B. 22 C W. N. 745 : 28 C. L. J. 32. 46 I. C 593.

——even if newspapers are admissible in evidence without formal proof, the paper itself is not proof of its contents. It would merely amount to an anonymous statement. 7 Lah. L. J. 264 : 88 I C. 22 : 1925 Lah 299

——the evidence that the witness saw the document and heard it read out by somebody else is only hearsay so far as the contents are concerned and does not fulfil the requirements of s. 60 as to the oral evidence generally 25 A L J. 65. 31 C. W. N. 21 : 100 I. C. 1 : 28 Punj. L. R 109 29 Bom. L R. 800. 1927 P. C 15.

S. 61 (Proof of contents of documents.)
S. 62 (Primary evidence.)
S. 64 (Proof of documents by primary evidence.)

——in dealing with documentary evidence, the substantial principles on which the authenticity and value of evidence rest, ought to be observed 14 M. I A. 570 p. 588 P. C.

——secondary evidence should not be accepted without a sufficient reason being given for the non-production of the original. 3 M. I A 156, P. C, 14 M I. A. 453, 570 P. C.

——written receipts for payments are important but by no means necessary as proof nor are they of the nature of primary evidence, the loss of which must be shown in order to let in secondary evidence. 4 C W N 18.

——if account books are regarded merely as memoranda and rough books and if the regular accounts be prepared upon an examination of the said memoranda, they could hardly be regarded as original accounts 9 C. W. N. 421.

——the rule that a counterpart is primary evidence as against the parties executing it and secondary evidence as against the parties who did not execute it, has no application to the case when neither the lease nor the counterpart is complete in itself, but each supplements the other. 6 C. L. J. 572.

Ss. 63, 65, 66. (Secondary evidence.)

——secondary evidence should not be accepted without a sufficient reason for the non-production of the original 3 M. I A 156. **P.C.**, 14 M. I. A. 453, 570 **P. C.**, 97 I. C. 82 : 1926 All 741.

——there is distinction between the admissibility of evidence and the manner of proof. Secondary evidence may be allowed only when primary evidence is itself admissible. When the law declares certain evidence to be inadmissible it cannot be held that, though it cannot be proved by primary evidence it may be proved by secondary evidence. 95 I. C. 444 : 27 Punj L. R. 268. 8 L. L. J. 158.

——a deed of relinquishment requiring registration, secondary evidence of its contents cannot be *admissible* 101 I. C 839 : 1927 Nag. 214.

——a copy of a copy is not secondary evidence. 15 M L J. 157.

——a copy of a copy is admisible in evidence by the consent of the parties. 1928 M W. N. 796 : 1928 Mad. 1255

——proof of loss by the custodian only is sufficient. 24 O C 272, 48 I. A. 365 **P. C.**, but mere assertion of loss in application only without proof is not sufficient. L. R. 3 A. 539.

——a police sub-inspector's report only as to the loss is not sufficient to admit secondary evidence of a lost *bahi*. 4 Lah. L J. 416.

——a certified copy produced in a previous suit between the predecessors of the parties showing that the original document was produced in court may go in evidence. 1922 Bom 177.

——if a proper case has not been established for the admission of secondary evidence of the contents of document it is not permissible to go to other evidence for the purpose of indicating the [illegible] C. 997 · 26 C. W. N. 226 : [illegible] W. N. 232 : 88 I C. 219

——s. [illegible] is exhaustive of the kinds of secondary evidence Translation of a document in judgment not *inter partes* is not admissible. 43 M. L J. 37 · 16 L. W. 11 : 31 M. L. T 45 : 1922 M. W. N. 432.

——allowing secondary evidence depends upon the discretion of the judges. 71 I C. 568.

——where a primary evidence is inadmissible, secondary evidence [illegible] 1922 Lah 354 : 66 I C 111

[illegible] the court cannot [illegible] 5 Mad. 257. [illegible] 923 A 612 [illegible]

——the expression "secondary evidence means and includes etc . . who has himself seen it" means that the person who is to prove the contents of the document must be a person who has seen the contents of the document *i.e.*, who has read the document and

Ss. 63, 65, 66. (Secondary evidence)—*contd.*

not a person who has seen the document and heard the document read by somebody else. 31 C W N 21 : 100 I. C. 1 · 1927 M. W. N. 30 : 8 Pat. L. T 280 25 A. L J 55 · 1927 P. C 15 22 A. L. J. 364 : *overruled.*

——evidence as to the general result of the public documents is admissible where the original cannot be conveniently examined in court 34 C 293 : 11 C. W N 501

ed copy is the only not apply when the 289 1927 Pat. 61 :

——no objection should be allowed to be taken in the appellate court to the admissibility of a document as secondary evidence, which has been admitted in the first court 31 C 155, 26 C. 53, 84 I. C 921 : 1925 Mad 257, 7 Lah L J. 79 · 88 I C. 541 : 1925 Lah. 347, *Diss.* 3 Pat. L T 397 : 67 I C 628

——the appellate Court may consider whether secondary

——when a sale proclamation is not forthcoming the sale certi- s to what was stated

ed of sale of property

——where a mortgage deed was lost before its registration secondary evidence was admissible in suit to enforce personal liability. 105 I C. 502

——secondary evidence of unstamped agreement of sale was not admissible even as payment of penalty. 23 Bom. L. R. 506.

——partnership account must be produced by each party, when one party fails to do that the other party may give secondary evidence and in that case subsequent production of the papers will be disallowed without the consent of the other party or the order of the court under s. 164 Evi. Act. 34 C. L. J. 405.

——except in clear case of miscarriage decision of the trying court as to the sufficiency of grounds for admitting secondary evidence is admissible in evidence. 19 C. 438, P. C , 9 W. R. 241.

——absence of objection does not make secondary evidence admissible if it be not legally admitted. 26 C. 53 : 2 C. W. N. 649. But objection cannot be taken in the appellate court. 31 C. 155, 3 Pat. L. T. 397.

——objection to admissibility of a document may be taken at any stage but objection to mode of proof must be taken at the time of proof. 9 C. W. N. 111

Ss. 63, 65, 66. (Secondary evidence)—*contd.*

——secondary evidence may be given of an acknowld. 13 C 292.

——where the question was whether a *purdanashin* is bound by a mortgage bond purported to be signed by her son under a general power of attorney which was not produced, dary evidence of it was not allowed. 29 C. 729, P. C.

——certified copy of a mortgage deed is admissible on notice to the party in possession of its original, but such can be dispensed with if there is sufficient reason as for inst the mortgagee denies the existence of such document. 97 I 1926 Pat 512.

——where the original of a document could not be trac a certified copy taken at a time when it had been filed in of law is produced, and its custody is satisfactorily proved, sec evidence is admissible and there is also a presumption of genui 39 C. L. J. 90 ; 28 C. W N. 1033.

——where a pro-note was filed in court and was subse discovered to have been substituted by a forged one, the plff. bound to prove the loss or the cause of its disappearan secondary evidence should be allowed. 29 C. W. N. 965 ; 23 109 · 86 I. C. 552 . 49 M L. J. 132 P. C.

——newspapers are not secondary evidence of the fact men by them 7 Lah. L. J. 264 ; 88 I. C. 22 : 1925 Lah. 299.

S. 67. (Proof of signature and handwriting)

——ss. 67 to 73 govern cases both of primary and sec evidence. 82 I. C. 306, 1925 All. 56

——"signing" means the writing of the name of the pe that it may convey a distinct idea to some body else that wh writing indicates is a particular individual whose signature it purports to be A "mark" is a mere symbol and does not any idea to a person who notes it, very often probably even person who made it. 2 C. W. N. 642, 25 C. 911.

——the use of pen and ink is not necessary for signing. 911, 26 C. W. N. 642.

——a subscribing witness is not required to prove a doc 21 W. R. 429.

——handwriting may, in addition to the usual metho proved by circumstantial evidence under s. 67 which prescr particular kind of proof. 37 C. 467 : 14 C. W. N 1114 (12 B Ap 18, 21 W. R. 429, 11 B. 690) *Ref.*

——a document does not prove by itself, nor is an un signature proof of its having been written by the person signature it purports to bear. 26 C. W. N. 113

——s 67 makes proof of an execution of a document som more difficult than proof of any other matter. 1925 All. 3 I. C 564.

——the ordinary modes of proving the execution is by some one who saw the executant write, or who knows his

S. 67. (Proof of signature and handwriting)—*contd*

writing or by a comparison of his signature with his signature in other documents written by him 59 I. C. 188

——s. 67 does not always require the direct evidence of handwriting It was also never intended by s 60 either to exclude circumstantial evidence of a thing which could be seen, heard and felt. 48 C L J. 32 1928 Cal 498. 111 I C. 792

As to the method of proving the signature and handwriting, see ss. 45, 47 and 73 Evi. Act and sec. 90 which relates to document more than 20 years old

S. 68 (Proof of execution of document required to be attested)

——under the amendment of the section by the Amending Act XXXI of 1926 no examination of the attesting witness to prove the execution of a registered document, not being a will, is necessary unless its execution is specifically denied by the alleged executant. 104 I C 622 · 1927 Pat 403

——the acknowledgement of execution before the Sub-Registrar and the signature of the Sub-Registrar below the endorsement on ... defini-

... uired by ... 251 : 17 M. L. J 213.

——a document executed in England when it is required to be attested but which is not required to be attested under the Indian Law and which relates to property in India, may be proved by only proving the signature of the executant. 7 Pat 520 : 111 I. C. 57 : 1928 Pat. 304

——to attest is to bear witness to a fact, and it is not necessary that the attesting witness should sign his name personally. 33 C 861 4 C L. J. 41.

——an attesting witness is a person in whose presence the instrument is executed, 'presence' means mental cognition of the ... not be regarded ... 539 : 37 C. 526. ... to be attested, ... 7 C W. N. 160.

——a mortgage-deed is attested by witnesses within the meaning of s. 59 Tr. P. Act only when they are present at the time of execution. 31 M. 215. 18 M. L. J. 219 : 3 M. L T. 300.

—— mortgag ... the scrit ... ing witn ... 438, 26 ... 34 C. L J. 498.

——an attesting witness to a document is a witness in whose presence the document is executed. 34 C. L. J. 498; 49 C. 438.

S. 68. (Proof of execution of document required to be attested)—*contd.*

——the writer may be an attesting witness. 48 C. 61.

——when a scribe does not subscribe as a witness he is not an attesting witness. 20 C. W. N. 699 (Patna H. C. case). *Contra*, 5 C. W. N. 454. 204, 532.

the execution can be as W. N. 585 : 35 C. L. J 33 B. 41). *Ref* (35 A.

——person whose name was written by the scribe without a mark by the witness, is not an attesting witness 38 A. 461.

——a document required by law to be attested cannot be

——the mere fact that a document required to be attested was allowed to go at the tr cannot take the place of proof of execution.

——in the absence the presumption is that th the witnesses and that the C. L. J. 114.

——s 68 is mandatory and is not controlled by s. 90 The mere fact that the only surviving attesting witness is considered to be hostile does not relieve the party from the duty of examining him as witness. Moreover all processes as mentioned in Or 16 R. 10 C. P. C. must be exhausted, issuing summons and warrants only will not do. 31 C. W N. 215 : 98 I. C 147 : 1927 Cal. 102.

——where in a mortgage suit the only living attesting witness is summoned but he resiles and the plff. proceeds to prove the document by other evidence, the provision of ss. 68 and 71 are complied with. 33 C W. N. 248 : 49 C L J. 16 : 1929 Cal. 183

all the attesting witnesses are dead the law would be was executed I, 23 M 697 mination-in- ss disproves the oppo te

——an illeterate person cannot prove a mortgage deed 1922 A 232, 66 I C. 557.

——evidence of attestors to mortgage-deed is indispensable unless it is impossible to produce them. 1925 All 56.

——this section must be observed even in case of secondary evidence 1925 All. 56, 82 I. C. 306.

——when an attesting witness denies having witnessed the execution, the party may adduce other oral evidence to show that the attestor did as a matter of fact see the execution. 67 I. C 87 (C.

S. 68. (Proof of execution of document required to be attested)—*contd.*

——a mortgage-bond cannot operate as such unless it was signed by the mortgagor in the presence of at least two witnesses who signed it as attesting witnesses. 38 C L. J. 114

——when the writer denies the execution but the other witnesses whose names are preceded by the writer's name prove the execution, it may be fairly presumed that both signed as attesting witnesses 7 C W N 384

——where a mortgage-bond which ought to be attested by two witnesses, was attested by three, proof by one of such witnesses is sufficient proof 29 C 355 6 C W N. 395.

S. 69. (Proof where no attesting witness is found.)

——to apply this section it must be proved that no attesting witness can be found so all the processes including arrest of the witness and attachment of his property must be exhausted. 110 I. C. 756 1928 Pat 356 7 Pat 312

——in case of mortgagor being illeterate, if all the attesting witnesses die, the document cannot be proved by a person who knows the handwriting of the attesting witness. 25 A. 365.

——death of attesting witness must be satisfactorily proved. 13 Bur L. T. 114 61 I. C 637

——when one attestor is dead and the other either denies or does not recollect execution, it can be proved by other evidence 1 Pat 154 1922 P. 415

——in case of will, when attestiag witnesses deny to prove, it may be proved by other evidence. 20 C. W. N. 192.

——the requirements of s 69 are sufficiently complied with by proof of the handwriting of the scribe and by the fact that some of the attesting witnesses signed by the pen of the scribe. 34 A. 615 10 A. L. J 217

——where the only living attesting witness was got at by the opposite party and in cross-examination denied the clear evidence he gave in chief examination about execution and attestation, the evidence in chief examination was acted upon. 1921 M. W. N. 747

S. 70. (Admission of execution by party to attested document).

——s. 70 relates to admission of a party in the course of trial of a suit 27 C 190.

——admission of representative of a party is not sufficient. 38 C. L J. 114

——admission of execution but denial of attestation of a mortgage bond requires due proof of the document. 38 C. L. J. 114

S. 70. (Admission of execution by party to attested document)—contd

... unless it amounts to an acknow- ... instrument The execution ... ing by the party. It includes ... ce of witness So where the ... mortgage deed but denies the ... ess is required to prove the presence of witnesses ... deed. 27 C. W. N. 263 36 C L. J. 373, *contra*. 24 Bom. L R 1296. 47 B. 137.

——to be good signature attested by two witnesses within s 59 T P Act, the persons signing as witnesses must be present at the execution of the instrument Where such persons were not present at the execution of the deed but the *pardanashin* lady admitted that she had executed the mortgage deed, held that notwithstanding her admission the *mortgage* deed was void even as against her. The words of this sec. apply only to a document duly attested. 42 C L J 148 30 C W N. 364. 6 P L T 575. 1925 P C 203 89 I C 659: 23 A. L. J 815 49 M L J 240 P C.

——admission by the party does not dispense with the necessity of proof of attestation by two witnesses to make a mortgage bond valid 7 C W. N 384 *contra*. 24 C. W. N. 24, 19 A. L J. 855 64 I C 11 44 A 127 · 1922 A 153

——where there was clear admission in the written statement but the attesting witness stated that the executant did not sign the deed in his presence, the document must be taken to have been proved 94 I C 558 1926 Pat. 295

——but where there was no proper attestation of execution of a mortgage deed admission of the mortgagor did not dispense with the proof of the execution by the application of sec. 70. 45 C L J 577 : 105 I C. 28.

——admission by some executant is not *effective* against others 7 C 2 Pat. 217 · 74 I C 150, 24 C L. J. 175 · 20 C. W. N. 1044 ... Pat ... admissible in evidence' as such ... be enforced as simple money bond ... J 473 *above*

——co-executant who is ... be scribe, cannot attest execution by others 14 C. W N. 1046. *contra*, 2 Pat. L. T 614 63 I. C 266.

——a markman can be attesting witness within the meaning of sec 59 of the Tr. P. Act, and sec. 68 of the Evi Act. 2 C W. N 603 ... under sec 59 of the Tr. P. Act cannot be the ... ing signed the document So a ... gor acknowledges the execution ... witness. 26 C. 78. ... of the Tr P. Act, is the attestation ... and not of the admission of execution. ... C 190.

S 70. (Admission of execution by party to attested document)—*contd*

——where the attesting witnesses signed their names before the mortgagor, the bond was invalid 32 C 729, 9 C. W. N. 697

——the question of attestation is a question of fact. 26 C. 78.

——the term 'admission' in sec 70 of the E Act, relates only to the admission of party in the course of the trial of a suit, and not to attestation of a document by the admission of the executant. 27 C. 190

——'signing' means the writing of the name of a person which may convey a distinct idea to somebody else, whereas 'mark' is a mere symbol and does not convey any idea to a person who noticed it, often even to the maker of it. 25 C 911 2 C W N 642

——the use of pen and ink is not necessary for signing 25 C 911, 26 C. W N 642.

S. 71. (Proof when attesting witness denies the execution)

——where the only living attesting witness was illiterate and denied execution, other evidence could be given 26 I C 500

——a statement of the attesting witnesses that they signed the blank paper was sufficient to attract the operation of s 71 and entitled the tender of other evidence 48 I C 624.

——other oral evidence is admissible to show that the attestor did as a matter of fact see the execution if he denies it. 67 I C. 87.

——if the attestors are dead or prove hostile, s 71 requires evidence to prove the execution of the document, it is not necessary to prove execution in presence of attesting witnesses 74 I C 959. 74 I C. 839.

S 72. (Proof of document not required to be attested.)

——where the attesting witnesses to the deed of sale are alive their testimony is not the only evidence by which it can be established, it may be proved by any other evidence 23 W R 293.

——when the genuineness of a rent-receipt is sworn to by the tenant by whom rent was paid it was legally sufficient to prove the receipt without examining the writer of it 1925 Cal 452. 82 I C 974.

S. 73 (Comparison of signature writing or seal)

——the comparison may be made by the court 26 C W N. 113: 34 C. L J 373 1914 M W. N 240 22 I. C 627

[illegible] iust purport the writing person. 14

——any document alleged by the party to be in the handwriting of a particular person may for purposes of proof be compared with other writing or signature admitted or proved.

S. 70. (Admission of execution by party to attested document)—*contd*

——*no* admission is effectual unless it amounts to an acknowledgment of the *formal validity* of the instrument The execution means something more than mere signing by the party. It includes delivery and signing in the presence of witness So where the mortgagor admits to have signed the mortgage deed but denies the presence of witnesses, attesting witness is required to prove the deed 27 C W. N 263 36 C L J. 373, *contra*, 24 Bom. L R. 1256 47 B, 137.

——to be good signature attested by two witnesses within s 59 T P Act, the persons signing as witnesses must be present at the execution of the instrument. Where such persons were not present at the execution of the deed but the *pardanashin lady* admitted that she had executed the mortgage deed, held that notwithstanding her admission the mortgage deed was void even as against her The words of this sec apply only to a document duly attested 42 C L J 148 30 C. W N. 364. 6 P. L T. 575 1925 P C. 203 · 89 I C 659: 23 A. L. J 815: 49 M L J 240 P C

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——admission by some executant is not effective against others. 2 Pat 217 74 I C. 150, 24 C L. J 175: 20 C. W. N. 1044 · 7 C. W. N 384, *Dist*

——when a mortgage deed is not admissible in evidence as such for want of attesting witness, it may be enforced as simple money bond 4 C L J 510 *but see* 35 C. L. J 473 *above*.

——co-executant who is also the scribe, cannot attest execution by others 14 C. W N. 1046, *contra*, 2 Pat L T. 614 65 I. C 266

——a markman can be attesting witness within the meaning of sec. 59 of the Tr. P. Act, and sec. 68 of the Evi Act. 2 C W. N 601

——attestation under sec 59 *of* the Tr. P. Act cannot be the attestation of the admission of having signed the document. So a Registrar before whom the mortgagor acknowledges the execution of the deed, cannot be an attesting witness 26 C. 78.

——'attestation' under sec. 59 of the Tr P. Act. is the attestation of the execution of the document *and* not of the admission of execution. 26 C. 246 · 3 C. W. N. 84; 27 C. 190.

S 70. (Admission of execution by party to attested document)—*contd.*

——where the attesting witnesses signed their names before the mortgagor, the bond was invalid 32 C 729 9 C. W. N. 697.

——the question of attestation is a question of fact. 26 C. 78.

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S. 71. (Proof when attesting witness denies the execution)

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——other oral evidence is admissible to show that the attestor did as a matter of fact see the execution if he denies it. 67 I C 87

——if the attestors are dead or prove hostile, s 71 requires evidence to prove the execution of the document, it is not necessary to prove execution in presence of attesting witnesses. 74 I. C 959: 74 I C 839.

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——where the attesting witnesses to the deed of sale are alive their testimony is not the only evidence by which it can be established, it may be proved by any other evidence 23 W R 293.

——when the genuineness of a rent-receipt is sworn to by the tenant by whom rent was paid it was legally sufficient to prove the receipt without examining the writer of it 1925 Cal 452: 82 I C 974

S. 73 (Comparison of signature, writing or seal)

——the comparison may be made by the court 26 C W. N. 113: 34 C. L J 373 · 1914 M. W. N 240 22 I. C. 627

——the writing to be compared with the standard must purport to have been written by the same person, that is to say, the writing itself must state or indicate that it was written by the person. 14 C. W N. 114 . 37 C 467

——any document alleged by the party to be in the handwriting *of a particular person may for purposes of proof be* compared with other writing or signature admitted or proved.

S. 73 (Comparison of signature, writing or seal)—*contd*

35 M. L. J 608 48 I. C 68, (37 C. 467 *Diss*, 14 Bom. L. R. 31 *Approved*)

——ordinarily methods of proving handwriting are; (1) by the admission of the person concerned; (2) by calling the writer or one who saw it written or one who is qualified to express an opinion as to the handwriting under s 47, (3) by comparison of handwriting as provided by s 73. but the last mode is always hazardous and inconclusive 14 C W. N 1114 37 C. 467, 26 C. W. N 113: 34 C L J. 373, 64 I. C 234, 66 I. C 773, 14 I. C 741: 11 M. L T. 424, 21 W. R. 429, 11 B 690, 21 W. R. 436, 22 W. R 272.

——comparison of the signature to a bond with a document not before the court or with one whose authenticity is disputed is illegal 1 Mad H C 164.

——the court could not properly make comparison of signature, taking for a standard a signature on a deed sought to be set aside as spurious 9 W R 450.

——finding of forgery based on a comparison of handwriting and not on any evidence was disapproved. 10 W R. 16: 8 B L R 490, P C

——the court may make a party write for the express purpose of comparison 10 M I A 530. P C. but in such cases comparison will be less satisfactory as a person may feign or alter the ordinary character of his writing with the view of defeating a comparison. 16 A 157 p 161 P C 21 I A 5 p. 28.

——question of comparison of signature is distinct from question of admissibility. 1926 Cal. 139 92 I. C. 442: 53 Cal 372: 27 Cr. L J. 266.

——to prove the handwriting of a person to a particular document a party may ask the court to have the handwriting of that person to be taken in court for the purpose of comparison 42 C L J 504

——but this sec does not empower the court to direct thumb impression to be taken of an accused in a criminal case 68 I C. 958 *contra*. 83 I C 668 1924 Rang 115 F. B. 6 Pat. 623, 1 Pat 242, 106 I. C 212 1928 Pat 103

——the court can direct the accused to make thumb impression for the purpose of comparison and if the accused refuses to comply with the order the court can draw an adverse inference 6 Pat 623 (1 Pat 242, 1 Rang. 758 · 83 I. C. 668: 1924 Rang 115, F. B *Ref*.

Ss. 74-89. (Public and private documents and certified copies,—presumption).

——a document prepared by a public servant in the discharge of his official function is a public document. The mere fact of a document being kept in the public office does not lead to the presumption that it is public document. 107 I. C. 618: 1928 Lah. 640.

——every person has a right to inspect a public document subject to certain exceptions, provided, he shows that he is individually interested in them. 8 C W. N. 125; 31 C 284, 20 M. 189

Ss. 74-89. (Public and private documents and certified copies,—presumption)—*contd*

——records of the proceedings of a Municipal Board are public documents and the officer who is authorised to give copies of such documents is a public officer 19 A. 293 F. B

——Loan Register of the Public Debt Office in the Bank of Bengal is a public document. 8 C W. N. 125 31 C 284

——in one case the certified copy of plaint was admitted in evidence on the ground of its being a public document 10 B L R. (App) 31. *Contra* 7 Pat L T 267. 92 I C. 184.

——notice under sec. 107 Cr. P C. is a public document 18 C. W. N. 644.

——the Quinquennial Register is a public document 7 W. R 14.

——registers kept under the Land Registration Act are public documents 2 Pat 839.

——certified copies of death Registers are admissible 46 C. 152, 41 M 26.

——deposition of witness is a public document 2 C L J 218, 4 C. W. N 429 : 27 C 639 27 I A 1, P C.

——certificate of sale granted by court is not public document 2 Bom. L R 233.

——an anumoti-patra is not a public document 14 C. 486. 14 I. A 71, P. C

——income-tax papers are not public documents 23 C 950 P C. [illegible] Bom. L R 535 [illegible] Govt. Revenue [illegible] are not public documents [illegible]

——Chitta made by Govt for revenue purpose, is public document and for private purpose is private document. 19 C W. N. 1015 p 1016, 19 C W N 1038, 15 C W. N 515

——partition Chitta distributing Govt Revenue is a public document and its copy is admissible. 15 C. W N 515

——certified copy of Probate Court is public document. 19 C. W N. 1068

——Chitta prepared by Govt of lands escheated to it is not a public document. 17 C. W N 151, (13 C L J. 293, 16 C 186, 7 C W. N 849), *fol.*

[illegible] the Govt. [illegible] from the [illegible] [illegible]nt. 14 C. [illegible] purpose of [illegible] without the [illegible] person who [illegible] W. N. 713- [illegible] a proceed- [illegible], 391. 1927

Ss. 74-89. (Public and private documents and certified copies,—presumption)—*contd.*

Pat. 167 : 8 Pat L T 74, 7 Pat. L T 671 : 95 I. C 965. 126 Pat 436

——Dakalnamah is a public document and its copy is admissible. 1927 All 52 6 L R. 383.

——deposition of witnesses taken by an officer of the Court is a public document 101 I. C 289 · 1927 Pat 61 : 8 Pat. L. T. 310. 5 Pat 777

——a school master is an "executive officer of Govt. within s 74 cl (1) (iii) 50 B 716 · 1927 Bom 11 : 99 I. C 307

——certified copy of a plaint is not admissible in proof of the signatory as plaint is not a public document 7 Pat. L T. 267 9? I C 184 1926 Pat. 184, *contra*, 15 W R. 437, 10 B. L. R Ap 31.

——the copy of an application for compromise with an order of the court on it is admissible. 1 A L J 369.

——if a person is proved to be the publisher of a newspaper then under s 81 there is a presumption that what purports to be a newspaper of a particular name is that paper and that every copy of it was issued by the publisher of that paper The presumption under s 81 does not include a presumption that it was printed and published by the person by whom it purports to be, 36 M. 457

——the text of an Act as published in the Gazette must be taken to be the authorised text of the Act 97 I C. 316 · 1927 Pat 142

——Rennell's map was made some 22 years or so before the Decennial Settlement There is a presumption of its accuracy under s 83 Evi Act. 34 C L J. 205, 66 I C. 287, 15 C L J. 281.

——maps and surveys made in India for revenue purposes are official documents prepared by competent persons, and with such publicity and notice to persons interested as to be admissible and valuable evidence of the state of things at the time they are made. But they are not conclusive and may be shown to be wrong, but in the absence of evidence to the contrary they may be judicially received in evidence as correct when made. 30 C. 291 : 7 C. W. N. 193 5 Bom L R 1 P. C (19 W. R. 127, 11 C 784, 16 C 186 22 C 252 *Ref* 7 C W N 849 p 851, 13 C. L. J. 293 : 15 C. W. N. 706 41 I. C. 247, 2 I C. 513, 15 C W N 706, 4 C. W. N. 113, 6 C W. N 629. 13 C L. J 625

——evidentiary value of the Thak map may be affected by the condition of the land being jungly at the time of the survey. 15 C. W. N. 887 14 C. L. J 319 : 13 Bom. L. R. 806, 16 C W. N 317

——a map prepared by private arrangement by a *Dy.* Collr. for settlement of the silted bed of a river does not come under s 83. 19 I. C. 572

——chittas prepared by Govt in connection with resumption proceedings are not evidence against private person 1926 Cal 159: 98 I C 85

——s. 83 does not deal with the admissibility of private maps it may be admissible otherwise. 17 C. L. J. 643 : 16 I. C. 747, 9 C W. N. 111.

Ss. 74-89 (Public and private documents and certified copies,—presumption)—*contd*

——the word "accurate" in this section means accuracy as to drawing and correctness of the measurements i e accuracy with regard to the drawing of the map. 25 W. R 179, 18 C 224, P C, 7 C. W. N 612, 10 I C 653 · 9 M L. T. 415

——objection to the want of proof of the accuracy of a map may be waived. 9 C W N 111.

——where an application is made for letters of administration with a copy of the will annexed under a document purporting to be a power of attorney and to have been executed before and authenticated by a Notary Public, an affidavit of identification as to the person purporting to make the power-of attorney being the person named therein is unnecessary 33 C 625 9 C W. N 986

——post marks on letters are *prima facie* evidence as to the time, dates and places mentioned 20 C L. J 455

——the words ' deplomatic agent ' in clause (6) of sec. 78 are very wide and *prima-facie* cover the Resident of Hyderabad who is the Political Agent of the Govt. of India 50 B 716 1927 B 11

S. 90 (Presumption as to documents thirty years old)

——it is well settled that the production of an ancient document unless supported by some corroborative evidence of action under it, is not entitled to any weight 42 C L J 14 · 89 I C 747 . 1925 Cal 1189

——if one is dealing with a document 30 years old the mere fact that the proof of consideration is not at all satisfactory, is by itself a slender ground for holding that the document known to have come into existence was entirely unreal 5 I C 135, 39 C L. J 380 81 I. C 493

——where a document, more than 30 years old, is free from suspicion of dishonesty, it may be admitted in evidence without proof 18 W. R 485, 1921 Pat 49 5 Pat L J 563 57 I C 786

——the s itself admits a presumption of the genuineness of a document 30 years old, if produced from legitimate custody. 5 Bom. L. R. 144

——a private partition chitta purporting to be more than 30 years old was produced in court by Collectorate officer who deposed that the Record Keeper of the Collectorate directed him to produce it in court, held that the presun[illegible] be raised as there was no proof th[illegible] production nor did the proof estab[illegible] was proper custody within s. 90

——production of a will and an *anumatipatra* by the Collector of the District with whom the properties were placed as head of the Court of Wards after 54 years, gave rise to the presumption under this s., 4 Pat. 67 · 1925 Pat 442 · 94 I. C. 814

——the presumption under this section must always be applied with a good deal of caution 31 C. W. N 215 : 98 I. C. 147 : 1927 Cal. 102 : 55 C. : 210.

90. (Presumption as to documents thirty years old)—*contd.*

——the rule under this s. as to proof of execution of documents :ty years old ought to be applied with special care and caution ; 539, 29 C. 740, 20 B. 1, 41 M. L. J. 310 : 1921 M. W. N 750 . 61 . 959.

——under this s. the court is not bound to presume the uineness of a document 30 years old, it should exercise its retion as to whether in the circumstances the presumption :enuinen ... it should upon ... 17 C. W .08, 95 I. ... 870, 2 C. J. 592, b ... reised 29 40.

——the court cannot presume the correctness or genuineness every statement made in the document, all that it can presume hat a document was executed by the person who purported to be executant. 98 I C. 1021 : 1927 Cal. 229.

——the court may presume the genuineness of signature which henticates a copy, 33 C. W. N. 578 ; 1929 P. C. 115

——where the courts in India refused to admit a document of e than 30 ... Privy Council did interfere. ... 31 : 6 Bom. L. R P. C., 8 O

——when ... *mirasi* tenure, not be proved for want of witness, it is necessary, in order to blish its authenticity, to show that it was accompanied by ession. 2 W. R. 22 P. C., but it is not necessary to go behind possession of the present owner. 11 W. R. 35, P. C , 4 W. R. 73 :., 13 W. R. 109, 17 W. R. 34.

——effect of the presumption under this s. may be weakened by umstances which tend to raise doubt as to its authenticity. 7 .. J. 615, 95 I. C. 261 : 1926 All. 537.

——jama wasil baki papers of more than seventy years old is cient to raise the presumption of fixity of rent under s. 50 B T. , 45 C L. J. 129.

——in reckoning 30 years, not the date of filing but the date on ch it is tendered in evidence, is to be considered. 5 C. L R 135, Mad. 184.

... ment shown to

documents were in fact executed by persons possess... iority. 27 C. W. N. 964.

——when the document is signed by agent, authority must be ed. 3 C. 557, 6 C. 209.

S. 90. (Presumption as to documents thirty years old)—*contd*.

——the s. does not prove the authority of a person to sign for another. 50 C. 526 1924 Cal. 82, 1923 A. 420: 73 I. C. 989.

——it only presumes the execution but not the authority as agent which must be proved by the person relying upon it. 85 I. C. 220 (C), *contra*, 97 I C 292; 24 A L. J. 920 *and below*

——when the signature of the executant purports to be made by scribe, authority of the latter is presumed. 47 A. 31 83 I C. 5: 1925 All 1 F B

——the court may presume that the party who signed for the executant signed it with an authority from him 1927 All 765.

——when attesting witnesses of a will thirty years old are dead a copy of the will is admissible and there is presumption of due attestation when a witness, who was present at the execution of the will, deposes 33 C L. J 352 63 I. C. 518

——a deed of gift 30 years old but not bearing any signature of the executant except a mark, is not admissible in evidence. 60 I. C 96

——private copy must be proved to have been compared with the original 1923 M W N 454 . 1922 M 674 73 I C 66

——when the adverse party is in possession of the original and he does not and will not produce it a certified copy of it will go in evidence under this s 21 B. 528.

——but where the original is in existence and is not produced or its non-production is not satisfactorily accounted for, a copy of it will not be admissible under this s. 25 M 674

——'proper custody' should be liberally construed. 11 B 94.

——the mere fact of certain document having been produced from a court where it had been filed does not necessarily bring that document within the requirements of s. 90 Evi. Act 4 Pat. 67. 1925 Pat 442, 5 C 918

——when the lower court does not draw the presumption, under s. 90 the appellate court is justified in refusing to apply the presumption. 108 I C 412, (M)

S. 91. (Exclusion of oral by documentary evidence)

——having regard to the terms of sec. 91 the court is to find *out the real contract between the parties*. *109 I. C. 18: 1928 Mad. 459*

[illegible] lly as soon as it [illegible] to prove it 111

[illegible] all be produced [illegible] A 8 · 19 W. R.

——oral evidence of transaction reduced to document is not admissible. 20 C. W. N. 182.

——this sec. is uncompromising When a *hundi* is inadmissible for being found to be insufficiently stamped the creditor cannot

S. 91. (Exclusion of oral by documentary evidence)—*contd*

fall back upon the original transaction and sue on the basis of the loan. 3 *Lab. L. J.* 157 : 3 *U. P. L* R 50 · 60 I C 107, 2 Lah. 3.. 66 *I. C.* 201, 61 P. R 1888 . 42 P. R. 1895, 95 I C. 701, *Contra* 192. A 529, 95 *I.* C 847 : 1926 Bom 357 : 28 Bom L. R 631, 104 I. C 470. 1927 Nag 241

——debt covered by pro note cannot be proved by independent prior agreement where pro-note is inadmissible for want of stamp. 85 I. C 389 . 1925 Mad 351

——where in a suit upon a promissory note executed by the *Karta* of a joint Hindu family, the plff wanted to have a decree on the original cause of action against all the members of the family, oral evidence is admissible to prove the different cause of action. 41 C L J 535 . 88 I C 1025 · 1925 Cal. 1153.

——the examination of witness by Police officer under s 16.. Cr P C does not come within the class of documents referred to in s 91 Evi. Act. and the Police officer can speak to it by going into the witness box. 88 I. C. 449 ; 26 Cr. L J. 1137.

——when an unregistered deed of mortgage becomes inadmissible as simple mortgage, evidence of equitable mortgage by deposit of title deeds is admissible 44 M 965 . 41 M. L J. 297 : 1921 M W. N. 704.

——where a lease is inadmissible for being unregistered the tenancy can be proved by other evidence under the doctrine of part performance 105 I C 172

——where an *amalnama* becomes inadmissible for want of registration no secondary evidence is admissible 63 I C. 883 (c).

——the sec refers only to the method of proof of the terms of contract, grant or disposition *of property*, it does not exclude other proof of the transaction, 1922 P. 222.

——permanent tenancy set up by the tenant cannot be proved by any evidence other than the settlement *bondabast* papers 3 Pat L T 485 : 68 I C. 653

——an unstamped receipt which is inadmissible in evidence does not prevent other evidence, 68 I. C. 494

——oral proof cannot be substituted for the written evidence of a contract 50 C 388, 38 C. L. J. 41 : 44 M. L. J. 602 : 1923 M. W. N. 762 . 28 C W N. 1 · 25 Bom. L. R. 582 P C

——tenancy may be proved without proving the lease. 6 C. W. N. 434, I. C. W. N. 248. 6 C W. N. 916, *Contra* 1923 Nag. 76 : 71 *I. C.* 33.

——termination of a tenancy may be proved by oral evidence although the tenancy has been created by registered evidence 64 I. C. 883 (C).

——when parties reduce all the terms of the contract into [illegible] e but if portion of the terms parol evidence of terms not 173 n. 1923 Bom 236 [illegible] ove a contract reduced to 109 I. C. 18 : 1923 Mad. 43.

S. 91. (Exclusion of oral by documentary evidence)—*contd.*

——in a suit on a contract evidenced by bought and sold notes, *oral evidence is admissible to show that the name of a third person* was entered by mistake 20 C 854

——payment of a debt may be proved by oral evidence though there is a receipt 9 A 356, 4 B. p 137, 3 M 53, 1923 Mad 32.

——written receipt is not in the nature of primary evidence. 4 C. W. N 18 P C, 1923 Lah 301 74 I. C 939

——oral evidence to prove the fact of partition is admissible though there is an unregistered deed of partition 1926 M W. N. 45 : 92 I C 1028 1926 Mad. 402 100 I. C 153, 99 I C 448, 103 I C. 281 39 M L. T. 276 1927 Mad 830

——admissibility of the unregistered sale deed of property below Rs 100 in value to prove the nature and terms of the transaction which fell through. 30 C W N 254, 1926 Cal 705 : 93 I C. 115

——an unregistered sale deed and partition deed can be used to prove the nature of possession of the person claiming under the deed *28 Punj L R 88 98 I C 940*

S. 92. (Exclusion of evidence of oral agreement)

If the contract, grant 91 says, no evidence lf, and this rule would was also forbidden to its terms Mark Ev. P. 73

——the distinction between ss 91, 92 and ss 93 to 99 is, that ss. 91 and 92 define the cases in which documents are exclusive evidence of the transactions which they embody, while ss 93 to 99 deal with the *interpretation* of documents by oral evidence The two subjects are so closely connected together, that they are not usually treated as distinct but they are so in fact Step Dig 7th Ed P 192.

——the rule in s. 92 is taken almost *verbatim* from Taylor on *evidence, including the exceptions*, 6 C 328 But *the admissibility* of oral evidence to vary the terms of a written document &c. is not governed by the English law but by this Act 8 C. W N. 101, 27 I A 58 ; 22 A 149, P C.

——a decree does not come within s. 92 The section refers to only what are known as "dispositive documents" and the words "or any matter required by law to be reduced to the form of a "document' must be read in that sense 91 I C 705, 1926 Cal 643.

——when there is a proposal in writing for a contract to be entered into at a later date it is doubtful if oral evidence of terms not to be found in the written proposal, is admissible 32 C 96 : 9 C. W. N. 147 : 31 I. A. 188 P.C., 15 S L R. 180 : 67 I. C. 19.

S. 92. (Exclusion of evidence of oral agreement)—*contd.*

——the sec does not apply where the parties did not intend that the writing should contain the whole agreement between them. 14 W. R 319, 17 C. 173 n, nor does it bar the admissibility of oral evidence as to some items of an agreement while others have been reduced into writing in letters between the parties 13 C. W. N 326.

——where at the time of the sale by the Govt. of a certain estate some portion of it were submerged under water and where in the sale notification the area of the estate was specified as certain number of bighas, held that the latter fact did not preclude the purchaser from claiming any accretion to the estate. 29 C W N 166 : 84 I C. 478, 2 C L J. 39, 19 W R. 89, 24 W. R. 91 *dist* 32 C. L J. 402. 21 W R. 115 *Fol.*

——s 92 does not apply to their parties. 45 C. 320 · 22 C. W. N. 257 P C, 15 C W N. 958 : 14 C. L. J. 276 P. C.

——s 92 does not apply to a criminal case where the Crown is the prosecutor, but where a private person is the prosecutor he being a party, the section applies. 8 I.C. 952 . 11 Cr L. J. 738

——evidence is admissible as to the respective shares of the parties in a purchase as to which the deed is silent. 101 I. C 653 : 38 M. L. T. 247 : 1927 M. W. N 168.

——evidence is admissible to prove identity of persons when the word 'others' is used 42 M. L. J. 475 : 1922 M. W N. 185 1922 M. 100 30 M. L T. 177 : 65 I. C. 973.

——evidence of oral agreement substituting a new executory contract is admissible. 44 A 258 ; 69 I. C. 990.

——previous correspondence may be looked at for the identification of land. 1923 A. 53 : 69 I. C. 647.

——reference to the earlier deed of mortgage is permissible for the identification of property. 44 A. 246

——antecedent documents may be consulted only for identifying land and not to contradict the terms of the settlement made 88 I. C 103 · 41 C. L. J. 386 : 3 Pat. L. R. 114 · 27 Bom L R. 819 : 48 M L. J. 611 P. C.

——in the case of a registered mortgage deed, oral evidence cannot be let in that the property really meant as security, is other than what appears in the deed. 90 I. C. 841.

——oral evidence is admissible to prove a discharge and satisfaction of a mortgage bond, 90 I. C. 450, 30 C. W. N. 710 : 44 C L. J. 449 . 1926 Cal 906 : 96 I. C. 11, 91 I. C. 757 : 30 C. W. N. 371 : 1926 Cal. 170, 42 C. L. J. 82 : 1926 Cal. 170, but the relinquishment of mortgage debt. 97 I C. 162 : 24 A. L. J. 839 : 1926 All. 693.

——where Govt. lands are sold in auction with the specification of certain area in the sale notification, purchaser can claim accretion. 29 C. W. N. 166 : 84 I. C. 478 : 40 C. L. J. 322 : 1925 Cal. 346.

——the admissibility of an oral agreement contemporaneous with a written document will depend to some extent upon the way

S. 92. (Exclusion of evidence of oral agreement)—*contd.*

in which the case is presented. 29 C. W. N. 670: 88 I C. 435: 1925 Cal. 860.

——s 92 merely prescribes a rule of evidence, it does not fetter the court's power to arrive at the true meaning and effect of a transaction, in the light of all the surrounding circumstances. 3 Pat. L. R. 227: 27 Bom L. R 787 86 I C 332 P. C

'he writen contract is admitted
24 C 20.
here there is no variation of
422
prove the inaccuracy of the
4 22 L W 848 1926 Mad
33 A. 340 P C. *Ref*
is admissible 84 I C 121.

1925 Cal. 94

——evidence negativing the written agreement is admissible 90 I. C 929.

——it is permissible to adduce evidence of a contemporaneous oral agreement under which parties to the written contract agreed that until the happening of a certain event no obligation whatever under the written agreement should attach 52 C. 677 1925 Cal 1007: 90 I. C. 59

——oral evidence to prove modification on a registered kabulyat is not admissible. 12 C L. J 442

——a contemporaneous oral agreement cannot be proved to show that the rent is less than what was stated in the registered kabulyat 6 C W. N. 60, but evidence may be given to show that the kabulyat was never intended to be acted upon or that the tenant has been paying less rent at lower rate 6 C W N 242, 2 I. C. 160, 10 C L J 740

——the statement of law in Amir Ali's Evidence Act that 'evidence to the effect that there was not an agreement at all is admissible' is too wide and must be qualified by the express provisos 1 to 3 to s. 92, 49 A. 680: 1927 All 422: 100 I C 1029

——when evidence of contemporaneous oral agreement may be given 63 I C 368, 19 A. L J. 816 63 I C. 861, 44 A 421 20 A. L. J. 247.

——evidence of subsequent or contemporaneous oral agreement

——a subsequent oral agreement to take less than what is due under the mortgage bond is an agreement modifying the terms of the contract and is admissible 9 Lah. 597: 1928 Lah 873; 110 I. C. 424

——where a document is formally drawn up evidence to prove contemporaneous oral agreement is not admissible. 1923 Cal. 402: 70 I. C. 790.

S. 92. (Exclusion of evidence of oral agreement)—*contd.*

——while want or failure or difference in kind of consideration may be proved, evidence to vary the amount of consideration in a registered deed is admissible. 27 C. W. N. 496, 38 M. 514, *Fol* 27 A. 271: 9 C W. N 477 **P. C.**, 37 A. 348: 15 C. W. N. 521 **P C.** 10 C. L. J 27.

——a party cannot be allowed to prove that he has violated the law and committed a fraud upon the revenue of the country. 27 C. W. N. 496.

——this section has no reference to the interpretations of the terms of the contract. Where the terms are unambiguous and clear evidence to prove that the terms were used in a different sense must be excluded under the sec 55 C. 808: 1928 Cal. 737.

——in construing the terms of a deed evidence of intention of parties is not admissible 25 C. L. J. 567, **P. C.**, 22 C W. N. 257 **P. C.**, 28 C. 289: 5 C. W. N. 326, but as between third persons it is admissible 22 C. W. N 257 **P. C.** (4 C. W. N. 153; 27 I. A. 58, **P.C.** 25 M 7, 30 B. 119) *Dist.* 2 C. L. J. 338, 28 A 473

——where there is a mutual mistake of fact, the court will interfere to have the deed rectified, so that the real intention of the parties may be carried into effect. 2 C W. N 260, L. R. 4 A. 302.

——oral evidence is admissible to prove that what purports to be a deed of sale is really a deed of gift 15 C. W. N. 521 **P. C** (28 C 70, 27 A. 612), *reversed*

——where a deed is in form a sale deed, evidence of the surrounding circumstances is not admissible to prove that it was intended to operate as a mortgage 49 B. 662: 27 Bom. L. R. 951: 1925 Bom 501.

——parol evidence was allowed to prove that a village not included in a patni lease was intended by the parties to be included in it 8 W R. 152.

——oral evidence is admissible as to negotiations antecedent to execution of a mortgage showing the nature of interest in the property mortgaged. 26 C W. N 36: 34 C. L. J. 256

——in a suit for pre-emption the vendee can prove that the document was not a sale deed. 21 A. L. J. 932.

——a substituted contract may be looked to. 1923 Rang. 102: 74 I C. 154

——in India a contract of sale of goods can be proved by parol evidence. Where the bought and sold notes in a contract of sale happen to be falsified by the vendor the aggrieved purchaser is entitled to disregard them and prove his contract by other and antecedent materials. 31 C. 614: 31 I. A. 122: 8 C. W. N. 489: 6 B L R. 498, **P. C.**

——when a party to a deed is permitted to go into oral evidence, the other party can rebut it by oral evidence. 5 C. W. N 158.

—— the rule of exclusion of oral evidence does not bar strangers to a deed from proving by parol evidence the real nature of the transaction. 2 C. L. J. 338, 21 A. L. J. 932.

S. 92. (Exclusion of evidence of oral agreement)—*contd.*

——oral evidence is admissible to prove some items of an agreement entered into between parties when some others have been reduced into writing in letters exchanged between the parties. 13 C. W. N 426: 6 M. L. T. 368. 4 I. C. 85, 1923 Rang. 102: 74 I. C. 154.

——oral evidence may be allowed to prove the object of a deposit but not to prove a separate agreement 9 C W. N. 178

——oral evidence cannot be given to show that one of the executants of the hand-note was only surety. 8 C. W. N. 101, *contra* 3 C. 174, 92 I. C 667

——whether interest is payable per mensem or per annum under a promissory note as to which it is silent, cannot be proved by oral evidence. 4 Pat L. T. 577,

——where a promissory note is silent, as to interest, a verbal agreement, made subsequent to the execution of the note to pay interest, may be proved 12 C L. R 163, but extrinsic evidence as to contemporaneous oral agreement to pay interest cannot be proved. 8 C W. N 1260.

——where a promissory note is payable on demand an agreement providing for a different mode of satisfaction is inadmissible 63 I. C. 748, 45 B. 1135 . 23 Bom L R 188 63 I C 673, 90 I. C 378.

——a person is not entitled to adduce oral evidence of a condition by which he says it was agreed to postpone the enforcement of a promissory note 90 I. C 1020 · 1925 M. W N. 601. 1925 Mad 1240.

——the terms and purposes of a promissory note may be proved by oral evidence 13 Bur. L T. 239 : 64 I C 33

——when parties depart from original written agreement it is incumbent on the party insisting on such substituted verbal agreement, to show that both the parties were proceeding on a new understanding 33 C L J. 577.

——agreement that money due on a promissory note was not to be paid or demanded until settlement of accounts, is inadmissible 44 A. 521 · 20 A L. J 315

——misdescription of property cannot bar oral evidence being given to identity 1 Pat L R 80 · 71 I C. 689

——when a hatchitta upon which the suit is brought is silent as to interest oral evidence may be given to prove verbal agreement to pay interest, 9 C L R 301, 62 I. C 315, or of prevailing custom. 62 I C 315

——oral evidence may be given as to how the interest was to be paid 7 A W N. 61.

——oral agreement not contradicting the terms of the promissory note is admissible 10 C W N 713 P C

——an oral agreement may be proved to the effect that the terms of the document were not enforcible until the happening of certain event. 25 C. 401 , 2 C W. N. 188

——oral agreements mean all unwriten agreements including agreements implied from acts and conduct of parties. 22 M. 261.

S. 92. (Exclusion of evidence of oral agreement)—*contd*

——when a document is silent, oral evidence cannot be given to show that interest was payable not *per* year but *per* month. 18 C. W. N. 592, 14 C. W N. 1100 *not fol.*

——oral evidence may be given to the effect that after the execution of the mortgage deed there was an agreement between the parties that the mortgagee would be in possession of the property for the satisfaction of the debt. 11 C. L J. 39.

——the view that there has been introduced into the law of

Act, is not correct 40 C. L. J 481 : 82 I. C. 993 · 47 M. 729 P C

——where the mortgage deed provides for compound interest oral evidence cannot be given to prove that there was contemporaneous agreement to realise only simple interest. 78 I C. 742. 1925 Cal. 276.

——oral evidence is admissible to prove an agreement between the mortgagee and the would-be purchaser of equity of redemption as regards the terms on which the mortgagee would release or assign his interest. 40 C L J. 67 1925 Cal 94.

——where the vendor proves non-passing of consideration the purchaser may prove that the amount as stated in the sale deed was higher than the amount settled. 24 I. C. 661

——an agreement, the terms of which are not inconsistent with those of the lease, is not affected by this sec. 6 C. W N. 865 : 12 M L. J. 479 : 29 I. A 138 . 25 M 603 P. C.

——where there is a registered partition deed, oral agreement of the right of access to another's land is not admissible. 28 M. 495: 15 M. L. J 255.

——no writing is necessary in this country for surrendering a tenancy but when the original lease is registered, the surrender of a portion with an abatement of rent can only be effected by a registered instrument and oral evidence of surrender is admissible 63 I C. 483 (C).

——where there is a written lease, no evidence of custom is admissible. 48 C 359 : 25 C. W. N. 13 : 61 I. C. 503

——question as to admissibility of evidence should be determined ... lence in the first instance ... admissibility until final ... 173 *Fol.* ... document may be taken at any time, even after it has gone in evidence out the method of proving it cannot be questioned after proof 9 C W. N. 111, 23 C. 335, *Dist*

Ss 93-98. (Admissibility of oral evidence to interpret documents).

——extrinsic evidence is not admissible to alter a written contract, or to show that its meaning is different from what its words import. 7 W. R. 144.

Ss. 93-98 (Admissibility of oral evidence to interpret documents)—*contd*

, no evidence

o the general

——extrinsic evidence may be given to show that the survey numbers stated in the sale deed are wrong, and land actually sold are of different survey numbers. 30 M. 397.

——extrinsic evidence may be given to explain the ordinary meaning of expression in a compromise decree. 62 I C 702 (C).

——various words in written documents which *prima facie* present no ambiguity may be interpreted by extrinsic evidence of usage. 34 C. L. J. 160, 63 I C 138

——extrinsic evidence is admissible to resolve latent ambiguity, 36 C L. J 242 : 1923 Cal. 32 72 I C 696, 26 C. W N. 901. 35 C L. J. 87 : 64 I C 824

——terms being ordinarily ambiguous, extrinsic evidence of usage is admissible 26 C. W. N 1032, 64 I C 693

——when the lands leased out cannot be identified correspondence preceding the lease is admissible. 20 A. L J 907 : L. R. 3 A. 623.

——where a testator bequeathed certain property, saying 'A and B, my *aurasa* sons' whereas their legitimacy was in dispute, the misdescription was immaterial 20 M. 167 : 22 M 383, P C

——where land within certain boundaries is sold, and wrong area is given, it is regarded as misdescription only 30 M. 397, 16 W. R 5 P C., 14 W. R 301, 5 B 208

——in cases of misdescription s. 94 does not apply 104 I C. 736.

S. 99. (Who may give evidence of agreement varying terms of document)

——persons who are not parties to document are competent to adduce oral evidence to show that the rights of parties to it are at variance with the rights ostensibly created and declared by the document. 53 I C 243

——in a mortgage suit the mortgagor and his representatives are estopped from denying the interest described in the document, but third persons can question the mortgagor's title 96 I C. 26 ; 1926 Mad 744 1926 M W. N 939.

——s 92 does not apply to third parties 45 C 320 22 C. W N 257 P C, 15 C W N 958 14 C L J. 276, P C

——persons not claiming through the settlor can challenge the validity of a waqf on the ground that it was merely illusory. 1928 Cal. 253, 32 M L J 431 *fol*, 10 C W. N. 449 *Dist* and *Expld*.

Ss. 101 to 106. (Burden of proof of fact or knowledge)

——it is incumbent on each party to discharge the burden of proof which rests on him. 12 C. L R 168.

——when property is attached claimant must first prove his case 11 W. R. 8 : 2 B. L. R. 91 F B.

Ss. 101 to 106. (Burden of proof of fact or knowledge)—*contd.*

——In case of Hindu joint family onus is on those persons who claim separate property. 6 M. I. A 53. **P C.**, 11 C. W. N. 417: 5 C L J. 340: 4 A. L. J. 227: 17 M. L. J. 228, 9 B. L. R. 597: 29 A 244, **P. C.**

——but there is no presumption in Hindu Law that transactions standing in the name of the wife are the husband's transactions 2 C. W. N 367, 8 C 545: 11 C. L. R. 41, reversed on facts by 13 C. 181, **P. C**, 17 M. L. J. 339.

——in case of boundary disputes the plff. is to prove his right to recover. 10 M I. A 81 3 W. R. 19 **P. C**, 10 C L. R. 169, 13 M. I. A. 59 P. C., 8 W R. 209.

——but when the boundary line passes through waste land onus is on both sides as if they are counter claimants. 21 C. 504 21 I. A. 39 P. C, 11 C W N. 230 p 234, 65 I. C. 743, 27 C. L J. 599, but the onus may be shifted on one party when the other party is given possession of the property by the Magistrate, 23 C W. N 593, 29 C 187. 6 C. W N. 386 **P. C.**

——when the deft. proves the non-payment of the consideration of a bond in cash as stated therein, onus of proving the passing of consideration otherwise than in cash is on the plff. 4 C W. N 82 **P. C**

——when a stranger contests the mortgage security, onus is on the mortgagee. 6 C. L J. 659: 3 M. L. T 38 (6 C. 268, 17 A. 428, 5 C W. N. 403, 5 C. L J. 653). *Ref.* 3 C. W. N. 324, *Diss.*

——non-mentioning of the mortgage-deed in the income-tax returns submitted by the plff does not shift onus as to non-passing of consideration on him. 23 C. 950: 23 I. A. 92, **P. C.**

——trespasser, who seeks to maintain possession against the purchaser cannot plead that the deed of purchase is voidable at the option of the vendor: he must show that it is absolutely void 9 C W. N 477.

——denial of receipt of consideration by the executant before the registering officer does not shift the onus on the plff. 27 A 71

——when the execution of a mortgage deed is admitted, onus to prove the falsity of the recitals as to payment of consideration is on the executant, 6 C. L. J. 659. It is otherwise when a stranger contests *same case.*

——debtor must prove that the person to whom he made the payment was authorised by the creditor to receive payment. 23 Bom. L. R. 1391 **P C**

——the party setting up the illegality of contract is to prove that. 1 C. L J. 261, 10 Bom. L. R. 1004.

——in a mortgage suit against *bona fide* purchaser for value, the burden of proof lies on the plff. 6 C. 268: 7 C. L. R 6, 5 C. W. N. 403, 24 C. 62, *Dist.*

——a person suing another for fraud must prove it, he is not relieved from the obligation by the fact that the deft. has told an untrue story. 21 C. 921.

Ss. 101 to 106. (Burden of proof of fact or knowledge)—*contd.*

——living as husband and wife may dispense with the proof of marriage. 17 C W. N. 494, 38 C. 700.

——the legal presumption is that a child born to wife is husband's offspring, so the person alleging illegitimacy must rebut it. 2 C. L J. 218.

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ment
31 C

——the onus of shewing that a document duly executed and registered was antidated, lies on the person who alleges it. 1925 M. W. N. 632 · 85 I. C 882 49 M L J. 252.

——contents of a document cannot be proved inferentially. 17 C. W N 531

——no debate on the question of burden of proof arises when the entire evidence on both sides is once before the court. 27 C. W. N 328, 25 C. W N. 485 47 I. A. 76 P. C, 87 I. C 565, 1925 Cal 1262

——when the entire evidence on both sides is before the court the debate as to onus is purely academical 36 C. L J 196, 27 C. W N. 328, 45 M, 586 68 I C 538, P. C the question that remains for the court is one of inference from the facts proved 36 C L. J. 196, 27 C W. N 245 P. C.

——when both the parties have adduced evidence and the relevant facts are before the court the question of burden of proof becomes immaterial and importance should not be attached to the question on whom the initial onus lay The question of burden of proof arises only where there is no evidence one way or the other. 27 C W N. 245 · 37 C. L J. 199 P. C., 34 C L. J 333, 529, 563, 27 C W. N 134 35 C L J. 473 1922 Cal 160, 45 M 586 31 M. L T 51. 68 I. C 538 P C., 1929 Cal 325

——the whole evidence being gone into onus becomes immaterial. 47 C. 1027 38 C L J 72, 34 C. L. J 333, 529, 563

——wrong placing of onus is immaterial provided no party is prejudiced 52 C 121: 84 I C 693 1925 Cal 61

——the burden of proof as to the knowledge of true facts is on the mortgagor and not on the mortgagee 27 C. W. N. 943.

——onus of proving as to the exact time of death of the person who has not been heard for seven years is on the person who intends to extend the time of death 1 Pat 475

——the person alleging that a certain person died before another must prove the fact affirmatively 88 I. C 249 1925 M. W. N. 232: 1925 Mad. 1005

——the question upon which party the onus of proving a fact lies is a question of law 65 I C. 745

——the deft. who has admitted liability by affixing thumb marks ... from the liability.

t is unsustainabl

Ss. 101 to 106. (Burden of proof of fact or knowledge)—

——in case of claim preferred by the *wife* of the insolvent to property attached *by* the Receiver, the Receiver is to prove that property belongs to the insolvent *In such* a case ordinary rule does not apply. 19 A L J 497 : 63 I C. 519.

——every apparent transaction must be presumed to be real until contrary is proved. 2 Pat. L. T. 728: 69 I. C. 611, 2 Pat. L. T. 658

——when there is an affidavit of the peon serving the notice, the party impugning the fact must prove that *there* was no service. 1928 Cal 722

——where in a suit the mortgage bond *is alleged* to be lost but the defendant denies the execution of the bond, deft's *alternative* plea of payment does not *relieve* the pltf. from proving the loss of the deed in order to entitle him to use the copy of it. 49 A. 73; 97 I. C 82 · 1926 All 741

——recital *in the* document is sufficient proof of passing of consideration 38 C L J 114 ; 74 *I C.* 178, 1923 C. 119, 1923 Pat 20 70 I. C 804, 3 Lah L J 198 · 71 *I. C* 783, 104 *I C* 173, 1925 Lah 471 F. B. 1927 Lah 272.

——if a court takes into consideration an *admission in a deed* to bind a party, *the* whole of the statement therein should be considered 2 Pat L. T 658

——the person alleging adverse possession must prove it 35 C. L. J. 192 and under *Art.* 114 L. Act the *onus of proving* adverse possession is on the deft 36 C. L. J. 472.

——the person setting up adoption must prove it. 35 C L. J. 434.

——the burden of proving that a transaction is a *fraudulent* and collusive one *intended* to defraud creditors and *is merely benami* is upon the person who asserts *it*. 25 C. W. N. 409 : (1921) *M. W. N.* 80 : 62 I. C 356 P C

——onus of benami is on the person who alleges *it* 36 C L J 396. 35 C. L J. 589 65 I C 701 (C), 28 C. W. N. 62 4 Pat L T 54 72 I. C. 1003, 1923 Cal 292.

——*the* burden of showing that the judgment appealed from is wrong is on the *appellant*. 26 C. W. N 322 : 35 C. L J, 115 · 42 M. L. J. 253 : 1922 M W. N. 95 · 3 Pat *L. T.* 311 *P. C* , 65 I. C. 182 (C).

——ordinarily the burden of proving non-payment *of consideration* is on the vendor *but* where the purchaser cannot explain his being out of possession for a long time *it* shifts on the *purchaser*. 13 Bur. L. T. 112 . 61 I C 634.

——when a person executes a document as *major* a heavy burden lies upon *him* or his. representative to prove the *defence* of minority 47 C L. J. 628 : 32 C. W. N. 874 : 109 *I. C* 387 : 30 Bom L. R 1346, 1928 P C. 152

——an executant pleading minority *is* to prove his minority 8 O. L J. 324 . 63 I. C. 525

——non-executant minor members of a Hindu joint family are to prove that the transaction entered into by *the adult members* are not binding on them. 63 I. C. 258.

Ss. 101 to 106. (Burden of proof of fact or knowledge)—*contd.*

——the burden of proving that the executant of a document is a minor lies on the person alleging it. 47 A. 493 : 87 I. C. 445 : 1925 All. 681, 87 I C. 778 · 1925 All. 399 ; L. R 6 All. 219.

——when a sale-deed has been once executed and registered it can only be avoided by a subsequent registered transfer. 48 I. A. 365 : 24 O C 272 P. C.

——plff. is to prove that he is preferential heir 2 Pat L T. 97.

——in an ejectment suit the tenant is to prove that his tenancy is permanent. 61 I C. 597, 71 I C. 319, but the landlord must prove his right to eject 45 M. L J. 238.

——where the law is incapable of enforcement, possession follows title. 2 Pat L T 133 : 61 I C 78

——a person who challenges the correctness of a Record of Rights must prove inaccuracy 2 Pat L R 87 87 I C. 741 . 1925 Pat 498, 88 I C 495 · 1925 Pat 530 · 6 Pat. L T. 805.

——person in a fiduciary character must prove good faith. 34 C L J. 529. 563

——the fact that the onus has been wrongly placed becomes immaterial when it does not affect the decision on merits 3 Lah. L J 445, 27 C W. N. 134 35 C L J 473, 34 C L J. 333, 529. 563

——in a suit under Or 21 r 63. the burden of proof is on the plff. 2 Lah. L. J. 198, 60 I. C. 75, but where there is no decision in the claim case adverse to the claimant, this rule does not apply 60 I. C. 751.

...ter a long period the burden is on

... P C. does not throw the burden ... 401 . 71 I. C 478

——when encroachment is admitted, burden of proving extent is on the trespasser. 6 N. L. R 59 : 71 I. C. 83.

——where the mortgagor admitted the execution and the receipt of consideration before the sub-registrar, the burden of proof of ... agor 14 L. W. 344 : ... 4 I. C 173, 1925 Lah.

...ient in which receipt of consideration has been recited, the onus of non-passing of consideration is on the person alleging it, but in case of entry in an account book the onus is on the party alleging payment to prove it. 60 I. C 730, 68 I C 303.

——when the execution of ... mortgagor or proved against hi... recital as to the payment of ... 292 P. C, *Ref* but when a str... on the mortgagee to prove his ... to a document may show that ... or in reality it was different from ... 27 C. W N. 8 : 24 Bom L. R. ... 30 M. L ... 132 P. C.

Ss. 101 to 106. (Burden of proof of fact or knowledge)—contd.

——the onus is heavily on the person who alleges that certain partition lists were not acted upon. 1928 Mad. 865.

——in case of suit on a promissory note the plff is to prove the identity of the person to whom the note was given, it being not a question of benami 32 C. L. J. 132 · 63 I C. 210

——in a case between rival purchasers when the vendor admits receipt of consideration from the first purchaser, onus of its falsity is on the second purchaser. 63 I. C. 732.

——admission of signature on a document but not the execution does not shift the onus of proving the execution This is specially so where the signature is put on blank paper. 20 A L. J. 672 · 68 I. C. 809.

——when guardian sells property of a minor with the sanction of the Court, onus to prove want of of necessity is on the minor. 42 M. L J. 333.

——The meaning of the expression "proved" as defined in s 3 is in no way affected by the incidence of the burden of proof. 50 C. 318

——the onus is on the person setting up the will 5 C. W N. 895.

——but where the question was whether writing of the will took place before or after the testator took poison, the burden was held to rest on the party impugning the will. 21 A. 91 P. C.

——when the Zeminder sues for ejectment and the deft sets up *Shikmi* which is admitted or proved, the burden of proof as to whether the land is included within the *Shikmi* is on the zeminder. 3 C. W. N. 763.

——in an ejectment suit, plff must prove not only title but also possession within 12 years. 17 C. W. N. 389, P. C

——in a suit for ejectment plff. must recover on the strength of his own title and cannot depend on the weakness of the adversary. 17 C W. N. 669, P. C., 23 C. L. J. 151.

——where title of the plff. is proved or admitted the deft. is to prove his right to retain possession. 9 C W. N. 144, 8 C. L J. 170 *Ref.* 13 C. W, N. 661 *Dist.* 7 C. L. J. 553, 8 C. L J 170, 8 C. L. J 513.

——plff is to prove that his land is *zerat* or *kashland* 13 C. W. N 66, 6 C. W. N. 105, 3 C W. N 703, 10 C. W. N. 434

——person resisting partition must prove the fact. 33 C. W. N 734: 1929 P. C. 156

——states of things existing at the time of suit (as to standard of measurement in this case) may be presumed to have existed since the inception of the tenancy. 2 C L. J. 125.

——if a letter properly directed is proved to have been posted, the presumption is that it reached its destination and was received by the person to whom it was addressed 102 I. C. 821: 1927 Pat 305 8 Pat L T. 633.

——a person pleading certain exception, is bound to bring himself within it. 15 C. 555.

Ss. 101 to 106. (Burden of proof of fact or knowledge)—*contd.*

——the accused is to prove that he made the defamatory statement in good faith and that he is entitled to plead exception 8 to s. 499 I. P. C, 102 I C 511 28 C. L J. 575: 1927 Bom. 436 · 29 Bom. L R. 713

——letter when posted is presumed to have reached the person to whom it was addressed. 102 I C 821 1927 Pat 305. 8 Pat. L. T. 633.

——a person alleging marriage should prove it 5 C L J. 1: 17 M. L. J 50 · 9 Bom. L. R. 264 P. C.

——continued co-habitation with a woman of prostitute class will not give rise to the presumption of marriage. 28 C. L. J. 173 P. C

——the onus of proving that any particular lands were included in the Permanent Settlement of 1793, is clearly on those who affirm that 3 C L J 316

——the burden of proving waiver is on the person who alleges it. 11 C. W N 844 6 C L J 62.

——it throws upon the accused the burden of proving the existence of *circumstances* which bring the case within any of the special as well as any of the general exceptions of the Penal Code. 4 C 124 3 C L R. 122

——it is upon the accused to prove the existence of facts and circumstances which would show that he is not liable to be convicted of the offence with which he is charged 32 A 451 p 453

——a witness is not protected if he makes a defamatory statement, it lies upon him to show that his statement falls within one or other of the exceptions to s 499 I P. C, 29 A 685.

——when all the circumstances went to show that the intention of the accused was to employ a certain girl as a prostitute as soon as she was physically ready for the purpose, under s 106 Evi. Act the burden lay on the accused to prove otherwise. 33 C L J 451

——when thefts occured at different dates the presumption is that stolen articles passed from the thief to the receiver on different dates also, the accused is to prove otherwise 96 I C 120 27 Cr L J 872

Ss. 107 & 108 (Burden of proof of death)

——ss 107 and 108 relate to the question whether a man is alive or dead 23 B 296.

——there is a presumption in favour of continuance of life and it is for the person asserting death, to prove it. 64 I C. 468: 22 Bom L R 771, 1 Lah 554

——these secs refer to a man being alive or dead at the time when the question is raised and not as to the time of the death. 35 C 25 · 5 C. L. J 649: 11 C W N. 853 8 A 614 · 23 B 296 · 11 C. L J. 580. 6 I C. 244 · 1923 Bom. 208 69 I. C. 835. 47 B. 451. 100 I. C 446 · 1927 Nag 104, 100 I C 833 1927 Lah. 284.

Ss. 107 & 108. (Burden of proof of death)—*contd.*

——it is on the person, who alleges that the person was dead at some antecedent time to prove that fact by evidence. 35 C 25: 5 C. L. J. 649 11 C. W. N. 883: 14 C. W. N. 311. 11 C. L. J. 138: 37 C. 103, 1 Pat. 475 3 Pat. L. T. 352.

——under s. 108 there may be presumption as regards death and nothing as to point of time 34 A. 36: 37 M. 440, 41 M. L. T. 295. 21 M W. N. 610, 45 A. 466, 43 A. 673, L. R. 6 All. 227, 43 C L J 249 24 A. L J. 105 30 C W. N. 721. 93 I. C. 250: 5 Pat 312 1926 M. W. N. 203 P. C., 54 C. 186: 43 C. L J. 573: 97 I C 247.

——onus of proving that the death took place at any particular time within seven years lies upon the person who asserts it 30 C. W N 721: 43 C. L J. 249. 24 A L. J. 105: 93 I C. 280: 5 Pat. 312 1926 M W. N 203 P C., 54 C. 186: 43 C. L J. 578: 97 I. C 247. 1926 Cal 1056

——the rule of Mahamedan Law that missing person is to be regarded as alive for ninety years from the date of birth is superseded by s 108, 7 A 297, F. B, 43 A 673, 19 A L. J 713. 63 I C. 286 so also the rule of Hindu Law that at least 12 years should elapse before a man unheard of should be treated as dead, is inapplicable on the face of the s, 32 M. L. T. 6, 1923 M. W. N. 49: 71 I. C. 305, 1 A 53 F B, 8 A 614.

——a person who claims under Mahamedan Law a share in the property of his grand-father, must show either by establishing a presumption under s. 108, or by actual evidence, that the death of his father took place at the date subsequent to that of the deceased owner, 33 C. 173 . 32 I. A. 177: 10 C. W. N. 33: 2 C. L. J. 236 P C, 19 A L. J 713. 63 I C. 286. 7 A. 297: 11 A. L. J. 355: 19 A. L J. 713: 63 I. C. 286.

——there are two possible alternative courses which might be utilised in a case where one has to face an unexplained disappearance of a person about whose death nothing is known. One might be that if the circumstances were such as would justify a prudent person in coming to a conclusion that the death was extremely probable, an application might be made to the proper court upon affidavit showing the circumstance and asking leave to presume the death, or in the alternative if the court did not think that the evidence produced before it was not sufficient upon which it could prudently be said that death could be presumed, then, in such cases, the Court could and should appoint some person to look after the affairs of the individual who has disappeared until his death can properly be presumed. 3 Pat L. R. 43: 86 I. C. 358: 4 Pat. 378: 1925 Pat 369

——s. 108 provid[illegible] a rebuttable presumption of law ar[illegible] this it does not follow that [illegible] re can be no presumption of [illegible] 1927 All. 687.

S. 109. (Burden of proof as to relationship of partners, landlord and tenant and principal and agent).

——when it is proved that the person in possession before the defendant was a tenant, it is for the defendant to show when the relationship ceased and possession become adverse 28 M. L. J. 361 : 27 I. C. 804

——relationship of landlord and tenant continues until it is proved to have ceased 36 M 53.

——mere non-payment of rent does not put an end to the relationship of landlord and tenant. 4 C. 314, 3 M. 118, 17 B 736, *26 B. 410, 7 C. L. J. 202, 6 C. L. J 72.*

——when a tenant holds over after the expiration of the terms of the tenancy it is considered to be a new tenancy. 65 I C. 589.

——when a tenant holds over, he does so on the terms of the expired lease unless new stipulation is made 2 C W. N. 303, 6 C W. N 589, 9 C W N. 108n, 28 C 227, 16 C W. N. 496, 14 C. W N. 56n

S. 110 (Burden of proof as to ownership)

——person in possession is presumed to be owner. 103 I C 36.

——though s 110 recognise a presumption that the person in possession also has a good title, there is no corresponding section which says that the persons with title should be presumed to be in possession. 1923 Bom 361.

——when evidence of possession is equally strong, presumption will be that the possession goes with the title 27 C W. N 305 : 36 C L J. 396, 36 C 1 12 C W. N, 1095 · 8 C L J 436 P C., 15 C. L J. 1

——where evidence of possession is conflicting and not conclusive on either side, the presumption that possession goes with title must prevail 12 C. 38, 8 C W. N 876, 19 C 661 P C, 5 C L. J 71, 10 C. L J 527, 31 M 528, 13 C. L. J 625, 36 C. L. J. 396, 27 C 25.

S 111 (Proof of good faith in transactions).

——the relation between the parties must be such as to sugge[illegible] a special influence or control The mere relation of a daughter [illegible] mother in itself suggests nothing in the way of special [illegible] or control 33 C 773 10 C W. N. 570 3 C L J 4[illegible] . 3 A L [illegible] 353 8 Bom. L R. 379 P C.

——cases of fiduciary relationship between legal pract[illegible] and client 7 W. R. 99, 12 C 225 23 C 805 15 M 389, 16 C W [illegible] 649, 19 C W. N 162 · 23 I C 642, P C, 22 C W N 491 [illegible] Principal and Agent. 25 A 358 23 A W. N 70, 18 C 545 [illegible] B. 271 : 8 Bom L R 652, 10 I C 57 · 10 M L T 31[illegible] guardian and ward, 30 M 169 17 M L J 19 · 2 M L [illegible] between husband and wife. 20 A 447 11 M. I. A. 551 [illegible] R 153, between spiritual advisor and disciple 12 A [illegible] 1 W N. 649

S. 111. (Proof of good faith in transactions)—*contd.*

——where fiduciary relationship existed undue influence is presumed to have existed until the contrary is proved. 34 C L J 529, 563 : 10 W. R 128.

——where a party relies on a deed executed by a Pardanashin lady he must prove that it was the free and intelligent act of the lady. 95 I C. 506 · 1929 Nag 414.

S. 112. (Birth during marriage is conclusive proof of legitimacy.

——before presumption of legitimacy arises all the facts specified in the sec should be proved 1923 Nag. 43, 68 I. C. 465

——claimant must prove legitimacy. 44 A. 470.

——the burden is shifted by showing that the son has been acknowleged by his parents to be their son and that he has been accepted as such by repute and for 40 years 102 I C. 713. 1927, Mad 733

——the words "no access" seem to include impotency and the other physical incompetency. 18 B 468 : impotency is equivalent to non-access. 26 I C 996 What is impotency. 24 C. W N. 914

——non-access must be proved by cogent evidence 39 I. C. 29 : 56 P W. R. 1917

——the burden of proving non-access lies upon him who disputes the paternity of a child and it has been held that the serious illness of the husband during the period in which the child must have been begotten was not sufficient to rebut the presumption arising under this s. 29 C. 111 : 6 C. W. N. 146 P. C., 7 C. W. N 617 : 25 A 403 P. C

——birth during continuance of the marriage gives rise to the presumption of legitimacy. 7 Lah L. J 184 ; 90 I C. 123. 1925 Lah. 414 : 1925 Mad 426.

[illegible] the continuance of the second [illegible] birth of the [illegible] second husband [illegible] the point of [illegible], the time of [illegible] 531 · 8 Lah L. J 247

——as to the validity of marriage and legitimacy challenged on the ground of insanity of husband. 38 C. 700.

——there may be presumption of legitimacy on the ground of likeness between father and son. 19 C. W. N. 103n.

——where a person claims to be the son of a deceased person, he must prove that he was born within 20 days after the death of his father 29 C. 111 : 6 C W. N. 146 : 4 Bom. L. R. 243 P. C. 7 Bom. L. R 95, 7 C. W. N. 617 P. C.

——under s. 112, presumption is that a child born within 280 days after possibility of access is legitimate. It is not that such a child was conceived 280 days before its birth. 27 M. L. J 54, 8 M. 89 *Ref.*

S. 112. (Birth during marriage is conclusive proof of legitimacy)—*contd*

——where a boy was born about 7 months after marriage and it was not disputed that the father had no opportunity of access the child was held to be legitimate 26 I. C 969

——difference between legitimacy and legitimation by acknowledgment 26 C. W. N. 81 P C.

——the law presumes in favour of marriage and against concubinage when a man and woman have co-habited continuously. 15 I. C. 328, 63 I C. 387: 2 Lah 207, 60 I. C 375

——where there is *prima facie* evidence of co-habitation as man and wife and a long course of treatment as wife the presumption of marriage can be repealed only by evidence of clearest character 15 C. L J 621 45 C. 878 P. C.

——In England the declaration of a father or mother cannot be admitted to bastardise the issue born after the marriage but the Evi. Act does not contain any such rule 95 I. C 834. 1926 Bom 348: 28 Bom. L. R 607.

S. 114. (Court may presume existence of certain facts).

——

property [illegible]
possessi[illegible]
not aris[illegible]
is stoler[illegible]

——no time limit can be laid down to ascertain whether possession of articles is recent or otherwise If few stolen articles be found in possession of a person under the probability of being honestly received, some after the theft, the presumption under the law will not arise 94 I C 361 27 Cr L J. 617 1926 Cal 925.

——in a criminal case the onus is on the prosecution to prove the guilt beyond doubt and the burden never changes 52 C 223, 24 C. W. N 619 *Ref*

——it is unsafe to base a conviction on the uncorroborated testimony of an accomplice 44 C L J 216 1927 Cal 63.

——nothing can be presumed which offends legal principle 16 C W N 418.

[illegible]de against but in favour of [illegible] N. 745 53 C 533 24 A. L. J.

[illegible] relates to the existence of the certain facts and not to their probative value. 44 C L J 265: 1927 Cal 49

——inconsistent pleas and pleas raised but not proved indicate falsity of defence 33 C W N 430 27 A. L. J 261: 1929 P C. 95

——the presumption is that a Hindu family is joint in food, worship and estate 12 M I A 523, P. C. 3 M I A 229, P. C. 10 M. I A. 403 and that the family once joint retains its position as such. 11 M. I. A. 369. P. C

S 114. (Court may presume existence of certain facts)—*contd.*

——the presumption that all property including acquisitions made in the name of individual members, is joint family property, does not apply to a case governed by the *Dayabhaga Law*. 31 C. 448.

——the presumption is that acquisition of property by a member is joint family property. 14 M I A. 412: 13 M. I. A. 333, P. C

——presumption as to acquisition by Hindu widow with the profits of her husband's property is that it is her own property 25 M. 351, 20 I A, 12 P C, (10 C. 324), *Ref*

——there is no presumption when one co-parcener separates from others, that the latter remain united. (Mitakshara) 30 C. 725: 7 C W. N. 642: 5 B L. R 469: 30 I. A 130 P. C.

——the mere fact that the mortgagor is in possession of the mortgage deed does not prove that the mortgagee is a *benamdar*. 1923 Bom 429

——the inference of continuance whether backwards or forwards whether upwards or downwards, is an inference of fact and may therefore be rebutted. 1923 Cal. 247: 72 I. C. 849. 36 C L. J. 339

——signature by sheristadar in the writ of attachment "by order" of the Court should be presumed to be regularly done until the contrary is proved. 27 C W. N. 1042: 37 C. L J. 331.

——the posting of a letter if not returned raises the presumption that it reached the addressee. 45 M. L. J. 817: 33 M L. T 217, 8 Pat L T 633. 102 I C 821: *1927 Pat 305.*

——where the evidence on both sides is balanced the presumption is that the younger survived the elder. 1922 Bom. 347

——when an appellate judgment is silent on a point the presumption is that it was given up 68 I. C. 740

——possession of one member of a Hindu joint family is presumed to be the possession of all 11 B L R. 193.

——the presumption is that when an immovable property is purchased by a Hindu or Mahomedan in the name of his son, it belongs to him. 6 M. I A 53: 20 W. R 269. 13 M. I. A. 232 P C

——when a Hindu family is joint and a nucleus exists, the onus is on the party setting up separate property. 18 C. L. J. 548, 5 C. L J. 338: 11 C. W. N. 478, P. C.

——when a property stands in the name of a junior Hindu member and no separate fund is proved the presumption is that the father acquired the property in the name of the son 18 C. W. N 428 P. C.

——there is no presumption that debt contracted by the manager of the Hindu family was contracted for the benefit of the family 34 A. 126, 135.

——*suspicion though a ground for a scrutiny* cannot be made ground for presumption 16 C L. J. 629, 21 C. W. N. 585, P. C, 27 Bom L. R. 746: 1925 P. C. 177.

——alienation by widow with the consent of the next reversioner raises the presumption, either that there was legal necessity or

S. 114, (Court may presume existence of certain facts)—*contd.*
that the purchaser made reasonable inquiry and acted in honest belief. 17 C W N 701, 17 C L. J 499, F B 35 C 939: 12 C W N. 837, *overruled* 19 C 236 P. C. *Discussed*. Such consent of the reversioner also raises the presumption of the propriety of the transaction 17 C W. N. 1062

——when a Hindu family migrates from one part of the country where the Mitakshara law prevails, to another where the Dayabhaga law prevails, the presumption is that it carries with it the laws and customs prevailing in the part wherefrom it has migrated. 29 C 433: 6 C. W N. 490 29 I A 82 P. C

——person (true owner) in possession of land before diluvion is presumed to have continued possession during the time of diluvion, till he is dispossessed 6 C 725, 7 C 225, but in case of the possession by trespasser, possession during submergence rests with the true owner. 29 C 518: 29 I. A 104 6 C W N 617, P C. 8 Bom. L R 537, 9 C. W. N 111

——when evidence of possession on both sides is conflicting it may be presumed tha possession follows title. 8 C W N. 876, 12 C 38, 27 C. 25, 27 C W. N 305

——unsettled and unoccupied waste land being the property of no private owner, must be presumed to belong to the State 3 C. W N. 695

——where land is not let out for agricultural purposes and tenants are in possession for a long time by erecting buildings, and successions to the tenancy have taken place, presumption is that it is parmanent tenure 8 C 960, 5 C L J, 178 · 11 C W N 242, 5 C W N. 858 28 C 738 but in the absence of any of the above circumstances there will be no such presumption. 3 C W N 255

——non-payment of rent for a long time gives rise to the presumption that it is rent free. 24 I C 319, 354, but the cause of non-payment may be ascribed to some other reason 24 I C 586

——there is no presumption that lands are *lakhiraj* 4 M I A. 497, P C *or permanently settled by Govt* 2 C W N 695

——non-production of best evidence available raises the adverse presumption. 33 C. W. N 430: 27 A L J. 261 . 1929 P. C 95

——non-production of original title deed raises a strong presumption against the plff 62 I. C 697.

——where a party supresses a document the court is bound to make every presumption, consistent with facts against him 63 I C 625, 1917 M W N 487 P. C , 6 M I. A. 492 P C but it cannot displace contary inference supported by adequate evidence 13 L W 293 63 I. C 740

——non-production of accounts by money-lender raises perverse presumption 1925 Oudh 11, 1922 P. C 378 P. C

——non production of collection papers by tenant gives rise to a presumption against him 8 C W N 1. 30 C 1033 30 I. A. 177, P. C , 63 I. C. 625.

——non production of account-books by a party when they would throw much light on the case, raises adverse presumption.

S. 114. (Court may presume existence of certain facts)—*contd.*

29 C W. N. 941: 23 A. L. J 97: 86 I. C. 122: 49 M. L J 162 P. C., 10 Lah. L. J. 93: 111 I. C. 596: 1928 Lah. 397.

——but when one of the parties to a suit refuses to produce the documents in his possession though ordered by the court to do so whatever suspicion may be cast upon his conduct by his refusal it cannot alter conclusions which really turn upon the constructions of documents which are before the court. 27 Bom. L. R. 746: 1925 P. C 177 P. C.

——if the Crown withholds relevant document inference will be adverse. 50 C 276, 36 C. L. J. 345, 346, 40 M. 402, 33 C. L J. 336

——the presumption arising from the non-production of a document is not quite as strong one in the case of an old document ...s is mere

... raise an ... ce can be ... h. 821. 29

——when a man and a woman have cohabited continuously for a number of years the law presumes in favour of marriage and against concubinage. 33 C W. N. 645: 27 A. L J. 465: 1929 P. C 135.

——continual co-habitation and acknowledgment of parentage or treatment which tantamounts to acknowledgment, is presumptive evidence of marriage and legitimacy. 3 M. I A. 295 P. C. 3 A 723, 10 A. 289, 3 I A. 291: 2 C. 184, 7 C. W. N. 617: 25 I. 403 P. C., 29 C. 111, 2 Lah. 207: 3 Lah. L J 317: 63 I. C 397 But unless all the above circumstances be present there will be no such presumption 26 A. 295.

——long co-habitation raises the presumption of marriage unless the connection is known to have started in mere concubinage. 98 I. C 887: 1927 Lah. 48: 8 Lah. L. J. 532: 27 Punj L R 823

——presumption is that the document was made on the date which it bears 21 C. W. N. 585 P. C.

——when the document is in the hand of the debtor the presumption is that the debt has been cleared up 1927 Pat 186, 17 C. W N. 49, P C, 29 C. 334: 23 I. A. 43: 6 C W. N 401, P C 103 I. C. 488.

——but where the title deeds which the mortgagor handed over to the mortgagee are still in the hands of the latter no such presumption will arise. 46 C. L. J. 292: 105 I. C. 253: 39 M. L. T. 290: 53 M. L. J. 295 P. C.

——when official documents are destroyed by fire and documents are prepared, presumptions as to those documents are that official acts were regularly done. 21 C. W. N. 897, 1921 Pat. 341: 51 C. 226, 1923 P 96, 3 Pat L. T. 617. 67 I. C. 471.

——the meaning of Ill. (e) is that Official Act will be presumed to have been regularly done, but where under the Act certain things are required to be done before any liability attaches to any

S. 114. (Court may presume existence of certain facts—*contd*.

person, it is for the person who alleges that that liability has been incurred to prove that the things prescribed in the Act have been actually done. 53 C. 718 ; 30 C. W. N 713 : 1926 Cal. 968 . 96 I. C. 264.

——there is no impropriety to refer a thing as having been done when that thing is required to be done by a section in a statute. 96 I. C. 1039 : 1926 All 369 · 24 A. L. J. 825 F. B

——presumption is that the acts of the court were regularly carried out unless the contrary is shown. 93 I C 591 1926 All. 691

——things prescribed by statute may be presumed to have been done. 48 A. 766

——when an accused is convicted under s. 412 I. P. C maxi- ing his knowledge 32 C. L J. 19 of an accomplice : 1927 Cal. 536, 99

Ss. 115, 116, 117. (Estoppel)

——ss. 115 ar N 1135, 5 C. 669, 20 C 296 P W. N 721

——a party 10 C. W. N. 747 : 42 I. C. 55 C 266 : 1928 Bom 279.

——estoppel must be pleaded by the party. 28 C. L. J, 91 : 22 C. W. N. 179.

——every estoppel must be reciprocal, *i e*, to bind both the parties. 24 C L J. 541 20 C. W. N. 1140. 6 C L J. 621.

——estoppel is purely personal and will not affect others in so far as they claim a title otherwise than through the person estopped primarily. 85 I. C. 540 1925 Cal 993

——rule of estoppel is purely personal against the persons estopped and does not create any substantive right *in rem* It does not depend on any motive, knowledge or intention of the person making the representation 110 I C. 665 1928 All 459. 26 A. L. J 1106

——where the plffs. made statements in a suit inconsistent with those made defendants, but their father and defts by reason plffs. were not 1195.

——a prior mortgage cannot take the advantage of any finding in a judgment of a partition suit to which he is not party. 8 C. L. J. 478 13 C W N 287.

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—— mere opinion or on th 565 . 1928 All. 459 : 26

Ss. 115, 116, 117. (Estoppel)—*contd.*

——estoppel must be pleaded with sufficient clearance. 6 Pat. L. J. 273 : 2 Pat. L. T. 556 : 61 I. C 807.

——the acquiescence or estoppel which will deprive a man of legal rights must amount to fraud. What elements are necessary to constitute such fraud enumerated. 73 I. C. 233 (C), 48 A. 473 : 92 I. C. 1017 · 1926 All. 324.

——the vendor of a property is estopped from denying the title of a person who has purchased from a purchaser from him. 35 C. L. J. 78.

——when one party does not rely on the action of the other party there is no estoppel. 23 C. W. N. 521.

——the test is whether the representation caused the other party to act on the faith of it. 20 C. 296, P. C., 4 C. L. J. 323, 62 I. C. 809.

——only that person to whom the representation was made or from whom it was designed can avail himself of it, if the dec[illegible] did not hear it b[illegible] or withi[illegible] the [illegible] A declara-tion [illegible] property [illegible] does not operate as estoppel as against him in favour of a private purchaser from the Jt. Dr. 1927 Cal. 34 : 97 I. C. 625.

——widow and reversioners joining in a gift. reversioner cannot chal[illegible] 264 [illegible] of land on [illegible] title after the [illegible] wards, there was no estoppel by conduct. 4 Pat. L. J. 730.

——this sec. overrides ss. 91 and 92 Evi. Act. 72 I. C 931.

——unless barred by estoppel by conduct true owner is entitled [illegible] 137 [illegible] that he [illegible] him to do [illegible] is arrayed [illegible]

——grantor of a permanent lease is estopped from asserting his right as that of a raiyat. 105 I. C. 541 : 1928 Cal 87.

——suit for rent estops a person from subsequently denying the tenancy. 64 I C. 264.

——the purchaser in execution of a decree against the husband is his successor in interest and is estopped like the husband to deny the title of a mortgagee from the wife in whose name the property was purchased. 26 C. W N. 436.

——the purchaser in exection of a money decree subject to a mortgage cannot susequently challenge the mortgage. 95 I. C. 501 : 1926 Nag. 446, (47 C. 446, 19 N. L. R. 5) *Rel. on.*

——s 115 deals with estoppel by misrepresentation 33 C 915, but misrepresentation on point of law does not operate as estoppel. 30 C 583.

Ss. 115, 116, 117. (Estoppel)—*contd.*

——the term 'intentionally' is used in s. 115 for the purpose of declaring the law of India to be precisely that of the law of England. 17 C. 296 : 19 I A. 203 P. C.

——estoppel is only a matter of proof and evidence and not a matter of equity 20 C. 236, P. C, 29 B. 580, 25 B. 499, 5 C. 649, it is a mixed question of law and fact. 6 Bom. L. R 440, 640

——the doctrine of estoppel cannot be invoked to defeat the plain provision of Statute 19 C. W. N 208, 211, 22 C. W. N. 894, 36 C 920, 38 C 512, 17 C W N 408, 60 I C. 3, 20 N. L. R. 162 : 1925 Nag. 125, 111 I. C. 175 : 1928 Lah. 609 . 10 Lah. L. J. 413 F. B.

——there cannot be any estoppel against a statute nor can the parties contract themselves out of any statute. 87 I. C. 565 : 1925 Cal. 1962

——although the house of an agriculturist is not saleable under s. 60 (1) (e) of the C P. C yet an agriculturist is estopped to take such objection when he has once conceded to it 102 I C 616 : 8 Pat. L. T. 563 1927 Pat 233, (34 A. 22 F B. 24 C W. N. 575, 4 B 25) *fol.*

——no court can enforce as valid that, which competent enactments have declared, shall not be valid, nor is obedience to such an enactment or thing from which a court can be dispensed by the consent of the parties, or by a failure to plead or to argue the point at the out-set. 52 C 408 . 86 I. C. 545 23 A. L. J 105 : 29 C. W. N. 693 27 Bom L. R 770 : 1925 M W N. 257 P C

——it is not competent to a party to a contract enjoying the benefit under it to say that he is not bound by one of its terms. 82 I. C 970 . 1925 Cal 389.

——a compromise does not constitute an estoppel debarring a party to challenge it even if it be beneficial to him, if he has not taken any benefit thereunder 108 I. C. 44 . 1928 Cal. 334.

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——question in each case should be dealt with on broad grounds of justice and good sense, irrespective of the existence of a precedent in point 3 C L J. 629 10 C. W. N. 747 33 C 915.

——immaterial recital in a deed does not operate as estoppel. 13 C. L. J 271.

——knowledge of the true state of things is a bar to plead estoppel. 17 C W. N. 137, 2 Lah 88 . 3 Lah L. J. 223 : 62 I C. 665, 1923 M. W N. 225 : 72 I. C. 545, 1925 Mad 95 . 85 I C. 855 : 47 M L. J 622.

Ss. 115, 116, 117. (Estoppel)—*contd.*

——there is no estoppel when both parties are equally conversant with the true state of the fact. 23 B. 406, 20 M. 325, 30 C. 539 : 30 I. A. 114 : 4 C W. N 441 : 6 Bom. L R. 421 **P. C.**, 35 C. 267 : 10 C. W. N 650 : 4 C. L. J. 22.

——there is no estoppel where the real fact is known to the person to whom a false statement is made. 28 B. 393 : 50 C 529 **P. C.**, 1923 M. W. N. 225 : 72 I. C. 548, 25 Bom. L R. 1170.

——or where truth of the matter appears on the face of the proceedings. 27 C 407 : 27 I A. 33 · 4 C. W. N. 533, **P. C.**

——a judgment operates as estoppel between parties, 6 C L. J 621, so also the decision in an execution case on a point of law 2 C. L. J 584

——a mortgagor cannot question the title of the mortgagee. 19 C. W. N 208.

——when one causes a conveyance in favour of another and assists him in getting mutation of name, he is estopped from denying the latter's title. 22 C. W. N. 891, **P. C.**

——doctrine of estoppel by conduct does not apply to an act done out of kindness and affection as that would be unreasonable and not conducive to the peace and welfare of the families. 18 C. 341 : 18 I A 9 **P. C.**, 33 C. 1119 : 19 C. W. N. 765.

——granting permission to build—reliance on such permission and acting on it operates as estoppel. 45 B. 80, 3 Pat. L. T. 467 : 67 I. C 744.

——where a person in *bonafide* belief that the property belongs to him spends money in building and the true owner stands by, he is estopped from asserting his title 97 I. C. 441 : 1927 Cal 54

——silence does not operate as estoppel unless it be fraudulent. 73 I C. 222 (C), 7 C. L J. 604. I C. L. J. 23 . 32 C. 357 *contra*, 9 A. 413 p 419, or there is duty to speak. 85 I. C. 540 : 1925 Cal. 993, 85 I C. 747.

——acquiescence may operate as estoppel, 33 C 1119 : 4 C L J. 198, if it is fraudulent. 73 I. C. 223 (C).

——though mere acquiescence is not equivalent to consent, yet consent need not be by word and may be by act, and if consent can be intimated by conduct as well as by act it is clear that acquiescence may, under certain circumstances be taken to be consent 1925 Cal. 993 85 I. C. 540.

——a person deriving any advantage and taking benefit under the order of the court is to be deemed to have acquiesced in it and cannot challenge it at any subsequent proceeding or by way of appeal (12 C L. J 556, 21 C. W. N. 232) *Rel. on.* but where part of the amount claimed is decreed according to the admission of the deft. and the claim for the rest is dismissed, execution of the decree as regards the part decreed does not estop the plff. from appealing against the dismissal of part. 95 I. C. 10 : 1926 Cal. 960 (12 C. L. J. 556, 21 C W N. 232) *Dist.*

——a party cannot contend against an order after enjoying benefit under it. But a D. Hr. may accept the costs deposited in

Ss. 115, 116, 117. (Estoppel)—contd.

a money-suit in which only simple interest is allowed and compound interest is not allowed and at the same time continue the appeal. 72 I. C. 554 (C)

——a party who has asserted a certain position in a previous litigation cannot re-agitate the matter on the assumption of fresh fact. 106 I. C 484.

——if a party having a right stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwords complain But acquiescence cannot rehabilitate or render valid a transaction which is *ultra vires* and illegal. Further, estoppel by acquiescence connotes, among other things, that the person estopped, in effect has represented to the person who is infringing [illegible] claim that his right is being [illegible] representation has altered [illegible] est. 52 C. 748 : 29 C. W N.

——acquiescence is an instance of estoppel, mere non-interference is not enough Acquiescing with full notice in act prejudicial to oneself so as to evidence reasonable belief of his consent followed by consequent alteration of other's position is necessary. 1925 Cal. 288.

——negligence may operate as estoppel, 2 Bom. 1119, 820, 25 B. 599 if it is fraudulent. 73 I. C. 223 (C).

[illegible]

——a principal is not estopped by agent's misrepresentation unless it was within the scope of his agency. 9 M. L J. 57

——a person is not entitled to give an undertaking to a criminal court to abstain from certain action and to go and file a civil suit for declaration that the undertaking given by him was of no effect. 85 I C 586 : 1925 All. 605.

——where a vendee under a contract for sale of immoveable property stated to the vendor that his (vendee's) money was ready and that the title was being engrossed and where those two matters alone were wanting to complete the sale and where the vendor gave five days' notice to the vendee to complete the sale, held that the vend[illegible] of his statements 41 C. [illegible] 7 Bom L. R. 814 : 1925 M. [illegible]

[illegible] settlement come to by her [illegible] whereby he released by [illegible] he had in the property. [illegible]

——A person who takes the possession of certain property as mutwalli cannot say that the wakf is void 55 C. 443 : 32 C. W. N. 248 : 1928 Cal. 130 : 105 I. C. 647.

Ss. 115, 116, 117. (Estoppel)—*contd.*

——a coparcener enjoing property under the will of anothe coparcener and acting under its terms cannot repudiate the will sut sequently 104 I C. 650 : 1927 Mad. 1066

——the signature of attesting witness does not fix that witne with knowledge of the contracts of the document or with an liability under its terms 42 C. L J. 215 ; 90 I. C. 534 : 26 Punj L 215 : 87 I. C 652 . 1925 Lah. 413, 112 I. C. 89 : 9 Lah 214 : 19 Lah. 432.

——although attestation by itself does not amount to an estopp it can do so when there are circumstances showing the consent the attestor in the transaction 32 C W N 533 : 47 C. L J. 18 30 Bom. L. R 267 : 107 I. C. 20 : 29 Punj. L. R 182 : 26 A. L J. 55 1928 M. W. N. 933 . 1928 P. C. 20 **P. C.**

——when the widow and the next reversioner joined in conve ing a property, the reversioner cannot, after he comes into possessi challenge the transaction under the rule of estoppel. 1925 Cal 15 87 I. C 790.

——if a Hindu reversioner enters into a compromise wh amounts to a settlement of a doubtful claim, it is binding on t although at the time of settlement he was merely a reversione. A 687 96 I. C. 595 . 1923 All. 715.

——a mere undertaking may operate as an estoppel thoug may not amount to a contract. 1925 Cal 94 · 84 I. C. 124

——to oppose joinder of parties precludes objection for r joinder 6 P. L. T 237 : 1925 Pat 57 : 84 I. C. 293.

——when in partition proceedings under the B E Partition it was conceded by all the landlords that certain lands were free lands and the lands were taken as such in the adjustmen assets of the different co sharers, held that the landlords to wl the lands were allotted could not afterwards deny that lands rent free 29 C W. N 333 . 86 I. C. 835 ; 1925 Cal 635.

——where subsequent to a lease the lessor's agent wrote a le to the lessee stating that the latter had a permanent right in leasehold and he might erect building thereon and the lessee acc ingly erected a building, held that without deciding the ques whether the lease was originally a permanent lease or not the l lord was estopped from evicting the lessee from the demised l 30 C. W N 49 : 41 C. L. J. 543 ; 6 Pat. L. T. 404 : 23 A L. J. 1925 M. W N. 453 **P. C**

——if the agent of a firm exceeds the limit of his authority firm is bound if the contracting party has reasonable groun believing, and in good faith believes in the authority. 26 C. 3 C. W. N. 313, **P. C.** but not when the agent acts fraudulentl his own interests. 6 C. W. N 429.

——The ground of estoppel cannot be pleaded against an in unless the infant has practised fraud 12 C W. N. 481, 26 C C W. N. 498, appeal from 25 C. 616 : 2 C. W. N. 330

——an infant is not presonally liable to pay a debt contract him by fraudulent misrepresentation 24 C. 265 : 1 C. W. N 270

Ss 115, 116, 117. (Estoppel)—*contd.*

——where an infant, by fraudulent misrepresentation as to his age, induces plff. to advance him money on the security of a mortgage the plff. is entitled to a mortgage-decree without interest. 2 C. C. W. N. 18, 60 I. C. 267, 1923 Bom. 169 · 46 B. 137.

——but when an infant induces a person to enter into a contract by false representation that he is of full age he is not estopped to plead inability to contract because s. 115 of the Evi. Act. must be read subject to the Contract Act. 111 I. C 175 · 1928 Lah. 609 : 10 Lah. L. J. 413. F B.

——when a minor makes fraudulent representation of his age, he is not protected under law 25 C. 371 · 2 C. W. N. 18 and 201. 23 Bom. L R. 975, 62 I C. 237, 1 Lah. 389 . 59 I. C 393, 69 I. C. 543, but a false representation made to a person who knows it to be false, is not [illegible] 30 C. 539 [illegible]

——wh [illegible] whom he [illegible] subsequent [illegible] the ground [illegible] to the suit. [illegible] *fol.* (20 A. 90, 45 A [illegible]) Dist

——an infant is not estopped by the acts and admission of others (mother and natural guardian) 17 C. W. N. 10

——a mortgagor is estopped from denying his right to mortgage alleging that he is only a trustee. 1 Pat. L R 225. 4 Pat L. T. 437.

——a deed is not binding against a witness to it, as he cannot be supposed to know its contents 17 C. W N. 255 n, 3 C W. N. 207, 24 C. L. J. 487, 21 C. W. N. 225 42 C. 876, P C., 26 C. W. N. 201 P C.

——ss 116 and 117 are not exhaustive of the doctrine of estoppel by agreement 23 C. 915 · 3 C L. J. 629 10 C. W. N. 747, 32 C. W. N. 867, 49 C L. J. 1

[illegible] of the landlord who lets him [illegible] 6 C 725, 69 I C 647 (A) L. R [illegible] 45 C. L J 249 : 103 I. C. 93 .

——s 116 provides that a tenant cannot deny that at the be- [illegible]

Ss. 115, 116, 117. (Estoppel)—*contd.*

——s. 116 does not apply to tenants who have previously inducted. 1923 Lah. 483: 73 I. C. 450, 72 I. C. 855, 1923 284.

——if through ignorance or fraud a tenant attorn to a cer person he is not estopped from showing that the lessor ha title either when the lease was executed or attornment was by payment of rent, but the onus of proving want of title the lessee 91 I. C. 669, 1926 Cal. 720.

——the tenant may say that the contract of tenancy is vo voidable on account of mis-representation or fraud 30 Bom. L 741: 111 I C 911, 1928 Bom 265.

——when tenant has executed a kabuliyat and has obta possession of certain land he cannot, in a rent suit, set up the that the lessor is only a *benamdar* for some other person 572, 20 A. L. J 907 49 C. 37.

——in a suit for rent by registered proprietor, deft. may se the title of a third person to whom he had attorned in good f 4 C. W. N. 606

——the tenant can prove subsequent cessation of landl

——when a tenant after taking land from one person pa to another he is not estopped from disputing the title of that ot 1925 Cal. 482.

——landlord acknowledging in deeds the permanency of tenancy is estopped to deny it. 23 C. W. N. 966

——a person not claiming possession of land under tenant is estopped from denying title of the lessor 44 A 671.

——a tenant cannot deny title of landlord without resto or giving up possession 3 Lah. L. J. 227: 60 I C 502, 24 C. L 103, 20 C W. N. 1335, 9 O and A. L. R. 1011, 67 I. C. 269, 32 C. N 867, 1928 Cal. 546.

——the tenant cannot deny the title of the landlord who ducted him, even after the termination of the tenancy. 32 C N. 867: 1928 Cal. 546, 49 C L J 1.

——a person entering into a covenant in his *kobuliat* is bo to recognise right so recorded even if such rights were *incorrec* recorded and had no real existence. 33 C. L. J. 317: 63 I. C. 161.

S. 118. (Who may testify).

——before recording the evidence of a child the court sh test his compe ... although it is compulsory.

——before ... st be examin and he must ... 3 C. W. N. 14 18 C L. J. 582, 11 C. W. N. 61.

S. 118. (Who may testify)—*contd.*

——the only test of competency is that the witness should not be prevented from understanding the question put to him or from giving rational answers to them for tenderness of age or other [illegible]

S. 122. (Communication during marriage).

——communication during marriage should not be allowed to be given out. *40 C. 891, 1923 Lah. 40.*

S. 123. (Evidence as to affairs of state).

——statements made by witness in the course of departmental inquiry into the conduct of a police officer charged of taking illegal gratification are not privileged and the accused are entitled to cross-examine. 16 C. W. N 431.

S. 124. (Official communication).

——statements made by witnesses in the course of departmental inquiry into the conduct of police officers who were subsequently put upon trial on charges of taking illegal gratification are not privileged. 16 C W N. 431

——documents produced or statements made under process of law cannot be said to be made or given "in official confidence." 32 M. 62 19 M. L J 263 . 4 M. L. T 317, 26 C 281.

——the deposition at the departmental enquiry is only admissible either to corroborate or contradict evidence. 40 C 898 p 918. 18 C. W. N 185

S. 126. (Professional communication).

——instructions to counsel are only privileged in the sense of being protected from disclosure to the opponent There is no privilege as against the court. The Judge can ask counsel whether he makes a charge on instructions and if so on whose. He cannot use them as evidence in the case. 40 C 898 . 18 C W N 185.

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42 I C. 532.

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S. 126. (Professional communication)—*contd.*

——*duty of* the attorney to keep client's instruction and documents, secret. 84 I. C. 353 : 1925 Bom. 1 P. C.

——absence *of* litigation or prospect thereof at the time the confidential *communications* are made is no excuse for disclosures *above case.*

——disclosure of advice given by another person is also forbidden. *above case.*

S. 127 (Section 126 to apply to inter-pleaders, etc.)

——section 126 extends to communication made to the pleader's clerk the same confidential character that attaches to a communication to a pleader direct under *s.* 126, 26 C. 53 : 3 C. W. N. 649

——statements made to the clerk of the muktear who was acting as the pleader of the accused, are privileged as those made to his employer. 25 C. 736.

S. 130. (Production of title-deeds of witness, not a party).

——a lessee is not bound to produce his original title deed. 17 C. W. N. 108 : 15 C. L. J. 6.

——if a document be the title deed of a witness or any person who would be entitled to refuse to produce it, he cannot be compelled to produce the document. 14 C. L. J. 120.

——but a party is *entitled to interrogate on facts* directly on issue *e. g.*, particulars of a document. 41 C. 6.

S. 132. (incriminating question to witness).

——a witness who being actuated by malicious motives makes a voluntary and relevant statement not *elicited by* any question [illegible] to *injure* the reputation of [illegible] P. C. and cannot claim [illegible] W. N. 911 : 2 C L. J. [illegible] [illegible] M. 477) *Ref.* 27 C. 252 *Discussed* 14 C. L. J. 31 *Dist.*

——the proviso to sec 132 does not apply unless the witness objected to answer the question. *It applied again to question asked* in the course of the trial. 16 C. W. N. 503, 15 C L. J. 399 : 39 C. 348, 22 Bom. L. R 1247 F. B.

——the mere record of a deposition is not by *itself evidence* of compulsory or voluntary *nature of* the *statement* of a witness. 105 I. C. 810 : 1928 Nag. 58

——the witness must claim the benefit under the sec 49 A. 271

——the court is to decide whether a communication is privileged or not 44 A. 360.

——statement of witness on oath is privileged. 43 A. 92 : 19 A. L. J. 940 . 58 I. C. 825.

[illegible] the question. 22 Bom. I [illegible] ted by s. 132 5 [illegible]

S. 133. (Accomplice)

——a person who has knowledge of the commission of the offence but keeps quiet for some days, is no better than an accomplice. 30 C. W. N 816 96 I. C 867 : 27 Cr. L. J. 1011

——a retracted statement of an approver is admissible against an accused 12 L. W 385 61 I. C. 528, 4 Pat. L. T. 381 : 73 I. C. 965, 69 I C. 462, 1923 Lab. 335.

——in dealing with the evidence of an accomplice the Judge is not bou[illegible]
other re[illegible]
696, 192[illegible]

——[illegible]
whose [illegible]
corroboration of any material point connecting and identifying the accused with the offence, is bad in law 86 I. C 401 . 6 Lah L. J. 608 · 26 Cr L. J. 769, 93 I. C. 884 : 1927 Pat. 232 · 27 Cr. L. J. 484

——where there is nothing outside the confession of the co-accused the accused must be acquitted. 48 A. 409 : 1926 All 377 : 95 I. C 74 : 24 A. L. J 410 : 27 Cr L. J. 746.

——where the approver's testimony was not sufficiently corroborated by the evidence as to the recovery of articles which were incapable of identification, the accused should not be convicted. 84 I. C 1052 : 26 Cr L J. 412 1925 Lah 44.

——if the court is satisfied as to the veracity of the testimony of an accomplice, conviction may be based on uncorroborated evidence of the accomplice. 85 I. C. 236 . 26 Cr L J. 492 , 1925 Rang 122

——where a witness is found from his own testimony to be privy to the crime alleged to be committed by accused, his evidence is no better than that of an accomplice. 1825 Lah 253

——a retracted confession is not the testimony of an accomplice. 40 C L J. 551.

——there is no doubt that the uncorroborated evidence of an accomplice is admissible in law 51 C. 160. 28 C. W N. 536. 81 I C 712

——it is not necessary that an approver should be corroborated as regards every single statement that he makes On uncorroborated statement he can be believed if the jury thought it reasonable. 52 C. 595 42 C. L. J. 501 : 87 I. C. 925 : 26 Cr. L J 1037, 96 I. C. 127 : 27 Cr. L J. 879 : 1926 All 70.

——a retracted confession must be much more corroborated than evidence of accomplice taken on oath. 84 I C. 712 . 1925 Cal. 406.

——an approver need not be corroborated as regards every single statement that he makes. On uncorroborated points he can be believed, if the jury thought it reasonable Proceedings of verification regarding the confession of an approver by inquiry on the spot may be of value as corroboration of the evidence of the accomplice. 52 C. 595 : 42 C. L. J. 501 : 87 I. C. 925 · 1925 : Cal. 872 : 26 Cr. L. J. 1037.

S. 138. (Order of examination and direction of re-examination.

——It implies that a party must have had an opportunity to cross-examine. 73 I. C. 339.

——where a witness dies after examination-in chief and before cross-examination, the evidence is admissible for its worth. 48 M. 1: 1925 Mad. 497.

Ss. 141—143. (Leading question.)

[illegible] be properly put in cross- [illegible] put by public *Prosecutor* [illegible] asked 42 C. 957: 19 C. W. N. 676.

S. 145. (Cross-examination as to previous statement in writing).

——a witness should not be disbelieved without *drawing* his attention to a document inconsistent with his deposition. 45 *M. L. J.* 436: 1923 M W. N. 622 · 33 M. L. T. 309 P. C.

——witness must be given opportunity to explain. 19 C. W. N. 792: 21 C. L. J. 1 . 39 B. 441 P. C.

——this section must be strictly followed; any lasity of practice cannot be condoned. 26 A. L. J. 673: 1928 All. 511.

——*previous deposition must be produced.* 7 Lah. L. J 339: 90 I. C. 657, 8 W R. Cr. 87.

——previous deposition of a witness though not read *over to* the witness is admissible under this section to *contradict the witness* at a subsequent trial 104 I. C. 100: 28 Cr. L. J. 772: 1927 Pat. 315: 8 *Pat. L.* T. 773,

——previous statement of a prosecution witness *used under* this section to cross-examine the witness or under s. 155 Evi. Act. for discrediting him cannot be used as substantive evidence against *the accused.* 105 *I.* C. 677: 28 Cr. L. J, 965: 1927 All. 705: 25 A. L J. 994.

——the first information report is admissible under *this section* and may be relied on by the defence to contradict the *informant.* 44 C. L. J. 253. 1927 Cal. 17.

Ss. 146—152. (What questions should not be allowed).

——cross-examination to credit is necessarily irrelevant *to any* issue in the action; its relevancy consists in being *addressed to the* credit or discredit *of the witness* in the box so as to show that his evidence for and against the relevant issue is untrustworthy. 19 C. W. N. 617 21 C. L. J. 528: 17 Bom. L. R. 455: 39 B 386 P. C

——scandalous questions if not relevant should not *be allowed.* 1923 Cal. 315, 5 M L. J. 138: 65 I. C. 693.

——when a question in cross-examination *reflects not on the* witness but on a third party s. 150 which must be *referred back to* s. 146, can have no application. 16 C. W. N. 145: 9 I. C. 509.

Ss. 146-152. (What questions should not be allowed)—*contd.*

——it is unprofessional on the part of counsel to cross-examine a witness as to facts within his personal knowledge. 40 C. 898: 18 C. W. N. 185.

——the question whether a counsel has exceeded the power given him for the purpose of conducting his client's case is that which can only be dealt with by a Full Bench. 16 C. W. N. 145.

——the courts' disciplinary power over advocates in relation to [illegible]

S. 154. (Question to own witness).

[illegible]

——mere changing the version does not necessarily make a witness hostile. 13 C. 53 p 56 37 C L. J. 173: 71 I. C 657

——unless there is something in the deposition which conflicts with the earlier statement affording ground for thinking that the deponent has been gained over by the defence the prosecution is not entitled to declare him hostile. 94 I. C 705. 1926 Pat. 316: 27 Cr. L J 657, 7 Pat L T 567

——where a witness called by a party is cross-examined by him, his evidence cannot be believed in part and disbelieved as to the rest but it must be rejected in toto 37 C. L. J 173 71 I C 657.

——*under this sec the result of cross-examining a prosecution* witness by the prosecution itself is to discredit that witness altogether and merely to get it of a part of his testimony. 42 C. L. J. 504 53 C 372 92 I C. 442· 1926 Cal 139

——a witness who is unfavourable is not necessarily hostile, for a hostile witness is one who from the manner in which he gives his evidence, shows that he is not desirous of telling the truth to the court. 34 C. L. J. 107, 49 C. 93: 66 I. C 15

——a party when called by his opponent, cannot, as of right be treated as hostile, the matter being solely in the discretion of the court. 34 C. L. J. 107, 49 C 93 66 I. C. 15.

——when defence puts questions in cross-examination in leading form under sec. 143, the pltf. may with the leave of the court under sec. 154, cross-examine on the point. 19 C. W. N. 676

S. 154. (Question to own witness)—*contd.*

——a witness is not necessarily hostile because in an absent minded moment he admits the truth. 3 Pat. L. J. 419 : 1918 Pat. 254 : 44 I. C. 33.

S. 155. (Impeaching credit of witness).

——as to the right of the party to impeach the credit of his own witness. 16 C. W. N 189n.

——the evidence of a witness who is hostile to the Crown may be impeached by reference to the Police diary. 3 Pat. L J 563: 45 I. C. 272.

——statements made by third persons to the police *during* police investigation may be admissible to impeach the credit of the person. 44 C. L. J. 253 ; 1927 Cal. 17.

——the first information report is admissible under s. 155 and may be relied on by the accused to impeach the informant's credit. 44 C. L J 253 : 1927 Cal. 17.

——evidence of the particular estimate formed by a *Judge in* another case of the credit to be attached to the testimony of a witness who is cross-examined in a subsequent trial is *inadmissible.* 4 C. W. N, 684 p. 685

——where the previous deposition of a witness *is relied on to* [illegible] *statements along*

[illegible] *in cl. (3)*

[illegible] *44.*

——statement to third person may be proved to *show that* the witness is unreliable but it cannot prove the truth *of his own* unsworn statement or make it evidence against third *person.* 11 C W N. 370 : 5 C. L. J. 123 ; 34 C 129 : 9 Bom. L. R. 3 : 17 M. L. J. 67 P. C., 42 M. L. J. 278 : 66 I. C. 326.

——statements of a witness made to a police officer *may be* used in court by the prosecution for discrediting *him if he tells there* a different story under s. 155 and s 162 Cr. P. C is *no bar.* 3 Pat. L. J. 568 : 45 I. C. 272.

— [illegible] officer and taken down by him ir [illegible] 155 (3) provided *only that* the p [illegible] been complied *with, in the* matte [illegible] it, which were *to be relied* upon [illegible] amination. *1925 Cal.* 1017 : 30 C. [illegible] L. J. 129

——previous depositions of witnesses *examined for the* prosecution in a criminal trial can be admitted to corroborate *the present* story. But those depositions cannot be used to contradict what the witnesses state in their cross-examination in the *previous trial.* They could not be admitted for that purpose under s 157, 1925 Pat 391 : 86 I C. 153.

Ss 157-158. (Former statements).

——retracted statements of witness before the *investigating* police officer and the *committing* Magistrate *may be used* in the Sessions Court. 23 Bom. L. R. 820.

Ss. 157-158. (Former statements)—*contd.*

——retracted statement not made before the accused cannot be used as substantive evidence. 1921 M. W N. 872 : 14 L. W. 612.

——evidence of identification in the jail cannot be used as substantive evidence in the trial 19 A. L. J. 947.

——oral accounts of statements made by witnesses to the police in the course of investigation under s. 15. Cr P. C. are admissible under s. 157 Evi. Act. 6 Pat. L. J. 241 : 2 Pat. L. T. 565 : 61 I. C. 785.

——s. 154 Cr. P C. clearly contemplates the first information received to be recorded, and not a statement made by a witness during investigation after the Sub Inspector has actually arrived on the scene and himself seen what has happened. 47 A. 280 : 23 A. L. J. 14 : 85 I. C. 650 : 26 Cr. L. J 554

——first information report against the accused is admissible under s. 157 in order to corroborate the prosecution case 44 C. L J. 253 1927 Cal 17.

——a recital of age in guardianship petition is not admissible in evidence unless it is relevant under s 32 (5) Evi. Act 36 C. L. J 213.

——testimony of plff or deft. should not be disbelieved because they are parties Their evidence should be scrutinised like that of other witnesses 49 C 345 35 C L J 175

——s 157 which lays down the general rule must be taken subject to the exception contained in the special rule enacted by s 162 Cr P. C, 2 C W. N 712.

——this section cannot be invoked to let in statements made by somebody else as evidence for the purpose of corroborating a witness examined in the case 1928 Cal 893 110 I C. 521

——if necessary a witness will be allowed to be recalled to give evidence under s 157. 5 C W. N 16 (note).

——where a person making a dying declaration chances to live, his statement cannot be admitted in evidence as a dying declaration under s 32, but it may be relied on under s 157, to corroborate the testimony of the complainant when examined in the case 4 Bom L R 434

——under s. 157 the deposition of a witness given at a previous trial when the accused person was absconding, but with regard to whom the M had omitted to record that he was absconding was admitted in corroboration of the witness's evidence given at the subsequent trial 8 A 672

——statements by a witness at the trial should be altogether rejected if it is in hopeless conflict with his previous statements. 7 Cr L J. 371 26 P L R. 659 1925 Lah 483

——previous statements might be used to corroborate or contradict statements made at the trial not to corroborate statements made prior to the trial 34 B 599 53 C 372 92 I C. 442 : 1926 Cal. 159 27 Cr. L J 266.

——a petition filed by a client that his pleader could not appear on account of *hartal* is admissible in evidence in proceedings under the Legal Pr Act. 49 C. 732 . 26 C. W. N. 589 . 35 C. L. J 326.

S. 163. (Giving of evidence of document called for.)

——this sec does not render proof of the document to be exhibited unnecessary or alter the normal incidence of that burden 1923 *M. W. N.* 292 : 72 I. C 453, 5 Bom L. R 380, 23 O C. 156· 57 *I. C.* 973.

——account books called for and *inspected* by the opposite party need not be proved and are admissible *in toto*, 1923 *Nag* 119 : *106 I C.* 305.

S. 165. (Judge's power to put question or order production).

——the provisions of this sec. only forbid the cross-examination without the leave of the court, of any witness upon any answer given in reply to a question asked by the Judge. 24 C 288, 29 C. 287

——the court cannot examine witness without giving the parties notice and opportunity to cross-examine. 19 C. W. N. 903.

——examination of witness by the appellate court. 47 C. 1043 24 C W N. 860 33 C. L. J. 34.

——the court's decision must rest not upon suspicion but upon legal ground based on legal evidence 33 C. L. J. 107, 25 C. W N 409 : 1921 M. W. N. 80 P. C., 36 C. L. J. 396.

——the words "any witness" in s. 165 include a court witness. *9 O. & A L. R.* 549 : 74 I. C. 108

——the court can call for a document under this sec., *1923 Oudh* 59 : 70 I. C. 278

——the court is not entitled to put question with regard to the statements made by witnesses to the investigating officer in order to shew that the witnesses had made contradictory statements to [illegible] S. 165 does not give such a power [illegible] in contravention [illegible] *42 C. L J.* 528

S. 167. (No new trial for improper admission or rejection of evidence).

——under s 167 the improper admission of evidence is not ground of itself for reversal, if apart from it there is other evidence to support the decision. 82 I. C. 283 : 25 Cr. L. J. 1275

[illegible] a ground [illegible] the [illegible] apply [illegible] record

——where the improper admission of evidence does not prejudice the accused in any way it is not a ground for new trial. *27 Cr. L. J* 753 : 7 Pat. L T. 673 : 95 I. C. 273.

——where inadmissible evidence is let in appellate court must consider if injustice has occurred and if the jury were *likely* to give different verdict. 1925 Cal. 161 : 84 I C. 451 : 26 C. L. J. 307.

S. 167. (No new trial for improper admission or rejection of evidence—*contd.*

——an erroneous omission to object to inadmissible evidence does not make it admissible The omission to take objection to the admissibility of a document becomes fatal only in cases where if the objection is taken in time, any defect in its admissibility can be cured and the document made admissible In other cases objection as to inadmissibility can be raised even in second appeal though it was not raised in the lower court. 41 C L. J. 374 86 I. C 734. 1925 Cal 1034

SUBJECT INDEX.

ADMISSIBILITY.

General.

——where a document is admitted in evidence without objection it cannot be objected to at a later stage but where an evidence is admitted without objection it may be objected to afterwards. 35 C. L. J. 473. 27 C W N. 134 · 1923 Cal 160.

——an objection as to the mode of proof not taken in the trial court cannot be taken for the first time in second appeal. 36 C L. J. 186. 64 I C 266. 72 I C 748.

——the proper time to object to the competence of a witness is when he is tendered but failure to do that does not estop to take objection during agreement 45 A 226.

——if a party consents to the recital in prior judgment being taken as proof of a will, he cannot object to their admissibility in appeal. 43 M L J. 448. 1922 M W N. 464 31 M L J. 125 · 69 I. C. 15.

——the court cannot look at any document not on the record without giving other side opportunity of being heard. 67 I. C. 871: 1923 Cal. 194

——thak and survey map are not conclusive as to whether lands which formed part of the bed of a river were included in the Permanent Settlement of 1793, 36 C. L. J 336. 1923 Cal. 247: 71 I. C. 849 but they are good evidence of possession 4 Pat. L. T 487: 1923 P. 558. 72 I. C. 643.

——recitals of boundaries in the document of a third person are not admissible. 35 C L J 91. 1922 Cal. 251. 29 C W. N. 469.

——*the absence of an entry in a document is distinct from the question whether the contents are binding on persons not parties to it.* 36 C. L. J. 389: 1923 Cal. 261: 74 I. C 383.

General—*contd.*

——Batwara papers and writ of attachment issued in 1792 and 1797 are admissible in evidence to show the non-existence of tenures 36 C. L. J. 389 : 1923 Cal 261 · 74 I. C 384

——where a judgment is admitted to prove that there was litigation which terminated in a certain way, all the recitals do not form part of the evidence 28 C. W N. 62.

——a document not otherwise valid may be admissible as proving admission of the executant. 3 Pat. L. T. 387 : 67 I. C. 49

——a statement made to a S. I. just before death is not evidence 3 Pat. L. T. 398 · 1922 P. 40 : 65 I. C. 1002

——the production of a judgment in a previous case only establishes the fact that there has been a judgment but it does not prove its correctness 36 C L J. 9 : 1923 Cal 240 · 70 I C. 194

——a decree between a co-sharer and the Government is admissible 50 C 446 . 45 M. L J. 444 : 1923 M. W. N 511 32 M. L. T. 162 **P. C.**

——the court should not rest its decision merely on suspicion unsupported by legal testimony, 36 C. L. J. 396 27 C. W N 305 1923 Cal 220, 25 C. W N. 409.

——substance of pleadings contained in the judgments may furnish evidence of the allegation made by the parties on that occasion 36 C. L J. 434 : 1923 Cal. 18 : 71 I. C 680, 18 M 73; 3 C. 586, 5 C L. J 521, 15 M 19, 15 M. 378.

——recitals in a will are not evidence to prove the truth of the fact stated therein but they can be looked at for seeing whether it is consistent with the assertions made by the testator in his life-time. 26 C W N 772.

——Road-cess Returns are admissible only against the maker 42 C. L. J. 14 . 89 I. C. 747. 1925 Cal. 1189.

——a retracted confession is admissible for its worth. 49 C. 573 26 C. W. N. 680 . 35 C. L. J. 279 : 69 I C. 145.

——great caution should be exercised in arriving at a conclusion by a comparison of thumb-impressions. The positive evidence of witnesses should not be lightly brushed aside. 36 C. L. J. 9 . 1923 Cal 240 · 428 I. C. 194

——former statements of a witness can be used to contradict or corroborate them but they cannot be used as substantive evidence. 38 C. L J 109.

——any particular answer given by a witness may, after it is given, be ruled out as irrelevant, but the court cannot say beforehand that all the evidence not yet taken is going to be irrelevant. 1923 Nag. 58.

——a kabulyat executed between the [illegible] his superior landlord cann[illegible] existed before th[illegible]

——much we[illegible] absence of detail [illegible] J. 399 : 1923 Cal. 261

——partition deed of property of Rs. 100 or upwards must be registered. 15 C. W. N. 375, 1923 Rang. 57 : 74 I. C. 47. 1? C.

General—*contd.*

L. J. 25. (13 M. 281, 2 Bom L. R 800, 12 Bom. L. R. 635) Expl. *contra*. it need not be in writing. 25 C. 210.

——an unregisterd document of partition is inadmissible and oral evidence as to partition is also inadmissible, but if the arrangement has been acted upon and there is part performance by the party seeking relief, proof of the arrangement can be let in 4 Pat L. T. 657, 1923 Rang 57. 74 I. C. 47, 20 A. L. J 777 1922 A. 493.

——fact of partition may be proved by oral evidence though the document is inadmissible 1923 Lah 392, 25 C. 210

ADMISSIBILITY OF THE FOLLOWING DOCUMENTS.

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——arbitration award in criminal proceeding in which all the parties to the present suit were not parties, is admissible in evidence as to right of outflow of water through a drain 14 C. W N. 64 (note).

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——entries in *Batwara* papers are valuable pieces of evidence. 29 C. W N 333. 86 I C 835. 1925 Cal 635: 87 I C. 694 (c).

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——non-entry in return filed by third person is admissible in evidence. 15 C L J. 7. 17 C W N 108

——cess returns are admissible in favour of stranger. 6 C L. J. 22, 23 W R. 293, 39 C 995, 1005

——cess return filed on behalf of minor is not admissible in his favour 18 C. W N 1076

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——are valueless without proper oral evidence regarding them. 29 C 187 P. C

——*Jummawasil Baki papers* are only corroborative evidence. 10 C L. J. 545, 8 C. 926, 931 they are not independent evidence. 10 C. 248, 16 C. L. J. 328., 17 C. W. N 774, 90. I. C. 564.

Chittas, Kabulyats, accounts and receipts—*contd.*

——*Jamabandi* papers prepared by the landlord though not binding upon the tenant is admissible in evidence to prove the fact that since the creation of the tenancy rent has been assessed and that such assessment was on the basis of a certain area. 5 Pat. 157: 7 Pat. L. T. 375. 1926 Pat. 197.

——*Chittas* prepared by zemindars in the absence of tenant are admissible in evidence in rent suits but their evidentiary value will depend on circumstances of each case. 88 I. C. 518. 1925 Cal. 1104.

Chittas of Govt.

——of private land is not admissible but of Thakbust land is admissible 17 C. W. N 151, 13 C. L. J. 293, 16 C. 136, 7 C. W. N. 849.

——made for revenue purpose is admissible. 19 C. W. N. 1015, 19 C. W. N. 1038.

——prepared by Govt. are admissible in evidence though their value will depend on the circumstances of each case. 105 I. C 61 (C). *For other cases see sec. 83 Evi. Act.*

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——to lease is admissible. 17 C. W. N. 347.

——relating to properties other than those in suit is not admissible. 16 C. L. J. 71, 19 C. W. N. 347: 36 M 46, 2 C L. J 343, 11 C L. J. 543, *Contra*, is evidence of title. 1917 Pat. 161, proves party's admission. 1917 Pat. 181.

——when it forms part of the consideration, it is admissible 35 C. 837. 12 C. W. N. 849. 7 C. L J. 492, 5 C. W. N 485, 21 I C. 135, 34 C. 456

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——if parties give effect to, by conduct it is admissible. 19 C W. N 250 P. C., 27 C. W. N. 1054

——is admissible to prove the oral agreement to grant lease, 16 C. L. J. 71, 19 C. W. N. 347.

——filed after decree in a mortgage suit as regards interest and adjustment which the court accepts, is admissible. 17 C W. N. 565

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——not admissible 20 C L J 516

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——an entry in landlords' settlement book containing particulars of lease not admissible, is admissible 32 C L J 1 P C.

——by under-raiyat for more than 9 years is not admissible. 17 C W N 59, 468, 19 C W N. 168 n.

——for 9 years with recital to execute fresh lease after terms is admissible 20 C W. N 948, 15 C L J. 122, 15 C. L J. 672: 10 C W. N 618 *Contra* 13 C W N. 595.

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——made for one purpose can not be used for another purpose 14 C. L J 578

——filed as correct in former proceeding is admissible. 7 W. R. 249.

Map—*contd*

——maps and surveys made for revenue purposes are offic documents. 1924 Cal. 977.

——a map and a report of the commissioner prepared in c suit may be admissible in evidence in another suit if the comm sioner is examined as a witness. 105 I. C. 61 (c).

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——under which the lessees takes possession though not regist ed is admissible. 19 C. W. N. 56.

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——copies of, under Regulation XIX of 1814, betwen parti is admissible. 23 C. W N. 48, 25 C. 90 and 17 C. W. N. 779 17 L. J. 462 *Dist*, 13 C. W. N. 93 *followed*.

——entries in *batwara* papers are valuable pieces of eviden 29 C. W. N. 333 86 I. C 835.

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——verified, is admissible to prove admission 14 W. R. 434, W. R. 34

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[illegible] admissible. 15 M 19 37: 10 B L [illegible] 926 Pat. 184

Ap. [illegible] exists a plai cannot be admissible to prove a statement made by the superi landlord 39 C L J. 90

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——when the genuineness of a rent receipt is sworn to by th tenant by whom the rent had been paid it was legally sufficient

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to prove the receipt, notwithstanding that the person whose signature it bore had not been examined 82 I. C. 974 (C).

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Sale certificate.

[illegible] and 22

adjoin-
110 I.

Thak map and survey map.

——are evidence of possession and as such of title 18 C W. N 1281 **P. C**, 19 C W N. 1280, 25 C. L J 425 **P. C.**, 13 C. L. J 293, 625, 28 C. L. J. 223, 21 C. W N. 291 **P. C**, 30 C. 291; 7 C. W. N. 193 **P. C.**

——in case of boundary dispute Topographical survey maps of 1869 are admissible in evidence under sec 36 Evi. Act. 11 C. W. N. 230 30 C. 291 7 C W N 193

Unregistered document

——agreement between mortgagor and mortgagee varying the term of a mortgage deed is not admissible. 17 C W N 233 **P C**.

——an agreement for partition need not be registered. 37 C. L. J 435

——an unregistered deed of gift executed in 1882 is admissible for collateral purpose 34 C L. J 432. 26 C W. N 65

——an unregistered partition deed is admissible to prove fact of division in status 61 I C 399.

——document varying the terms of a registered document is not admissible 39 C 284 16 C W N 5 **F. B**, 7 C 293 *appl* 31 C L. J 312

——document varying the rent of a lease is not admissible 27 C. L. J 107, 39 C 284: 14 C L J 412, 35 C. 1010 3· 8 C L J 90

——deed of family arrangement is admissible 35 A 502

——deed of transfer of mortgage-decree is admissible. 35 A. 524, 6 C. W. N 5 but of mortgage debt is not admissible 22 C. W. N 641, 23 C. W N. 51 n.

——composition deed is admissible. 19 C W N 91 n. 38 B. 576.

——document which is compulsorily registrable is not admissible. 4 C 83 But it is admissible as acknowledgment 5 C 215, 26 C. 334 as liability to debt 5 C. 611, as personal liability. 9 C. 523, in a case of specific performance. 12 C L J 548

For other cases see ss. 17 and 18 of the Registration Act.

Writen statement.

——is admissible to prove admission 22 W R. 303.

ADMISSIBILITY OF EVIDENCE.

——may be given to show that a deed of sale is a deed of gift. 13 C. L. J. 510 **P. C.**

——in previous proceeding is admissible with the consent of both parties. 38 M 160.

——given in previous deposition not admissible without proving

with reference to the . .. C. W. N. 501 **F. B.** 15 ... 71 A. 63, **P. C.** 4 C. 483, **F. B.** 7 A. 335, **F B.**, 10 A. 289, *fol.* 12 A. 1, **F. B.** 2 Bom 61 *Ref.*

——given in previous deposition not admissible unless it is put to the witness. 21 C W. N. 175: 19 C. W. N. 729 **P. C.**

——extrinsic, varying the terms of registered document is not admissible 18 C. W N. 66· 19 C. L J 95: 5 I. C 339 **P. C.** 25 C L J 24, 21 C. W. N. 740, 20 C W. N 182.

——of oral agreement not contradicting the terms of a promissory note is admissible. 19 C. W. N. 713 **P. C.**

——evidence ... nt is not admissible as be' ... transac tion with third ... C (4 C. W. N 158 **P. C** ... t. all the cases on the point have been discussed in this case See also 25 C. L. J. 567 **P. C.**, 18 C. W. N. 1260

——evidence of conduct of the parties was admissible to prove that the stipulation was never intended to be acted upon, *i. e. from the very beginning* 27 C. W. N. 336: 25 C. 603. 2 C W. N 562 **F. B.** 28 C. 256, 28 C. W. N 289: 5 C. W. N. 326, 20 C. W. N 341, 680. *Ref.* 27 I. A. 58. 22 A. 149: 4 C. W. N. 153 *Dist.*

——description of witness in the heading of the deposition recorded ... C. heading of the depos ... 241, 24 I. A 163 P C ... ious suit as witness is ... suit under s 33 Evi. ... 36 C L. J 186

——to prove a deposition it is not enough to file a certified copy of the deposition. Identity of the person who gave the deposition must be proved. 30 C. W. N. 254: 1926 Cal. 705: 93 *I C. 115.*

——absence of entry in a document is relevant, its effect is to be determined on the light of the general evidence in the case. 35 C *L. J.389*

——of a witness dying before cross-examination *is not admissible.* 17 *C. W. N. 230.*

——of plaintiff to contradict the defendant's document after defendant has closed his case is not admissible. 37 B 582.

ADMISSIBILITY OF STATEMENT.

——of one-self in a previous deposition to prove pedigree is admissible if that was made at a time when there was *no controversy* 12 C. W. N. 266.

Admissibility of statement—*contd.*

——made in another suit is admissible 22 C. W. N. 363

——made in a *Kabulyat* is admissible. 19 C L J. 1.

——previous statement of a member of a family as to the non-existence of a person is admissible under s. 39 Evi Act, 18 C W. N. 160 n. so the statement of a relative as to the age of the minor. 19 C. W. N. 646 20 C. 758 *fol*. 24 C. 265 and 17 C 849 not *fol* also the statement of a relative as to the birth of a person is admissible. 19 C W. N. 646,

——statement made by defendant in talk of compromise is admissible and it binds the co-defendant if there be joint liability. 25 C. L. J. 42 20 C W. N. 117 21 C W N 996

——statement partly against and partly for, the former can be used against one but the latter cannot be used for him. 17 C. W. N. 1013.

——previous statement may be proved to be mistake or untrue, unless another person has been induced thereby to change his position 11 C W N 321 p, 329 P. C.

——statement which is communication during marriage is not admissible. 40 C. 891

——statement of deceased person as to custom, if made at the time of controversy, is not admissible 21 C L J 9 P. C.

——statement of husband as to date of birth of wife is admissible. 19 C W N. 787 P C.

——statement of presiding judge as to what happened before him is conclusive evidence 21 C W. N 33 F B.

——statements of ages of witnesses at the head of deposition do not furnish evidence on the subject 28 C W N 1033 39 C L. J 90 80 I C 357, 8 C W N 24 P C, 26 A 108 *Ref*

——statement in a will cannot be evidence of title. 41 C. L. J. 258 : 87 I. C 404

OBJECTION TO ADMISSIBILITY

——objection to admissibility of document should be taken at the first instance and cannot be taken in appeal 6 C L J 22, 34 C 1059 6 C L J 678 P. C

——where a certain piece of evidence is not legally admissible the omission to object to it does not make it admissible 40 C. L J 39, 78 I C 219 1924 Cal 1042, 47 C L J 288 107 I C. 457: 30 Bom L R 757 · 1928 Cal 127 P C

——an omission to take objection to the reception of an irrelevant document does not make it admissible, but where such document is admitted in the first Court without any objection no party can object to its reception in evidence at any late stage. 43 C. L. J. 274 : 94 I C 279

——a party cannot in second appeal challenge the admissibility of a document which had been admitted in evidence without objection in both the lower courts. 97 I. C. 414

——when evidence is received without objection in direct contravention of an imperative provision of the law, the principle on

Objection to admissibility—contd.

which unobjected evidence is admitted, be it acquiescence, waiver or estoppel, none of which is available against a positive legislative enactment does not apply. 27 C. W N. 134.

——when an instrument is once admitted in any proceeding either under s 35 or 36 of the *Stamp Act*, it is available in that proceeding for all purposes as if it had been properly stamped at the outset. 27 C. W. N. 513.

——objection to admissibility may be taken at any time but the method of proving must be questioned before proof 9 C W. N III, 82 I C. 974, (C). 1925 Cal. 452.

——an erroneous omission to object to that which is not evidence does not make it admissible 23 I. A. 106, 29 A. 76 P. C. 91 I C 449 (C), 43 C. L J. 274.

——when inadmissible evidence is wrongly admitted without any objection being made the appellate court should dismiss the evidence from consideration. 47 C. L J. 288: 107 I C 437: 30 *Bom. L. R.* 757: *1927 P. C.* 127 *P. C.*

——a document required to be attested cannot be admitted for collateral purpose even without being properly proved and its admissibility without objection also may be challenged at a subsequent stage 35 C. L. J. 473.

——the court may at the time when the evidence is tendered, decide admissibility. 17 C. 173, 9 W. R. 587, 1 A. L. J. 224n.

——when the copy of the copy of a document is admitted in evidence without objection, objection is not open in appeal 84 I. C. 921: 1925 Mad. 257.

EXAMINATION OF WITNESS

——before examining an infant witness his capacity must be examined and he must be administered an oath. 18 C. W. N 147 18 C L. J. 582.

——the judge must test the competency of a child witness before examination. 11 C W. N. 51, 1923 Pat. 91.

——where the trial judge who has seen and heard the witnesses comes to the conclusion that they are creditable and are uttering the truth it requires circumstances of exceptional character to justify a court of appeal in coming to a different conclusion. 29 C W. N. 610: 1923 P. C 156

——when a necessary witness becomes hostile, party may ask the court to summon him with liberty to both parties to cross examine him if necessary. 19 C. W. N. 827.

——there is no rule that plff. or deft. must be disbelieved because he is a party. Their evidence should be scrutinised like the deposition of other witnesses. 49 C. 545: 35 C. L. J 175.

——in order to have no presumption raised against a party by the fact that an important witness has not been called, he should exhaust to the utmost of his power, every means to bring that witness before the court. 49 C. 345: 35 C. L. J. 175

Examination of witness—*contd.*

——when previous deposition is used to contradict, the witness must be allowed to explain it 19 C W. N. 729, P. C., 21 C. W. N 175.

——when defence puts questions in cross-examination in leading form the other party may cross-examine on that point with the permission of the court. 19 C. W. N 676

——a deed is not binding against the witness to it 3 C W. N. 207, 17 C. W N 255n. 42 C. 876 24 C. L. J. 487; 21 C. W. N. 225 P. C.

——attestation of a document by itself does not estop a person from denying its contents It does not directly or by implication convey any knowledge of the contents of the documents To operate as estoppel it must be proved by independent evidence that the attestation involved consent to the transaction 26 C W N 201 · 35 C L J 409 42 M L J 436 20 A L. J 305 · 24 Bom. L. R. 557 P C

——the signature of an attesting witness does not fix that witness with knowledge of the contents of the document or with any liability under its terms 44 C L J 215 90 I C 534. 1926 Cal. 224, 96 I. C. 483, 1926 M. W N 958 1926 Mad. 609.

——description of witness in the heading of the deposition recorded, is no evidence 8 C W. N 241, P C., 28 C W N 1033; 39 C L J. 90 80 I. C 357.

——the name, parentage, age, residence and profession of a witness form part of the deposition on solemn affirmation and not part of the heading of the deposition 7 Pat 361 111 I C 308. 1928 Pat 420 (Criminal case.)

——a witness's testimony may be partly accepted and partly rejected but the admission in pleadings should be considered as a whole 19 C. W N 413, 4 C W N 18 P C

——a witness is not to be disbelieved because he is not of high position 20 C W. N 717, P. C., 18 C W N 521 41 I. A. 80 P. C., 22 I. A. 12 p 24 P. C.

——as to the credibility of a witness the Privy Council is not better competent to determine where the truth lay than the lower appellate court. 55 C 1043: 32 C. W. N 1117 30 Bom. L R. 1389. 111 I. C. 480. 1928 P. C. 200

——note obtained from a witness as to what he will depose is privileged 20 C W. N. 617 P. C.

——the provision of reading over the deposition to the witness, is directory. 27 C. L J. 377.

——it is common fairness to allow the hostile witness to be cross-examined, if it be disallowed, the evidence is of no value. 6 C. W. N 513, P C.

——the court can make use of its *personal knowledge of the* character of a witness in order to decide his credibility. 15 C. 684. 15 I. C. 81 P. C. *contra.* 25 C. W N. 73 P. C.

——examining the witness without putting him in the box is a matter of comment. 23 C. W. N. 961 P. C.

Examination of witness—contd

——a witness in a case under s. 145 Cr. P. C. is entitled to recover cost by civil suit. 8 C. W. N. 178.

——a pleader in the *muffasil* court can put questions from his own recollection and knowledge. 13 C. W. N. 340: 35 C. [illegible] 9 C. L. J. 259.

——a pleader who is authorised to withdraw the suit or to give up claims, can place the deft. *on special* oath and bind his client thereby. 24 C. W. N. 395.

PROOF.

——living as husband and wife may dispense with the proof of marriage. 17 C. W. N. 494, 38 *C*. 700.

——it would be unwise of a judge to act in a disputed Indian case upon oral evidence that there had been an ante-nuptial agreement which would in effect be a marriage settlement unless there was contemporaneous written evidence to corroborate the oral evidence. 29 C. W. N. 1013: 42 C. L. J. 8: 48 M. 605: 85 I. C. [illegible] 1925 M. W. N. 717: 23 A. L. J. 662.

——contents of document cannot be proved inferentially. [illegible] C. W. N. 531.

——a mortgage deed executed by an illiterate person cannot be proved by a person who knows the handwriting of the attesting witness even when all the witnesses are dead. 35 A. 365

——a certificate of a manager cannot go in evidence unless it be proved by the manager himself. 19 C. W. N. 1148.

——any secondary evidence of a public document may be given when the original is lost. 23 C. L. J. 506

——admission of execution of a mortgage bond by [illegible] executant is not sufficient proof against others. 24 C. L. J. [illegible] 20 C. W. N. 1044, 7 C. W. N. 384, *Dist.*

——rent receipt may go in evidence without proof. 24 C. [illegible] 7 W. R. 15, 12 W. R. 34, 20 W. R. 264, *contra.* 14 W. R. [illegible] 8 W. R. 488

——when attesting witness repudiates the execution and signature in the will it may be proved by other evidence. 23 C. W. N. 292, 20 C. W. N. 673, P. C., 23 C. L. J. 632.

——plff. must prove his case though *ex-parte.* 23 C. W. N. 139.

——doctor's certificate as to the proof of age is nothing. [illegible] C. W. N. 257, P. C.

——presence of semen on the woman's loin-cloth is not a test that she consented to an intercourse. 1925 Lah. 94.

——In case of a grant century old when direct evidence cannot forthcome, resort must be had to secondary evidence or to the inference of a legal origin to be drawn from long user. 14 C. W. N. 1217: 20 C. L. J. 407, P. C., 18 C. W. N. 898, P. C., 21 I. C. 354.

——if the original deed of grant be not *forthcoming*, its [illegible] be proved by subsequent conveyance. 18 C. W. N. 873 P. C.

——the ordinary means of proving the execution of a document is by calling some one who saw the writing or who knows the

Proof—*contd.*

handwriting or by the comparison of signature with other signature on other documents 59 I. C. 188 (c).

——suspicion is not a ground for judicial decision. 49 C. 93: 66 I. C. 15

——ordinarily in a boundary dispute the commissioner's report is of great importance 90 I. C. 643.

——for a deposition to be proved it is not enough merely to file a certified copy of the deposition It is necessary to adduce evidence proving the identity of the person who gave the deposition. 30 C W. N 254

——when the evidence is let in the question of burden of proof is merely academical. 106 I. C 243, 1928 Pat 190, 9 Pat. L. T. 393.

EXECUTION OF DECREE

——after decree it is open to any party to a suit to whose interest it is that further proceedings be taken, to initiate the supplementary proceedings but in the ordinary case it is the plff. who moves 40 C L J 439: 35 M L. T. 143 26 Bom L. R 1129: 22 A. L. J. 990 81 I. C. 747 1924 P. C 198

——when the execution application is filed by one of two decree-holders and it is not objected to by the Jt Dr but the latter raises the plea of limitations when fresh petition is filed, held that he is precluded from questioning the validity of the prior application. 32 C W N 1107: 1928 Cal. 861, 8 C 51 P. C *Rel on*

——the misdescription of properties in the sale proclamation does not affect the sale if it can be gathered from the surrounding facts and circumstances that there could not be any doubt as to what was actually sold 33 C. W N. 305.

For other cases, see, "*C P. C. execution*"

EXECUTOR.

——executor derives his title from the will but administrator derives title from the grant, so cause of action against the former runs at once but against the latter after he gets the grant 20 C. W. N. 833, P. C

——powers of the executor dealt with, 28 C. L J. 141, 271, 31 C. 89

——power given to the executor to sell property includes power to mortgage unless expressly prohibited. 1923 M W N 14. 1923 Mad 43. 43 M. L J. 551: 68 I. C 856.

——where the executors are given power to borrow for the purpose of management and cultivation they are entitled to hypothecate the property for that purpose. 111 I. C. 57: 1928 Pat. 304: 7 Pat. 520

——whenever an executor exercises disposing power under a probate granted the property must be deemed to have come to him as executor, though it did not come into his possession. 33 M. L. T. 438 P. C.

Executor—*contd.*

——an executor or administrator has no absolute power to dispose of the property of the deceased unless it is necessary for the due administration of the estate. 47 C. L J. 569 : 1923 Cal. 412 : 107 I. C 747.

——the executor is not entitled to maintain a declaratory suit against a decree on a mortgage created by a legatee pending administration 42 M. L J 567 . 21 M. L T. 50 · 1922 Mad. 306

——if one who is neither executor nor administrator intermeddles with the goods of the deceased or does any other act characteristic of the office of executor, he thereby makes himself what is called in law an executor of his own wrong or more usually an executor *de son tort* 42 C. L. J. 280

——*where properties were bequeathed to son and grandson* appointing the widow as executrix but the son *entered into* management of the properties after the testator's death, held that he was an *executor de son tort*. 1926 Mad. 681 : 95 I. C. 33.

——a person who takes away a portion of the property of the deceased while there is a legal representative, does not become an executor *de son tort* It must be *proved* that he intended *to act as legal representative of the deceased* and to represent his estate by intermeddling with it 30 C. W. N. 565 : 1926 Cal. 825 96 I. C 695

——the argument that an executor *de son tort* could not be used by a legatee, at any rate, in the absence of the legal personal representative applies only where there is any legal representative, 43 M. L. J. 486 . 31 M. L T 221 : 46 M. 190

——where the executor *de son tort* takes possession of all the assets of the deceased, a suit for general administration can be filed without joining the legal representative. 43 M. L. J. 455. 1922 M W. N 532

——after the administration of the estate the executor becomes *functus officio* and if he still *remains in* possession of the estate as a trustee the legatee is to sue in the civil court for the administration of the estate 108 I. C. 323 : 1923 Pat. 348 : 7 Pat 396

——*where there are several executors*, the powers of all may, in the absence of any direction to the contrary in the will be *exercised* by any of them who has proved the will. 34 C. L. J. 457. 27 C. 681.

——it is the duty of all executors to watch over and if necessary, to correct the conduct of each other and an executor who stands by and sees a breach of trust by his co-executor becomes responsible for that breach. 10 C. L. J. 503.

——suit for possession by one executor is defective. All the executors must be brought on the record within time. 40 M. L. J. 532 1921 M. W. N. 246 : 13 L W. 302 · 29 M. L. T. 281 : 65 I. C. 36 C 229 *Expl.* 25 M. L. J. 452 : 9 L. W. 37 *Diss.*

——an executor is not bound to renounce executorship until the validity of the will is established. 60 I. C. 974 : 47 C. 835.

——the executors are bound to render accounts of their management of the estate. 10 C. L. J. 503

Executor—*contd*

——when an executor is sued for accounts he is to prove any debt due to him by the testator in satisfaction of which he has appropriated any asset. 70 I C. 548.

——when in pursuance of the directions in a will the executor deposits money in a bank to accumulate until the minor legatee attains majority but before that event the executors withdraw [illegible]

[illegible]

——an executor though not a trustee for specific purpose (under s. 10 of the Limitation Act) is a trustee with a fiduciary character even as regards the next in kin. 42 C. L. J. 468.

EX-PARTE.

——no order should be passed without giving the party any opportunity to be heard and to adduce evidence 33 C. L. J 279 · 34 C 929 *Ref.*

——when case is heard *exparte* great care should be exercised. 39 C. L J. 279 8 B L R 44

——when a case is adjourned it cannot be heard *exparte* refusing to allow the deft to make appearance and to adduce evidence. 39 C. L J 279 . 22 M L J. 60 *Ref.*

——in *exparte* case, the court is to take good care that plff case is at least *prima facie* proved 5 W. R 503.

——the court may order a party to appear in person, and if | does not, the court may pass a decree *exparte*. 41 M. 25 23 B 518, *Dist*

——when deft's pleader asks for time, which is not grante remains in court but does not adduce or submit argument, the st is not tried *exparte* 17 C W N 628, *contra* 1918 Pat. 236

——an *exparte* decree may be set aside on the ground of frau 23 C W. N. 633 23 C. L. J 587 29 C. 395 6 C. W. N. 473. I. A P C. *see other cases under 'Fraud'*

——an *exparte* decree is a good decree, but if it is made in t absence or without notice to a party, it is not binding against hi 18 C. W N 1288

——an *exparte* decree may be impeached on the ground of frau 23 C. L. J. 587 27 C 11 3 C W N 660 26 C 891 3 C W N 67 30 C. 369. 29 C. W. N. 133 20 C W N 819

——an *exparte* rent decree, though not executed, is eviden as to the amount of rent. 3 C. 393 . I C. L R 365, but it is n

C!

Ex-parte—*contd.*

conclusive as to rental. 16 C. 300, **F. B**, 7 C. 23 : 8 C. L. R. 13, 11 C. L. R. 483, 23 W. R. 140.

——a *decision*, whether *exparte* or contested, in a previous rent suit operates as *resjudicata* in a subsequent rent suit even for a ... which arises in the ... ht to have been ... W. N. 254: 41 ... *Diss*

——an *exparte* rent decree operates as *res-judicata* as to the relationship of landlord and tenant. 17 C. W. N. 627 : 18 C. W. N. 33. 20 C. W. N. 48.

——an *ex-parte* rent decree if executed, is some evidence of rate of rent. 2 C. W. N. 172.

——no *ex-parte* order can be passed against a person without allowing him to be heard and to *adduce* evidence in his defence. 34 C 929 : 12 C. W. N. 65.

——a suit to declare an *ex-parte* decree of another court as *fraudulent* is maintainable by the Jt. Dr. in the court where he resides and where it is transferred for execution. 27 C. W. N. 53. 5 C. W. N 559 *Ref.*

FACTUM VALET.

——the adoption of an only son is valid *Precepts of the Smritis* forbidding it is directory and not mandatory. *If the factum*, the external act, *is void in law, there is no room for the* application of the maxim The truth is that the two halves of the maxim apply to two different *departments* of life. Many things ... or religion are valid ... ply the whole maxim ... 26 I. A. 113 21 A ... I. 43 P. 46 ... I and the *doctrine* of ...

——though the principle of *factum valet* is acted upon to the fullest extent only in Bengal, it is recognised also in other schools of law. The adoption of a *brother's son* in preference to ... is not mandatory. 3 C. 587 : 5 I. A. 40 : 2 C. L. R. 51 **P. C.**

——though according to the Benares school the adoption of an *only son* is sinful and contrary to Hindu Law, *yet when* it is made it is not void, the doctrine of *factum valet* apply to the case. 14 A. 67 P. 98, **F. B.**

——the fact that there was a person better qualified than the one adopted will not by itself, *render* an adoption invalid, as the ... 10 B. 80. ... octrine was applied. 12 A. ... **F. B.**, 22 B 558 **F. B.** ...

——the doctrine of *factum valet* is inapplicable to the case of an adoption of an orphan son when given by an *elder brother* as it is invalid under the Hindu Law. 39 M. L. J. 475: 23 M. L. ...

Factum Valet—*contd.*

T. 428 : 1920 M. W. N. 708 : 60 I C. 141, 48 I. A. 705, P. C. But amongst the Jainas of Mahikantha Agency it is customary. 45 B. 754 : 23 Bom L R. 227.

FAMILY ARRANGEMENT

——family arrangements are those arrived at by members of the same family in settlement of doubtful claims, there being uncertainty as to the rights of the various claimants, the dispute being composed by a settlement based on the acknowledgement of a pre-existing title in the disputants 87 I C 724 1926 All 7

——a family arrangement is binding as much on the parties thereto as on the sons and descendants 47 A 327 23 A. L J 141 : 86 I. C 554

——a family arrangement may be set aside on the ground of mistake, inequality of position, undue influence, coercion, fraud or any other similar ground but any such allegation must be clearly established 10 C L J 503

——where the family arrangement has been fairly entered into without concealment or suppression of truth, although the parties might have greatly misunderstood the situation and mistaken their rights, it cannot be set aside. 1927 Mad 126 98 I C 268, 10 C L J. 503 *fol*

——in considering whether a deed of family arrangement is valid or not one has to consider the benefit of the family as a whole and not that of the individual member 103 I C 354. 1927 Pat. 339 · 8 Pat L 759.

——where there has been a division of property by way of family arrangement and there has been a part performance of the arrangement, it cannot be repudiated by any party 1924 All. 826 · 22 A. L J 779 L R 5 A. 568, 45 A. 277, 40 A. 487, 24 C W. N. 105, 42 C. 801 *Ref.*

——a fair compromise of family dispute will be upheld by a court though resting on ground which as between strangers may not be satisfactory. 2 Pat 554 73 I. C. 542 . 1924 Pat. 49.

Family arrangement—*contd.*

——if their is a *bona fide* claim by a member to the family property although the claim may turn out in the end to be of no substance, any arrangement come to to settle the claim is valid 11 I. C. 354 : 1927 Pat. 339 : 8 Pat. L. T. 759, (6 P. L. J. 634 : 12 I Pat. 726, 33 A 356 P. C., *fol.*

——where however there was no existing dispute and the facts were not fully disclosed and the parties who consented had no subsisting interest, the arrangement was not binding on them. 48 C. L. J. 489 : 1929 Cal. 149, but in the same case it has been held that on equitable principles such settlement is also binding on persons who though they may not have been either parties thereto or derived their interest from such parties, have acted upon it or have derived some benefit under it.

——a *bonafide* settlement of a family dispute which has been fairly arrived at and acted upon cannot be set aside by a minor party unless vitiating circumstances are alleged and proved. 21 A L. J. 488 : 74 I. C. 964 : 1923 A. 566.

a document of title 20 A. L. J. ... 1926 All.

——what are the essentials of family arrangement. 1926 All.

——a *bonafide* family settlement of disputes of doubtful rights is binding on all parties to the settlement but where the object of the settlement is to effect a contingent reversionary interest in the nature of a *spes successiones*, the only way of doing it is by means of a surrender accelerating the reversion and converting its contingent nature into a vested interest and thus destroying its character, as a *spes successiones. A spes successiones* cannot be dealt with in anticipation. 23 L. W. 496. 96 I C. 483 : 1926 Mad 609.

... deceased person applied for probate of ... filed a caveat ... compromise between ... ghter withdrew her ... 187 : 94 I. C. ...

——settlemet of *bonafide* dispute between the widow and daughter on one side and the nephew of the deceased on the other according to the terms of the oral will, is binding. 1927 Mad. 195 97 I. C. 570.

FISHERY.

——in tidal but not navigable rivers right of fishery belongs to the proprietors through whose estates they run. Navigability does not necessarily mean tidality and the two terms are not equivalent. 17 C. W. N. 1108.

Fishery—*contd.*

——Jalkar right extends to the waters in the river bed though they are not connected with the waters of the flowing stream throughout the year. 17 C. W. N. 1173.

——when river shifts its course, leaving *dobas* in its old bed, [illegible] river retains his [illegible] in communication [illegible] 18 C. W. N. 104 n.

——the owner of fishery right in a river which taking new course flows through another channel in which another person has fishery right, cannot claim any right. 24 C L. J 158, 20 C. L. J. 385 : 42 C 489, *Dist*,

——*kopras* or sheets of water which once formed the bed of a river, being completely disconnected with the main river, could not be the subject of fishery right which a person had in the river, 22 C. W. N. 63, 12 C. L. J 216, *Ref* (17 C W. N. 1173, 32 C 1141). *Dist.*

——but the grantee of a fishery right in a rever is entitled to fish in all waters comprised within its banks although a particular sheet of water is disconnected with the main stream for a part of the year 91 I. C 752

——ownership continues where the river changes course but does not lose its identity 21 C W. N. 1007, 42 C. 489 18 C. W. N. 1117: 20 C. L. J 885, P C.

——the above P. C case of 42 C 489 has been considered in 46 C. L. J 93 . 104 I C 494, 1927 Cal. 741, where it has been held that where a river flows over another's land for the time the grantee does not aquire an extended right of fishery.

——as the right of fishery, in ordinary course, follows the title to the soil, a stranger cannot claim a right of fishery in an inland [illegible] rship, (the authori- [illegible] ver, if not originally [illegible] rty so as to entitle [illegible] completely isolated

——one who has a right of fishery in a public navigable river is also entitled to such right in a channel which is connected with it like an arm of the river system and flows in the bed from which the river has shifted. 32 C. 1141 . 2 C L. J. 569, 12 C W N. 559 p. 561. *Ref*

——when an arm of a public navigable river ceases to be an arm of the flowing river, the person who had a wright of fishing in the river ceases to have any in the arm : it becomes the property of the adjacent owner. 12 C W N. 559, (21 W. R 27, 32 C 1141 . 2 C. L. J. 569), *Ref.*

——when a tidal and navigable river shifts its course, fishing right continues to subsist in the river in its new course. 12 C W. N. 105.

Fishery—*contd.*

——the plff. is to prove either that the channel was navigable river or that there is a grant of several fishery such grant need not be proved by direct evidence. 33 C. L. J 42 C. 489 · 20 C. L. J. 835 : 18 C W. N. 1117 P C.

——Govt has the right to have fishery right in tida navigable river. 12 C. W. N. 105, 10 C W. N. 540: 4 C · 51, *Dist*

—— unless a person can establish his right to a fishery ... e no title to any ... lying outside the

——fishery rights in water in certain burrow-pits cannot separate from the land and such rights would not remain afte transfer of the land to a stranger. 35 C. 614

——exclusive rights of fishery in tidal navigable rivers c granted to private individuals or to certain classes of persor the Crown. 11 C 434 F B.

——in the absence of proof by prescription, the rights to fishery cannot be established without proof of a direct grant Govt. 11 C. 434, F B., 56 C. 444

——a grant of jalkar should be construed like any other g 11 C 434, F B.

——grant of fishery right may be presumed from long cont user. 33 C 1349, 33 C L. J. 229 . 60 I. C. 778, 11 C. 434

——fishery right can be acquired by adverse possession public navigable river if exclusive acts of possession are prove the statutary period. 31 C W N. 473 : 103 I. C 13 : 1927 Cal. 46 C L J. 322

——the grantee of a fishery right in a river is entitled to in all waters comprised within its banks, even though a parti sheet of water may be disconnected with the main stream d part of the year. In each case the court has to decide on the if the waters over which the right is claimed are a part of the r 91 I. C. 752.

——grant of several fishery need not be established by a di proof of the grant. 33 C. L. J. 229, 41 I. A. 221 : 42 C. 489 . 20 C J. 385, P. C.

——a jalkar does not necessarily imply any right to the and a suit for the recovery of money payable under a lease m conferring a right of fishing and no right to land is governed special limitation provided by Sch. III, Art. 2 cl. (b) B. T. · 19 C W N. 514

——a proprietor can lease out fishery without giving any r to the soil and then let out the land subject to the fishery r but if he lets out the land first he cannot claim the right to water and fish unless he reserves the right of fishery. 3 Pat L 53 . 64 I. C 346.

——the right of a person to rear fish in another's tank is a n right which a court of law cannot recognise. 28 C. W. N. 516.

Fishery—*contd.*

——the right of the public to fish in the sea is a common right and cannot be the subject of property of anyone. 31 Bom. L. R. 329 ; 1929 Bom 226.

FORFEITURE.

Forfeiture of money on breach of performance of contract

——what part of the deposit is to be forfeited by the vendor in case of breach of performance of contract by the purchaser depends upon the intention of the parties 24 C W N. 40. (17 C. W. N. 100, 19 A. 489, 33 A 166, 23 B 56, 33 M. 375, 38 M. 178). *Ref.*

Forfeiture of tenancy.

See T. P Act Ss. 111 and 112

FRAUD.

——general allegation of fraud unaccompanied by particulars are insufficient 17 C. W N 524

——particular allegations of fraud must be made and proved. 24 C. L. J 335. 1921 Pat 181

——the question of fraud must be considered as a whole. 17 C. W. N 478

——fraud must be established by proof. *18 C. W. N. 681.*

——fraud may be proved by theorems and inferences from facts proved. 18 C W N 185.

——circumstantial evidence is not only sufficient but in many cases it is the only proof that can be adduced to establish fraud Circumstances of mere suspicion should not be taken as proof of fraud but the evidence must be sufficient to overcome the natural presumption of honesty and fair dealing. Fraud is not to be presumed or inferred lightly. 90 I. C. 229 (c).

[illegible] are not permissible [illegible] 45 M. L J. 363 : [illegible]

[illegible] speak. 32 C. 357 : 1 C. L J. 23.

——silence without fraud cannot operate as estoppel. 32 C. 357 : 1 C L. J 23.

——breach of trust and confidence constitutes fraud of the gravest character. 30 C. 369 : 7 C. W N. 353.

[illegible]

——a fraudulent or collusive decree may be set aside by the party if the intended fraud has not been carried into effect. 19 C. W. N. 1151, 18 C. W. N. 1331 : 18 C. L. J. 616.

——a party to a fraudulent transaction is entitled to relief in a court of equity as against his fraudulent confederate so long as the

Fraud—contd.

C. W. N. 1111.

suit may be set

331 18 C. L. J.

—after making *benami* transactions to defraud [illegible] the object is carried out, the beneficial owner cannot sue. 15 C. 370, 27 C. 231 · 4 C. W. N 289, 33 C. 967 : 29 C. W. N. 950 : 4 C. L. J. 22, 23 C. 962, 11 B. 708, 31 B. 405, 20 M. 326, 29 M. 71, 31 M. 9?, 485, *contra*. 3 C. W. N. 620.

—where an intended fraud has been carried into effect, a court will not aid a [illegible] laim or recover the property [illegible] from the fraud of [illegible] who enabled such third party [illegible] fraud. 33 C. 547.

—in setting aside sale after 30 days, evidence of fraud before sale also may be given which may leave an important bearing in the *determination* of the question whether there was fraud subsequent to the sale sufficient for the purpose of sec. 18 of the L. Act. 17 C. W. N. 473, (1 C. W. N. 67, 36 C. 654). *Diss.*, 2 Pat. L. T. 401.

—an executing court cannot take cognizance of a plea of payment or adjustment after 3 months *even* on the ground of fraud 16 C. W. N. 923, *contra*. 30 C. L. J. 248, 40 B. 333, 34 B 575

—an appellate court cannot *consider* fraud for the first time in appeal. 23 C. 483 ; 22 I. A 8 P. C.

—when fraud is [illegible]), s. 66 (new), C. P. C. is no [illegible] 18 C. W. N. 129 n. 1131. [illegible] ch passed the decree may set [illegible] W. R. 1921 ; 69 I. C. 2 [illegible] by fraud is maintainable.

—the court can set aside a decree obtained by fraud practised on court 18 C. W. N. 447, 15 C. W. N. 1010 : 39 C. 936, 43 C. 990, 1923 Pat 336 : 75 I. C. 343. *Fol.* ; but a decree cannot be set aside on the ground that it was obtained by false evidence. 16 C. W. N. 1062, 18 C. W. N. 631 : 41 C 990, 20 C. W. N. 83 n. 6 Pat L. J. 1 : 3 U. P. L. R (Pat) 1, 1923 Bom 379.

—a suit lies to set aside an *ex-parte* decree and a sale on the ground *of fraud* though application to set aside the decree under sec. 108 (old) (Or. 9, r. 13) had been previously refused. 27 C. 475 ; 5 C. W. N. 757 P. C., 29 C. 333 : 6 C. W. N. 473 P. C. 29 I. A. 99 P. C.

Fraud—*contd.*

——deft. can impeach an *ex-parte* decree on the ground of fraud. But there must be an issue to that point. 20 C. W. N. 675: 23 C. L. J. 587, (27 C. 11 3 C. W. N. 660, 30 C. 369 7 C. W. N. 353), *Fol*

——an *ex-parte* decree may be set aside on the ground of fraud. 23 C. W. N. 133, 23 C. L. J. 567, 27 C. 11 3 C. W. N. 660, 26 C. 891: 3 C. W. N. 670, 30 C. 369, 20 C. W. N. 819, 14 C. W. N. 695, 21 C. W. N. 1087, 32 C. 936, 15 C. W. N. 1010, 16 C. W. N. 1002, 18 C. W. N. 447, 63 I. C. 778

——an *ex-parte* decree may be set aside on the ground of fraud exercised by suppressing the summons. 1923 Pat. 336 : 75 I. C. 343, 1913 Cal. 569, 89 I. C. 736

——a suit to declare an *ex-parte* decree of another court as fraudulent is maintainable by the Jt.-Dr. in the court where he resides and where it is transferred for execution. 27 C. W. N. 359, 5 C. W. N. 559 *Ref.*

GRANT.

——if a grant is made for an indefinite period, it enures generally speaking, for the lifetime of the grantee unless there are some words showing an intention to grant hereditary interest. A condition against transfer does not render assignment or transfer of the lease inoperative as such a condition is often inserted merely as a foundation for a claim to a nazar or premium. 47 C. 979: 25 C. W. N. 857, 31 C. W. N. 46.

——the grantor cannot alter the order of succession. 112 I. C. 113 : 1929 Cal. 166

——where out of the income of certain property a fixed money payment was being made for more than hundred years to another, a grant of perpetual allowance charged on the property can be inferred. 1926 Cal. 562: 91 I. C. 911.

——where a grant is made by a zeminder of a tenure at a fixed rent although the tenure may be permanent, heritable and transferable the grantee will not have the mineral right unless there is express evidence to that effect. 33 C. W. N. 725: 1929 P. C. 152, 44 I. A. 46

——when a menial servant of a temple holds a land of a hereditary character as a remuneration of his services upon cessation of the services it is liable to immediate resumption. 59 I. C. 469 (C)

——donee must show that grantor had authority to grant but long acquiescence shifts the burden. 27 C. W. N. 964

——where the terms of the original grant are ambiguous or cannot be proved by direct evidence a reference to the mode of user is legitimate. 35 C. L. J. 493, 16 C. L. J. 322, 46 C. 160, 69 I. C. 183.

——if the general words of an ancient grant is uncertain they may be explained by subsequent user. 53 C. 533: 30 C. W. N. 745: 94 I. C. 974: 1926 P. C. 41: 24 A. L. J. 761 P. C.

Grant—*contd*

the construction of a grant depends on the interpretati... uity extrinsic evidence is n... on its own facts. 27 C. W... *Ref.*

——in the absence of any evidence as to the terms of the gra... the presumptic... had to t... grantee is not... trary to t... principle that... roperty is n... guidance to th... W. N. 725... 1929 P. C. 152.

——unless it be a Crown grant, a grant in respect of ampt... tute should be always construed against the grantor. 54 C 5... 31 C. W N. 885: 1927 M. W. N. 437: 101 I C. 359: 1927 P. C. 117.

——terms cannot be implied in a grant. 43 M. L. J. 158: M L. T. 317.

——if the original deed of grant be not forthcoming title ma... be proved by subsequent conveyance. 18 C. W. N. 898 P. C

——where the nature of grant was unknown and there wa... nothing to show that the grant was one in lieu of wages o... services and deft. enjoyed the land for 40 years pltf's suit wa... dismissed. 32 C. W. N. 727.

——the presumption of a lost grant may be drawn in case where the public of a locality have been using a bathing ghat fo... a long period 88 I. C. 505: 1925 Cal. 1233.

——whether a presumption of lost grant should arise or no... depends on the facts of each case. Where certain persons are i... possession of lands under a claim of rent free *brommottar* grant fo... nearly 62 years, a lost grant may be presumed. 31 C. W. N. 135 · 1927 Cal 210: 100 I C. 453, 41 I. A. 221: *Ref.* 42 C 489 P C., 6 C. 394 P. C., 1924 Cal 309.

——mere possession of land for a long series of years without payment of rent does not necessarily mean a rent-free grant, 35 C L. J. 307, burden of proof lies on person claiming exemption from revenue. 104 I. C. 742, 31 C. W. N. 1012.

——a grant for maintenance to a junior member in impartible estate is *prima facie* intended for life. 42 C. L. J. 280.

——in case of maintenance grants, rents and profits of the estate belong to the grantee and undisposed of accumulations cannot follow the estate. 67 I. C. 451.

——although in case of coparceners the grant of money and grain for maintenance would *prima facie* be an absolute gift in the case of grant to a lady for maintenance where alienation is prohibited, it is a maintenance grant only common to *Hindu joint* family. 96 I. C. 161: 1926 Pat. 481: 1926 P. H. C. C 241.

——in case of grant of century old when direct evidence cannot forthcome, resort must be had to secondary evidence or to the inference of a legal origin to be drawn from long user 18 C W. N. 1217 · 20 C L J. 407 P C., 18 C. W. N. 898 P. C., 24 I. C. 351.

Grant—*contd.*

——where out of the income of certain property a fixed money payment was being made for more than hundred years to another, the courts can draw an inference of a grant of a perpetual allowance charged on the property. 91 I C. 411 (C)

——the true effect of an order for confiscation depends on its terms 38 C L. J 121

——the use of the words "*putra poutradi krame*" in a grant makes it perpetual and hence transferable. 27 C. W. N. 964.

——unless contrary intention appears from the words used a *jaghir* is presumed to be grant of an estate only for life 71 I C. 929, 46 C 683. 1921 Pat 369 3 Bom. 186 *Ref.*, 68 I. C 849.

——a *jaghir* was confirmed by the Govt. of India in favour of two Mahammedan brothers and it stated that the estate should be continued to the ' present holder and his male descendants in perpetuity " In a suit by the female descendants of one of the brothers for partition of their share, held that in the right construction of the grant females were excluded from inheritance. 30 C. W N 122: 52 C 971 · 23 A. L. J. 667: 88 I. C. 347: 1925 C. W. N. 535

——a jaghir includes a *khorposh* tenure. 1928 Pat. 294

——a *jaghir* granted for the services for the convenience of the tenants of the zemınder is a private one and is therefore resumable 103 I C 679. 1927 Pat 386 7 Pat 36.

——a mere conveyance of land without expressly including an interest in the *shamilat* does not transfer such interest 103 I. C. 182· 1928 Lah 214

——where a person alleges that a tenure is resumable he must prove it. 28 B 305, 32 M L T. 399 1923 M W. N 343.

——where lands were granted in inam prior to 1802, that fact is strong evidence to raise the presumption that they were included from the Permanent Settlement 1923 M. W. N. 732 · 75 I C. 465

——there is no presumption that a grant of Saranjam is a grant of Royal Revenue only. 47 Bom 327; 28 C W N. 49: 37 C L. J. 464 · 72 I. C 898 P. C.

[illegible] s are not necessarily appli- The incidents of *saranjam* [illegible]annot create occupancy [illegible]fected after resumption. 51 L J. 420: 1927 P. C. 238.

——a grant which is resumable is not transferable 10 O L J. 355.

——the court must determine the terms of the inam grant. 1923 M. W. N. 347 : 72 I. C. 789 · 44 M. L. J. 649. 72 I C 690.

——*inam* grants should be construed strictly in favour of Govt. 49 B. 99 : 84 I. C. 397 : 1925 Bom. 12

——where the plff. had been given the inam on enfranchisemen[illegible] such grant conferred title on the grantee and he need not [illegible]

Grant—*contd.*

title by succession under Hindu Law. 97 I. C. 687 : 1926 Mad. 1210. 1925 Mad. 726.

——there is no presumption that a shrotriem grant includes both melvaram and kudivaram or that it does not include kudivaram. Circumstances will decide each case. 52 M. 453 : 33 C. W. N. 578 : 1929 P. C. 115 : 29 L. W. 804, P. C. 49 I. A. 286 P C., *fol.* 46 M 92. 1923 Mad. 1 : 70 I. C. 729 F. B. *Reversed.*

——*Devadayan inam* lands are not alienable. 1925 Mad. 1046 : 22 L. W. 225 : 91 I. C 666 : 51 M. L. J. 131.

——when an *inam* is enfranchised and title-deed issued in the name of a Hindu widow, it confers on her an absolute estate. 22 L W. 631 : 92 I. C. 472 : 1926 Mad. 227.

——lands granted in inam for the purpose of a service of a public nature cannot be sold by the inamdar, nor such alienation can be supported on the basis of custom. 86 I. C. 1041 : 1925 Mad 1155.

——if grants were *kadim* or in existence at the time of the grant of the village as inam, the right of resumption is vested in the Govt and not in the inamdar. 53 B 222 : 31 Bom L. R. 235 113 I. C. 467 : 1929 P. C. 30 P. C.

——where right to minerals is not reserved by the grantor and it is enjoyed by the grantee (a putnidar) for more than 60 years, held that the position between the zemindar and the patnidar is that the latter gets everything except what is expressly reserved 32 C. W. N. 16.

——a grant to any member of a family would be, in common parlance, a khorposh grant. It need not necessarily be limited to grants by a senior member of the family to a junior member. 1923 Pat. 294

——on the failure of the line of the grantee the grant does not revert to the grantor but escheats to the Crown. 53 C. 816. 30 C. W. N. 821 : 43 C. L. J. 567 : 1926 Cal. 993.

——*For other cases* see. "Fishery" and Easement" and "Rentfree".

GUARDIANS AND WARDS ACT (ACT VIII of 1890)

General.

[illegible] attacked on the ground [illegible] he C. P. [illegible] is su[illegible]

[illegible] me and

——where a person executes a document in his own [illegible] in personal capacity it has no reference to the ward. 27 C W N. 1029.

——a minor is bound by the acts of his guardian but the former may re-open the proceeding after the ceasing of disability. 2 Pat. 607 : 4 Pat. L. T. 335 : 73 I. C. 822.

——according to the Allahabad H. C. this Act is exhaustive. 26 A. 594

——a *de facto* guardian is a guardian within the definition of the Act. 36 M. L. J. 189 : 51 I. C. 236.

General—*contd.*

——a third party cannot be ordered to pay anything towards the minor's support. 87 I. C. 650 : 7 Lah. L. J. 193 · 1925 Lah. 427.

S. 3.

L. R. 75 89 I C 55 : 1925 Nag. 329.

S. 6. (Saving of power to appoint guardian).

——this Act does not interfere with the right of the managing member of a joint Hindu family to appoint managers and trustees for the minor sons of the family including his minor nephews. 38 B. 94,

S. 7 (Power of the court to make order as to guardianship).

——the question of appointment of guardian is to be decided under this Act and no suit is maintainable for the purpose. 110 I C. 46 1928 Nag. 297.

——it is not open to the court to appoint a person as guardian who has not applied to be so appointed. 1928 Lah. 456, 107 I. C 397.

——the court under this sec. will look to the interest of the minor only. 18 C W. N. 160 . 17 C L. J. 405, 15 C. W. N. 457, 29 A. 210 . 1915 P. R. 84.

——in a Mitakshara family a minor member has no interest in any individual property, so no guardian can be appointed to the property of minor unless he has separate property. 19 B. 309 **F. B.**, 19 C 301, 5 C 219, 30 M. L J. 504 34 I. C. 766, 1917 M. W. N. 744, 24 A. 407 **P C**, 1910 P R. 23 P W. R 33 this rule applies to the Aliyasantama family where the minor is entitled to maintenance *only 32 M 139 but a guardian of the person may be appointed* 19 B 309 **P. C**, 1910 P. R. 23.

——but the rule does not apply where all the members are minors, 30 B. 152, 117 M. W. N. 744, 32 B, 259 in which case a guardian of [illegible] when

appli- and 595,

——apart from this Act, H C. has, under its general jurisdiction power to appoint guardian of the property of a minor member of joint M. family. 25 B 353

[illegible] hen application ation that point leaving y of property.

S. 7. (Power of the court to make order as to guardianship)—contd

15 S. L. R, 178 : 66 I. C. 888, 40 B. 513, *contra.* 1933 Nag 68 I. C. 291

——where there is no necessity no guardian should be app 16 C. W. N. 444, 447, 1914 P R 93 : 26 I. C. 521.

——a court should not entertain an application for the appointment of a guardian when the existing family arrangement is satisfactory. 101 I. C. 259.

——court's appointment of guardian implies the remov natural or *de facto* guardians under sub-sec. (2), 37 M. 38, 36 M. 189 42 I C. 505, 50 I. C. 580.

——it is only where there is a written will appointing a guar in the way of the appoint 1922 M. W. N. 167 : 65

——where the father appointed his mother as testamen guardian of his sons and the mother of the minors applied to appointed guardian, the testamentary guardian should no superseded except for adequate reasons 31 C. W. N. 394 : 101 609 1927 Cal 389

——when there ... will the court can appoint 360, 40 167, 40 interest s 39 or s. 41 ordered the removal of the testamentary guard 52 B. 32 · 107 I. C. 49 : 1928 Bom. 20 : 29 Bom L. R. 1577.

——it is open to the court to appoint guardian for the prope of which the minor is not entitled to present possession. 70 I 360, 14 L. W. 706, 6 I C. 865, 15 A. L. J. 132, 43 C. 812 *contra.* 31 L J. 297.

——where in an order appointing guardian it is stated "th upon the petitioner furnishing security he is thereby appoint guardian of the property of the minor" the order is *ultra vires* a void as s. 34 only contemplated security in cases where guardian h already been appointed. 49 M. 809 : 51 M. L. J. 726 : 1 Mad 36 F B

——a minor shebait has no proprietary interest in the debutt ... it be appo ... 3, 33 M

——the existence of the guardian of person of a minor does n stand in the way to appoint a guardian of property. 13 W. R 230

——In case of dispute about the guardianship of minor's propert the court's duty is to ... rdian. 61 C 435 ... 81. ... I. C. 85 ... to be th

guardian of her minor child by the mere desire of the relations сaste

S. 7. (Power of the court to make order as to guardianship)—*contd*

waste or mismanagement is proved. 1923 Nag. 129 · 68 I C. 474, 16 C. W. N. 444, 447.

——bad term between the father and the mother does not deprive the father of the custody of the child. 1923 M. W. N. 668 : 73 I. C 948.

——father is the actual guardian, his duty is in the nature of a sacred trust. He may delegate his authority to another such as the tutors, schoolmaster or friend and may revoke it. 96 I C. 617 : *1926 All. 687.*

S. 8. *(Persons entitled to apply).*

——the court cannot appoint a guardian of its own motion. 4 C. 929 F. B

made by a person who is to be a friend or relative suggesting 18 C. W. N 160 17 C L J 405.

——an applicant for guardianship must reside within the jurisdiction of the court to which the application is made 107 I. C. 606 : 1928 Lah. 716

——it is competent to any friend or relative of a minor to approach the court in the case of minor being ill-treated and invoke its protection 23 Bom L R 1225 46 B 415

——a testamentary guardian can be declared guardian 3 M. L. J. 182 but his legal representative cannot continue the proceeding, the right being personal 23 B. 719. *contra*, 1917 P L R 116

——when one application is rejected or dismissed for default another application is maintainable 1 A 428, 17 C W. N. 429, *contra.* 1923 Nag 36 · 68 I C 291

——a Deputy Commissioner being the Collector in the Sonthal Perganas may act under this sec. and may pass order as District Judge. 34 C. 569

——a guardian of the minor's property in the hands of the administratrix of his father's estate can be validly appointed. The ... has no

ardian of

ave been R 74 . 73

I C. 255.

S 9. (Court having jurisdiction to entertain application).

——the question of domicile is irrelevant, only minor's ordinary residence is to be considered 34 B 121, 38 M 807 P C., 36 A. 980, when the case is transferred to H, C that court is confined to the power of the D. C 38 M. 807 P. C.

——the matter cannot be referred by the D C. to any subordinate court. 16 B 277.

S. 10. *(Form of application).*

——the application must disclose the causes for making the application 15 C. W N. 457.

——omission to give the particulars required by the sec vitiates the proceedings 1910 P W. R. 58

——when it becomes absolutely necessary to alienate the property of a minor to pay off debts it is fit case in which an application for the appointment of a guardian ought to have been accepted 1923 Lah. 601.

S. 11. (procedure for admission of application)

——where all the interested persons are present before the court *non-service of notice does not vitiate the proceeding.* 18 C. W. N 160 · 17 C L J. 405.

——the procedure must be *strictly followed.* 17 W. R 269

S. 12. (Power to make interlocutory order)

——the court may appoint *Receiver* under this *s.*, 36 B. 20, 17 C W N. 974 or temporary guardian pending the hearing of the application. 3 C L J 29, *44 B. 690.*

——an injunction against marriage may be passed. *2 C. W. N.* 521, 8 C 266.

——a pardanashin lady cannot be forced into public gaze nor a married minor girl 26 C. 650, 651 n., 15 C L. J. 147 : 16 C. W. N. 477.

——the court has got jurisdiction to issue an injunction restraining persons from celebrating the marriage during the minority of infants. 88 I. C 576 : 7 Lah. L. J. 30 : 1925 Lah. 358.

S. 13.

——the procedure under *s.* 13 is not intended to be summary. The fact that the mother of the Mahomedan minor was divorced is no ground to refuse guardianship, *if she is of good character* 87 I. C. 865.

—— [illegible] guardian are not [illegible] C [illegible] 87 I. C.

S. 17. Matters to be considered in appointing guardian

——welfare of the minor must be the first look out. 18 C W. N. 1198, 2 C W N. 191, 25 C. 881, 34 B. 121, 16 B 307, 29 A. 201, [illegible] M W. N. 561, 55 C. 730 . 111 I. C. 513 : 1928 Cal 600.

——when the parents who are European British subject claim adversely to the guardianship of the minor neither of them is entitled to it as of right but other things being equal if the minor is a male of tender age or a female, the minor should be given to the mother and if the minor is of an age requiring education and preparation for labour and business he should be given to the father. Matters to be considered in such cases fully discussed 55 C. 730 111 I C 513 1928 Cal. 600.

S. 17. (Matters to be considered in appointing guardian)— *contd*

L. J. 247, 1 M. L. T. 347

illiteracy of mother, 20 C.

I. N. 205, do not make her

right 31 C L. J 365, 12

M. 67, 7 A W. N 233.

——a mother divorced by her husband for adultery is not entitled to the custody of the minor. 44 C. 35.

——unchastity of mother does not deprive her of the right of guardianship 74 I C. 53 1923 Nag. 305.

——in case of claims between distant relation there is no question of preference other than what arises from a consideration of the minor's welfare 44 M L. J. 62 71 I C. 298, 16 M L J. 357, 2 C. L R 583, 10 I C 283 *Ref.*

——the fact of the applicant being a *pardanashin* lady is no ground for rejecting the application but if the property of the minor is a big one which cannot be managed by a woman, the application may be rejected. 69 I. C. 596, 18 C W N 160 17 C. L J. 405, 38 C. 783.

where a father has not obtain the cus-

s guardian the court

tor of nd of

vishes P C,

(1911) P W. R 196.

18 C. W. e irregula- . 204.

the consi- r and the he natural uardian as boy from

S. 17. (Matters to be considered in appointing guardian) contd.

the natural family and to affiliate him into the adoptive fam will thereby be frustrated. 4 Pat. 109 : 1925 Pat. 444 15 C W. 558 *Dist.*

S. 19. (When guardian is not to be appointed).

——the fact that a child may be happier or comfortable w. other relation is not sufficient to deprive the father or the husba of their right. 39 M. 473.

——but a father is deprived of the right becoming a convert Christianity. 25 C. 881.

——an application by the Hindu father under s 19 is not mai tainable. 24 Bom. L. R. 779 : 68 I. C 518, 72 I. C. 200, 9 O & L. R. ...

— not apply to persons oth than quently even a father can be ap person of his minor chil L. W

— ited in case the father of Europ ardian, 38 M. 807 P. C., 19 M. W. N. 414.

——without a finding that a father is unfit, no other person c be appointed guardian. 27 Punj L. R. 330 : 95 I. C 553 1 Lah. 393.

——father's right of natural guardianship cannot be delegat 38 M. 807 P C

——a court has no power to appoint or declare the father c minor as his guardian 26 P. L. R. 12 : 6 Lah. L. J 597 : 1 Lah. 250.

——a Hindu father or husband cannot be appointed or decla guardian under s. 19. 68 I. C. 957 : 1925 Mad 1035. ... only means th

1195 ... I. C. ...

——on an application by the father of an infant ... the court to declare him the le ... f the infant to be given to h ... J. 179 : 21 L W. 244, 39 M 6

——a mother's remarriage is no reason why the guardians of her minor son should be taken away from her. 26 Punj L. R ...

S. 23.

——a collector appointed by the court as the guardian of minor's property has got special powers under this sec and s. does not apply to such guardian. 96 I. C. 17 : 28 Bom. L. R. 623.

S. 25. (Title of guardian to custody of ward).

——the mother has a natural right of custody, 31 C. L. J 365, which she can not be deprived of by any agreement except under special circumstance. 24 C. W. N. 711.

——when child is in the custody of its mother's relation, father can apply. 86 I. C. 640 48 M. L. J 179 1925 Mad. 398

——the recognised principle is that a father is not only the natural guardian but he has an inalienable right to the custody of his minor son unless there are overwhelming circumstances against it. Although the court has discretion it must be a judicial discretion exercised upon recognised principle. 49 A. 332 101 I. C. 529 : 1927 All. 453 : 25 A. L. J 248

——any person may apply under this section who had previous custody, 12 A. 213, 39 B 438, 40 B 600.

——where the father is content to allow another relation, a ... and ... oral ... I. C ... on ... The ... ing

——a separate civil suit lies for such custody. 25 B 574, 8 C. 266, 40 B. 600, 9 M 31, 391, 2 L B. R. 140 **F. B**, 42M. 647 **F. B.** *contra*. 26 A 594, 37 A 515, 38 M. 807 **P. C.**

——a suit *inter partes* is not the form of prescribed procedure 38 M. 807 **P. C**

——a suit lies in the District Court only 42 M. 647 **F. B**

Ss. 27-30. (Duties and powers and liabilities of guardian of property).

——a guardian is in a fiduciary relation to the minor 2 Lah. L. J. 130.

legally appointed guardian. 8 C. W. N. 57.

——a guardian cannot bind a minor by a contract for the purchase of immoveable property nor can minor enforce specific performance of such contract on attaining majority. 39 C. 232 **P. C**, 34 C 163 **F. B.**, 30 C. 232, 5 P. L J. 239.

Ss. 27-30. (Duties and powers and liabilities of guard of properties)—contd.

... to manage ... house ... of ... enfor...

.. C. W. N. 477.

——guardian is liable to the extent of profits he has actu received or could have received. 12 C W. N. 481.

——mortgage of the minor's property after the revocation the power of the guardian even without notice of such revocation invalid 21 C. W. N. 63.

——a mortgage without permission is not void but voida 16 C. W. N. 716 16 C L. J. 537, so also a sale. 10 C W. N 761 C. L. J. 110, and a lease for over 5 years. 21 C. L. J. 644

——there is distinction between a condition precedent and condition subsequent imposed by the Dt. Judge on the guard ...

1924 All. 474 Dist.

——a lease ... by a court-guard ... for a term of 7 ... der this ... is valid if it wa... entered ... with the sanction of the court under Or. ... C. P. C. ... L. J 206.

——surrender of an exproprietory holding is not a trans within s. 29 and no previous permission of the Dt. Judge is necessa 101 I. C. 804 1927 All. 546.

——the sanction obtained under Or. 21 r. 83 C. P. C. does dispense with the requirement of sanction under s. 29 becau sanction by the D. judge is given under s. 29, considering welfare of the minor whereas sanction in an execution case und Or. 21 r. 83 C. P. C. is given for the protection of the interest of execution-creditor 36 C. L. J. 326 : 49 C. 911 : 28 C. W. N. 57.

——when the order ... is made under this sec. ... e infant's property ... nd he is not bound ... der affords the ... fraud or collusion ... of such order ... 17 : 97 I. C. 661 ... t. L. T. 553. 1925 ...

——a court's guardian cannot sell his ward's property exce with the sanction of the Dt judge. The Dt. judge can refuse the sanction for a better bargain and can direct a court officer to ...

Ss. 27-30. (Duties and powers and liabilities of guardian of properties)—*contd.*

it to public auction and obtain the highest value. 1925 Cal 1160. 85 I. C. 667.

——under s 31 the disposal of property in contravention of ss 29 and 30 is voidable and can be set aside in a proper proceeding. So where a person seeks to avoid it, he is in the position of a person who seeks equity and must do equity. 36 C L. J. 326 · 28 C. W. N. 57 : 49 C. 911, 3 C. L. J 260 *Ref.*

——whether the sale by a guardian appointed by court without obtaining sanction is voidable 87 I. C. 712 27 Bom. L R. 483 : *1925 Bom. 320*

——a sale by certificated guardian without the sanction of the Dt. Judge is voidable and not void If the minors are benefitted thereby they cannot avoid it without restoring the benefit to the purchaser 98 I. C. 500

——where the permission of the court for the marriage of the ward is not necessary, and the guardian incurs debt in arranging the marriage permission for repayment of the debt should be given. 97 I C. 823, 1926 Lah 438 27 Punj L. R. 292.

——an order under s 30 is not appealable. 44 A 458 20 A. L J. 390 : 1923 A 14 : 87 I. C 251.

S. 31. (Practice with respect to permission)

——subsequent sanction may validate a contract entered into by the guardian with the intending purchaser 8 Pat 226 1929 Pat. 202

——the order of permission must recite the necessity. 45 M. 429 : 42 M. L. J 333.

——the permission simply shifts the onus on the minor who may

rima facie

42 M. L.

ere it has

isive as to

ts. So also

L. J 197,

recting the

permission

licates the

bona fides of sale by the guardian. 26 C W N 218, 95 I C. 421.

——the order is sufficient if it substantially complies with the sec, necessity need not be stated in the order of permission. 11 C. L. J 197, 9 *Pat* L. T. 553, 1928 Pat. 543

——"any person" is not limited by the words "relation or friends." 35 M. 743.

S. 31. (Practice with respect to permission)—*contd.*

——an order of the Dt. Judge fixing the amount to be spe[illegible] for the marriage of a minor word is neither appealable nor revisabl[illegible] 48 A. 300 : 1926 All. 301 : 92 I. C. 482.

S. 32

——an order purporting to be passed under the G. & W. A[illegible] cannot bind third parties in possession of the estate. A Distric[illegible] Judge has no jurisdiction to dispossess third persons from the propert[illegible] which they may be rightly or wrongly in possession, [illegible] can at best give directions to guardian to take necessar[illegible] steps to recover the property, 47 All. 313 ; 23 A. L. J. 28 ; [illegible] All. 277

S. 33.

[illegible] into an arbitrat[illegible] [illegible] the husband [illegible] riage app[illegible] it was d[illegible] [illegible]nd not under [illegible]ble and that [illegible] own resp[illegible]

S. 34. Obligations of guardian of property

——cl (d) does not empower the court to direct the guardian to pay into court more than the amount shown to be due in the accounts shown by him. 1926 Mad. 478 : 1926 M. W. N. 359 : 93 I. C. 332 : 5[illegible] M. L. J. 273.

[illegible] to pay [illegible] revision [illegible] der was [illegible] pealable [illegible] 149 [illegible] [illegible] failure to furnish security is a ground for removal. 71 I. C. [illegible]

——objection of the relations to the application by the guardian for the marriage of the minor must be considered from the point of view of benefit to the minor. 24 Bom L. R 845.

[illegible] of the guardian or [illegible] 1923 Lah. 5[illegible] [illegible] realisation of the [illegible] is to suspend the [illegible] C. L. J. 112.

[illegible] on furnishing security [illegible] in approve[illegible] [illegible]d securities is [illegible] uardian [illegible]

S. 34. (Obligations of guardian of properties)—*contd.*

have had if he had followed the court's order that the court can order to produce. 94 I C. 79 . 1926 Mad. 1325.

—the court can investigate the accounts exhibitted under this sec. and direct the guardian to pay the balance due on a true and just accounts and if he fails to pay the court can deal with him under s. 45 107 I. C. 152 1928 Pat 255 · 7 Pat 144.

—the liabilities of the surety co-extends with that of the guardian unless otherwise limited. 12 C. W N. 481.

—just as the death of the guardian puts an end to his guardianship so does the death of the minor 110 I. C. 776 1928 Lah 495

S. 35

—there is nothing in this sec, making it inapplicable to the case of a ward attaining majority and applying for an assignment of the bond The sec. is perfectly general and can apply where the ward was a minor or to a case where he has ceased to be a minor. 51 M. 683 109 I. C 894 1928 M. W N 423 · 1928 Mad 545 42 M. 302, *Diss*

—if on the perusal of the accounts the court has reason to think that at least in respect of some moneys they have not been properly accounted for the ward should not be referred to a regular suit for the purpose or satisfying the court that the enjoyment has not been kept up 51 M. 683 109 I C. 894 : 1928 Mad. 545 · 1928 M. W. N 423.

S. 39.

—if the guardian is incompetent or otherwise an improper person to remain guardian proper proceedings for his removal should be taken under s 39, but until this is done the court should render every assistance to him to discharge his duty and to see that the minor remains in his custody 1927 Lah 266 . 100 I. C 807.

—a testamentary guardian is removeable under this sec for the welfare of the minor if the guardian be guilty of continued failure of his duties. 28 Punj. L. R. 127 : 100 I C 738

S. 40. (Discharge of guardian.)

—successive applications on the same grounds for the removal of the guardian is not maintainable when the previous one has been dismissed 45 A. 196 : 20 A. L. J 959 : 71 I. C 416.

S. 41. (Cessation of authority of guardian.)

—the words "any cause" in cl. (3) are not restricted to the causes mentioned in sub-secs 1 & 2. 110 I. C 776 : 1928 Lah. 495.

—until the powers of the guardian have ceased under s 41 (2) he cannot be called upon to deliver the property in his possession on behalf of the minor. 18 N. L. R. 184

—the court can order delivery of accounts and not rendering accounts. 29 C. L. J 44, 5 C. W. N. 207.

—when a minor attains majority and the guardian is discharged after filing his accounts the court cannot hold an inquiry and

S. 41. (Cessation of authority of guardian)—*contd.*

ascertain the amount really due. Under this Act the remedy of the ward is to proceed by way of suit. 50 M. 80 : 97 I. C. 578 : 1926 Mad. 977 : 51 M. L. J. 249. (5 C. W. N. 207, 21 C. W. N. 658, 29 C. L. J. 44) *fol.* (46 A. 458, 92 I. C. 95) *Diss contra.* 92 I. C. [illegible] 28 M. L. T. 115

[illegible] render account [illegible] ab. L. J. 361, 25 [illegible] II.

——an order discharging a minor from liability must be an *express order* 6 Pat. L. J 273 : 2 Pat. L. T. 556 : 61 I. C. 807.

——the death of the minor does not exonerate the guardian from accounting. 42 A. 1.

——*as the* guardianship terminates by the *death* of the guardian so does it terminate by the *death of the word, but* the jurisdiction of the court to recover property from the guardian is not put to an end thereby. 110 I. C. 776. 1928 Lah 495, 1918 M. W. N. 417 *33 B 419*

——the court can order a *de facto* guardian to deliver property 36 M. L. J 189.

——*the liability* of a discharged guardian continues even after *the discharge* as regards any fraud which subsequently be discovered. An order asking a *guardian to pay money* or give property into court is executable. 88 I. C. 165 : 23 A. L. J. 428 : 1925 All. 417

S. 43.

——s 43 (4) limits the exercise of the powers to furnish the *disobedience* of orders under clauses 1 and 2. 103 I. C. 493 1927 *Sind 262.*

S. 45.

——before taking action under s. 45 the court should make an *inquiry* in order to ascertain whether the guardian had any *property* of the minors in his possession and control which he was withholding 8 Lah 306. 103 I. C. 470 : 1927 Lah. 344

——a court cannot impose a fine under s. 45 without holding an *enq* [illegible] by the guardian, in order *to* [illegible] was due [illegible] 264 [illegible] 3, 109 I. C. [illegible] 1920 [illegible]

——*District* Judge cannot compel the *former* guardian to hand over to the new guardian the house over which he never obtained *possession* as guardian of the minor and which he never admitted *to belong* to the minor. 88 I. C. 444 : 23 A. L. J. 736 : 1925 All. [illegible]

——it is doubtful if the District Judge has power to make an *order* under s 45 (1) to direct a third person to produce the [illegible] *in court* when no direction or order was made under ss 12 (1) and 25 (1) 111 I. C. 134.

S. 46. (Reports by Collectors.)

——*when* the Dt. Judge calls upon the Collector for a report under this sec. it is *open to the* court *to treat* it as evidence [illegible]

Ss. 47, 48. (Appeals.)

——an order apppointing a guardian under s. 7 is not open to review as s 48 makes such an order final. 4 Lah. L. J. 274, 143 P. R. 196 *fol.*

——the order of refusal to remove a guardian is final and there is no appeal. 46 M. 873, 45 M. L. J. 481 74 I C. 896.

——where an order of a Dt. Judge has not been appealed against it becomes final and is therefore not liable to be contested by suit or otherwise 85 I. C. 667 · 1925 Cal 1160

——an order by the Dt. Judge fixing the amount to be spent for the marriage of a minor ward of court is not appealable nor is it revisable under s 48, 92 I C 482: 1926 All. 301

——the procedure to be adopted in an appeal under this Act is that of the C. P. C and the period of limitation in respect of the appeal under s 47 would be 90 days from the date of the order under appeal 110 I C. 374 1928 Lah. 488, (7 P. R. 1898, 43 M 37) *fol*

HINDU LAW.

(1) Applicability of Hindu Law.
(2) Accumulation.
(3) Adoption.
(4) Caste.
(5) Endowment.
(6) Gift.
(7) Guardian and ward
(8) Impartible estate
(9) Joint family.
(10) Marriage.
(11) Partition.
(12) Powers and liabilities of manager or karta
(13) Reversioner.
(14) Shradh ceremonies.
(15) Stridhan.
(16) Succession
(17) Widow.
(18) Will.

(1) Applicability of Hindu Law

——the difference in the Hindu Law as existing in different Schools is due to the dominating influence of the different commentaries But commentaries do not enact, they explain and are [illegible] A decision is declara- [illegible] 243 . 39 M. Bom L. R. 1070 57 I C. 545 P. C

——*Dattaka Chandrika* is authority in Southern India. 44 M. 656: 61 I C 690 P. C.

——*the lex loci of Berar and the Maharashtra is the Mitakshara* interpreted by Mayukha 5 N. L J 187 65 I. C. 671

(1) Applicability of Hindu Law—*contd.*

——the *jainas* are of Hindu origin. Although they generally adhere to the ordinary Hindu Law they recognise no Divine authority of the *vedas* and do not observe the *shradha* ceremony. 25 C. W. N. 273 : 16 N L. R. 170 : 1920 M. W. N. 627 : 61 I. C. 431, P C. 1925 Nag. 174.

——the general principles of Hindu Law are applicable to the Tbiyyas of South Malabar. 39 M. L. J. 427 : 13 L. W. 181. 60 I C. 209.

——in interpreting Mitakshara the views propounded by Balambhatta cannot be accepted without due caution 46 B. 541

——Hindu joint family rules do not apply to the *Cutchi Memons* 24 Bom. L R. 978 · 68 I. C. 862, 41 B. 181, 16 Bom. L. R. 244, *contra* 31 M. L. T. 185.

——*Rajbansis* are governed by the ordinary Hindu Law. 54 C 727 . 27 C. W. N 669.

——the holders of "*Chowrosi*" gadis claiming to be Surjabanshi Rajputs though are really descendants of aboriginal Bomyas are governed by the Hindu Law. 37 C. L J. 369 : 27 C. W N 901 · 4 Pat. L T. 217 : 44 M. L J. 476 25 Bom. L. R. 560 : 71 I C 769 P. C.

——a Hindu by becoming a Brahmo does not necessarily cease to be a Hindu, something further than mere becoming a brahmo is necessary for a man to cut himself off from Hinduism 49 C 1069 70 I C. 463 26 C W N. 799.

——a Goud is not a Hindu. 19 N. L. R. 104 · 1923 Nag 317. 17 N. L. R 183 : 66 I. C. 303.

——the Gujars of the Ninar District of the C P. are governed by the Benares School. 6 N. L. R. 39 : 71 I. C. 727.

——the Halai Memons of Bombay are governed by the Mahomedan Law in matter of succession. 24 Bom L. R. 753.

——the usual Law as to Hindus in the Province of Berar is the same as the Hindu Law in the Presidency of Bombay 1925 M W. N. 414 . 88 I. C 343 : 21 N. L R. 127 : 1925 P. C. 127 P. C.

——the law of Mithila School is the law of the Mitakshara except in a few matters in respect of which it has departed from the law of the Mitakshara 42 C. L. J. 592 : 50 M. L. J. 1. 1925 P C. 280 : 52 I A. 418 P C.

——Mitakshara is of paramount authority though where it is silent other books of authority can be referred to. 83 I. C. 147 · 1925 All. 19 : L. R. 6 A. I.

——in Berar the Mitakshara is paramount and there Mayukha is only of secondary importance, being relied on where the Mitakshara is silent or doubtful 87 I. C. 979 : 1925 Nag. 32 F. B

——except so far as their particular customs apply the *Ghartan Gosains* are governed by the usual law as to Hindus 88 I. C. 343 · 1925 M. W. N. 414 : 1225 P. C. 127 P. C.

——high caste Hindus working as traders in the town of the Punjab are governed by the Hindu Law. 4 Lah. 236 ; 73 I C. 109 · 73 I C. 239.

(1) Applicability of Hindu Law—*contd.*

——converts to Mahomedansim from Hinduism are presumed
being a rebutable
36 C. L. J. 64.

governed by the

——Dayanandis are Hindus forming a sect of the Arya Samajists, as they believe in the supremacy of the Vedas. 3 Pat. L. T. 551 : 1922 Pat. 235. 67 I. C 550.

——the Hindu Law is not merely a local law but is essentially a personal law, an integral factor of the status of every family which is governed by it. 50 C 370 : 37 C. L. J. 233

——a Hindu family residing in a particular province of India is *prima facie* subject to be governed by the law of the place recognised in that province 50 C 370 37 C L J 233, 48 C. 30 **P. C.**, 20 C 409, 1923 Nag 7, 68 I C. 325.

——where the parties were resident of Bengal, mere proof that at some time they came from outside Bengal and that on important occasions only they availed of the services of an up-country Misra Brahmin as priest is not enough to prove that Mitakshara Law will apply to them. 29 C W N 1052 90 I. C 281 1925 Cal 1097

local priest under the supervision
to show that the local law is
48 M. 1 1925 Mad. 497
special custom the ordinary Hindu Law applies 4 Lah L J. 336

——the presumption is that the migrated families carried with
d family relation pre-
50 C 370 37 C L J
650 34 B. 553, *Ref.*

and usages of the
L J 233, 29 C 433.

(2) Accumulation.

——a Hindu widow has the right to dispose of accumulated income not made of the family inheritance, but invested by her as her own property *20 C 433 20 I. A 12,* **P C.**

——a widow's savings from the income of her limited estate are her *Stridhan*, if the widow does not make any attempt to dispose of them in her lifetime they follow the estate from which they arose. Where both the family property and property purchased by the widow out of savings are alienated by her with the object of changing the succession, it is invalid 10 C 324 p. 334 10 I. A. 150 p. 158 **P. C.** 14 C. 387 : 14 I A. 63, **P C**

——the acquirer of property presumably intends to r.
dominion over it, and in the case of accumulation by a Hindu w
the presumption is none the less so, where the Hindu widow ass

(2) Accumulation—*contd.*

her interests in the land which is usufructuary mortgage acquire by her out of savings, it is valid. 25 M. 351.

——there is no presumption that moneys in the hand of a widow have come out of the savings of her husband's estate 1929 All 449 ; 113 I C. 266

——land purchased by Hindu widow with savings of her widow' estate, when undisposed of by her, passes to her husband's heir as a increment 9 C. 758, 5 C. 512.

——where the late husband possessed considerable property there is no presumption of law that property found to be in possession of the widow belonged to her husband, reversionary heir claiming the property must prove that. 26 C. 871 : 4 C. W. N. 1 26 I. A. 226, P. C.

——a widow can alienate the right to mesne profits under a decree which she has not treated as part of her husband's property 22 M 356.

——savings or property purchased out of savings by widow out of money awarded to her by decree for maintenance is her *Stridhan* and passes to her heir. 28 M. 1.

——the test is that savings made by widow and not thrown into the common stock are personal properties. 16 C. W. N. 834 9 C L J. 24 · 67 I C. 19.

——where a widow effects savings from husband's property and acquires property with it, unless she deals with it in such a manner [illegible] it must be deemed to [illegible] N. 32[illegible] · 35 C L J. [illegible] T. 311 P. C *contra*

——the presumption that the acquisition forms a part of the original property is not rebutted by the mere fact that it was acquired in the name of the daughter. Possession of the property decides the point 64 I C 531 (C), 6 M. I. A. 35, P. C. 13 M. I. A. 232 P. C 9 M. I. A 123 P. C. 26 C 227 *Ref*

——whether any saving or investment by widow is an accretion to her husband's property depends on the intention of the widow Investment in the widow's name cannot itself raise a persumption that the investment was intended to be an accretion. 46 B 37 23 Bom L. R 803 · 62 I. C. 954.

——rents in arrears are not her personal properties. 16 C W N 834.

——profits realised by agent but not given to the widow are not her personal properties. 18 C. W. N. 106 : 15 C. L J. 12.

——property acquired by widow out of the income of the husband's estate becomes part of that when she leaves it to the *ejmali* estate. 23 C W N. 64.

——an agent appointed by widow must account to the reversioner for profits realised during widow's lifetime and not paid to her, these cannot be presumed to be her *stridhan* 16 C. W. N 106 15 C. L. J. 12.

(2) Accumulation—*contd*

——direction in a will that the surplus income of property after making some monthly payments should be accumulated until the death of the testator's widow upon which event the whole of his estate together with such accumulation should pass by his trustee to his adopted son on attaining majority, if such son should survive his widow, and if not, to his daughters and their sons, was held to be invalid on the ground that Hindu testator cannot direct the [illegible] for an indefinite or any [illegible] interest. 25 C 662 : 2 C [illegible] (8 C. 385), *Ref* Affirmed by [illegible]

(3) Adoption.

(3 A) Who can be adopted.
(3 B) Who can give in adoption.
(3 C) Who can adopt
(3 D) Widow's authority to adopt
(3 E) Procedure in adoption.
(3 F) Dispute as to adoption.
(3 G) Effect of adoption.

(3 A) Who can be adopted ?

——adoption of an only son is valid, precepts contained in the Smritis forbidding the adoption of an only son, are monitary and not mandatory 3 C W N 427 · 26 I A. 113 22 M 398. 21 A. 560. 9 M L J 67 P C., 26 A. L J 1106. 110 I. C 665. 1928 All 459.

——a widow can give her only son in adoption 25 B. 537 p 542 3 Bom L. R 37.

——there is no legal force in the precepts that an eldest son should not be given to adoption, that a Hindu should adopt the son of his whole brother in prefe[illegible] natural father must be in c[illegible] M 398 : 21 A 460 : 9 M L. J [illegible]

——an adoptive father [illegible]

an orphan 70 I C. 653 : 1922 M. W. N 481, *see below*.

——an orphan cannot be adopted under the Hindu Law 52C, 482 . 87 I. C 357 23 A. L J 273 49 M L J. 173 P. C. 23 M L J. 189. 37 M. 529, 48 I A. 705 P. C., 45 B. 754, 49 C 120 · 26 C. W N, 881 : 30 M. L. T. 144 P. C., 1922 M. W. N 481 : 70 I C 653, 21 M. L. [illegible]

——an unmarried *Sudra* of any age can be adopted. 16 M. 384 p. 296.

——among Kshatrias a boy of the age of 19 whose upanayanam ceremony has not been performed may be validly adopted 2 Pat 469 . 4 P. L. T. 427, 72 I. C 230

(3 A) Who can be adopted ?—*contd.*

——all t[illegible] adoption should be made be[illegible] *before* the [illegible] 1927 Pat. 61

——performance of *upanayan* is an absolute bar to the [illegible] 1927 All. 634 : 25 A. L. J. 1009

[illegible] quiring a difference of age between [illegible] and the boy is merely directory [illegible]

——among the Agarwallas the qualifying age for adoption extends to 32 years. 52 C 482 : 1925 M. W. N. 692 · 87 I. C 357 · 49 M. L. J. 173 P. C.

——the text which prescribed the preferential adoption of *Sapinda*, has not the force of law and the principle of *factum valet* prevails. 3 C 587 : 5 I. A. 49 . 2 C. L R. 51, 10 B. 60.

As to other cases of factum valet, *see* 'Factum valet.'

——*adoption* by a family Hindu woman of a girl *is invalid*; 23 M L. J. 493 : it is valid. 26 B. 491 : 4 Bom. L. R 116

Quarie . whether such an adoption by a *dancing* girl is valid

——there can be no adoption unless legal marriage is possible between adoptive father and the natural *mother in her maiden state*. 11 M. 49, 6 C. 41 p. 47, 19 C. W. N. 841.

——the rule that no one can be adopted whose mother the adoptive father could not have legally married, is *confined to the* specific instance of a daughter's *son*, a *sister's son* and the mother's sister's son 32 B 169.

——the general rule that a daughter's son cannot be adopted may be varied by family custom. 36 C. 780 : 36 I. A. 103 : 13 C. W N 920 : 11 Bom. L. R. 833 : 19 M. L J 348 : 6 A. L. J. 557 P. C.

——the kayasthas of Bihar not being *Sudras* an adoption of daughter's son among them is invalid. 6 Pat. 506 : 8 Pat. L. T. 31. 1927 Pat. 145.

——a person belonging to the group of *ninety two families* among Marattas is a *Kshatria*, so he cannot adopt a sister's son [illegible]

[illegible] father and [illegible] 153 p 161 [illegible] 510 : 1 W [illegible] 33 I. A 97.

——*in case of marriage there are three prohibitions*, (1) *Sapindas* (2) *Sagotras*, (3) *Bandhu Sambandhas* or contrary relationship, this meaning that by analogy one is the father or the *mother of the* other as for instance, the *daughter of the* wife's sister and the sister of the paternal uncle's wife. 11 M. 48 p. 53.

——the son of wife's brother may be adopted; the rule that legal marriage must have been *possible between* the adopter and mother of the adoptive boy refers to the relationship prior to marriage. 3 M. 15.

(3 A) Who can be adopted ?—*contd.*

——when natural mother was seven degrees removed and adoptive father five degrees removed from the common ancestors, adoption was valid. 24 B 473.

——an adoption by a Hindu, belonging to one of 3 regenerate classes, of his mother's sister's son is invalid and *factum valet* cannot help 17 A 294, F. B. confirmed by the P. C in 21 A. 412 26 I. A. 153 3 C. W N. 454.

——a grand nephew may be validly adopted. 6 C. 41.

——*an adoption of half-brother is valid. 39 B 410.*

——there is no ground for holding that the adoption of a relation is limited to a particular generation 6 C 41 p. 48 6 C. L. R 393 p. 399.

——under the Hindu Law a husband's brother can be validly adopted. 49 B 615 27 Bom. L. R 674 89 I. C. 197. 1925 Bom 399.

——in the Punjab no adoption is invalid for any relationship between the adoptive and the natural parties. 36 I A 103 · 36 C, 780 : 13 C. W. N 920 11 Bom L R. 833 : 19 M L. J. 548 : 6 A. L. J. 567 P. C

——simultaneous adoption of two or more sons is invalid as to all. 12 C 406 : 12 I A 198 P C. 19 C 513 19 I. A 108, P C.

——adoption of a Brahmo boy is valid. 30 C 999 7 C W N 784, 25 B. 551 *Fol*

——adoption of a person of one subdivision of the Sudra caste into another subdivision of the same caste is valid 25 C. W N. 634

——intermarriage amongst *kayasthas* and Tantis belonging to *Sudra* caste is valid, so is adoption. 25 C W. N 639

——the following adoptions have been held to be invalid—daughter's son 26 I A 153 p 160 · 21 A. 412 p. 418 3 C W. N 454 p. 456, P. C 3 B 273, 298. Sister's son the above P C case and 33 I A 97 · 22 A. 488 10 C W. N. 730 3 C L. J. 594 8 Bom L R. 402 3 A. L J 415 P. C., 25 I. A. 46 p. 52 : 20 A 209 p 217 2 C W. N 193 p 195 *contra*. 9 M. I A 510, 1 W R. 25 P. C (parties were Vaisyas). Sister's daughter's son 7 M. 348, 7 I A. 173 p 177 2 M. 276 p 279 P. C. (half sister's daughter's son) Mother's sister's son, 26 I. A 153 21 A 412 : 3 C. W. N. 454 P. C. 34 B. 491 : 11 B. L. R 1172 Son of a daughter of a *Sagotra* 11 M. 49, F. B, 20 M 283 p 289 Brother, 3 M. 15 p. 16. Stepbrother, 3 M. 15 p 16 Paternal and maternal uncles 6 C. 41 p 47 : 6 C. L R. 393 p. 398.

—— [illegible] be valid, brother's son's s[illegible] Paternal uncle's son's s[illegible] p 399 Paternal uncle'[illegible] n, 3 M. 15 p. 17, 22 B. 973 p 679, *cousin standing in the same degree of relationship* to the common ancestor 68 I. C 566, 3 M 15, 36 M. 353, 34 B. 491, 14 M. 459.

(3B) Who can give in adoption?

——adoption must always be given either by the father or by the mother. 37 M. 529

——a mother may give in adoption during father's lifetime. 2 B. 388.

without authority from the 30 C 965 (22 M. 391 · 26 I B. 377, *Dist.* 11 M 43, 18 M at. L. T. 427 : 72 I C 230 provided that the husband has not expressly or impliedly prohibited her to do so. 3 B 377, 11 M. 43, 11 W. R 468, 3 C. W. N. 427 · 26 I. A 113 ; 22 M. 398, P. C.

——where there is competition between father and mother father's right preponderates. 11 M. 43,

——wife's power to adopt or give in adoption an only son, at least with the concurrence of the *sapindas* in cases when that is required, is co-extensive with that of the husband. (Madras case) 3 C W N. 427 : 26 I. A. 113 : 21 A. 460 : 22 M. 398 : 9 M. L. J 67 P. C.

——a widow can make a valid gift of her only son in adoption 73 I. C 204. 25 B. 589.

——a Hindu father, if he be not a Brahmin, does not lose the right to give in adoption by conversion to Mahammedanism 25 B. 551, 3 B L. R. 89.

——a lad of 15 who according to the Hindu law, attains discretion can adopt and give authority to adopt I C 239 : 3 I A 72 . 25 W. R. 235, P. C.

——a widow having re-married under the Hindu Widow Re-marriage Act is not deprived of her right to give her son by the first husband in adoption. 33 B 107 : 10 Bom. L. R 1134, contra 23 Bom. L R 482 : 62 I. C. 318 : 1925 Nag 1 F. B.

——the right of a Hindu father to give his son in adoption is not governed by any question of benefit to the boy, 1925 M. W. N 632 : 85 I C 882 1925 Mad. 932 : 49 M. L. J. 252 : 1925 M. 437.

(3C) Who can adopt?

——a minor may legally make an adoption. 5 C 363 p 357

——a widow though herself a minor may validly adopt a son. 11 C. 69 p. 72.

——but a widow twelve and half years of age cannot adopt she must be at least fifteen years old. 46 B. 307 : 23 Bom L. R 1175 64 I. C. 849, 22 Bom. L. R. 91 *fol.* 1920 M W. N. 721 · 12 L. W 544 : 60 I C. 246.

——the fact that an adopted son is [illegible] than the adoptive mother does not invalidate the adoption, [illegible] 313 23 A. 317

——adoption by [illegible] wife is preg[illegible] valid where the

——an adoption [illegible] pollutio[illegible]

adoptive father and [illegible] boy ar[illegible] . 533 : 14 M

datta homa being ne[illegible] case.

L. J. 340, 11 M. 5 *Fo*[illegible]

(3C) Who can adopt ?—*contd.*

——a *Sudra* leper may adopt a son. 28 C. 168

——there must be giving and taking. 25 C. W. N 403.

——a Hindu woman can under no circumstances adopt a son to herself. 36 C. 824

——a Hindu can adopt a son to her husband although the latter was not the last male owner from whom she obtained the estate 49 M. 636 96 I C. 950: 1926 Mad. 916.

[illegible] cannot adopt under the autho- [illegible] B. 410 · 7 Bom. L. R. 436.

[illegible] girl 26 B 491 4 Bom L. R. 115 *contra.* [illegible] C 214.

——adoption by a wife to her husband who is alive and lunatic, is valid. 22 Bom. L R. 1181 59 I C. 458

——an implied prohibition by the husband is sufficient to prevent a widow to adopt, no express prohibition is necessary. 1927 Mad. 733, 22 M 398 P C, 12 M. I A. 397 P C *Rel on.*

——a person who has a grand-son who is subject to the defect of dumbness from his birth, cannot be treated as sonless and an adoption by such person during the lifetime of the grandson is not valid 23 Bom L R 1320 65 I. C. 216

——a Hindu widow cannot adopt a son during the lifetime of a son previously adopted by her husband 23 Bom. L. R 1272 · 64 I. C. 614, 22 Bom. L R. 817

——the Agarwallas differ particularly from the Brahminical Hindus in their conduct towards the dead, omitting all obsequies after the corpse is burnt or buried. They also regard the birth of a son as having no effect on the further state of the proginitor and consequently adoption is a mere temporal arrangement and has no particular object. 52 C. 482 1925 M W. N 692 87 I C 357 27 Bom. L R. 837 49 M. L J 173 P. C

——adoption of the same boy by two brothers is illegal under the Hindu Law, *above case*

——the existence of an illegitimate child was no bar to adoption among *Sudras* 48 M. I.

——a step-mother succeeding to the property of her step-son as the widow of her father cannot make an adoption to her deceased husband 52 B 393 · 110 I. C 633. 1928 Bom 291 30 Bom. L. R. 591

——if a Hindu widow holds an absolute estate from her husband the adoption to her husband will have the effect of vesting that estate in the adopted son 1928 M. W. N 32 1928 Mad 118 109 I. C. 5, (10 M I. A. 279, 5 C. W N 20) *Rel on*, 1927 P. C. 139 *construed*

(3D) Widow's authority to adopt.

How authority can be given.

——authority to a widow to adopt need not be in any particular form, it may be in writing or verbal 20 C W. N. 650 P. C, 7 M. I A. 54 4 W. R. 116 P. C., 33 I. A 55: 28 A 377 8 B. L. R. 371 P. C

(3D) Widow's authority to adopt—*contd.*

——if an instrument giving permission to widow to adopt be not testamentary one, it must be registered. 27 M. 30.

——husband can authorise his widow by his will to adopt and at the same time appoint a guardian to manage the property during the minority of the son. 44 M. 188: 40 M. L. J 46 29 M. L. T 103: 62 I. C. 437.

——question of duration of husband's illness is material when he was a young man newly married and is alleged to have authorised his wife just prior to his death to adopt a son to him. 89 I. C 365: 22 L. W 91 1925 P. C. 54.

——a widow is bound by the act of her husband in making an adoption. 24 Bom. L. R 489: 67 I. C 656

——in the Mahratta country a widow can adopt where the husband does not expressly forbid the adoption 48 I. A 513; 49 C 1: 26 C. W. N. 393 24 Bom. L. R. 609: 30 M. L. T. 53 P. C.

——an entry in the *wajib-ul-arz* that the widows could adopt in a certain locality is a statement of a custom 38 C. L J. 293: 45 M. L. J. 215: 33 M. L T. 289 P. C.

——none but the person to whom a son is adopted, *or his widow*, can adopt, inclusion of other person in the power vitiates it 27 I A 128 27 C 996: 4 C. W. N. 549, 23 B. 590, 12 *B.* 185

Presumption of authority

——the court will be right in presuming the authority for an adoption which took place in 1867 and which was not questioned by anybody till the death of the adopted son. 86 I C. 772: 48 M. L. J. 353: 1925 Mad 803.

Construction of authority.

——authority how to be construed:—intention is to be looked to. 10 C W N 921: 29 M. 382: 4 C. L. J. 171; 16 M L J. 276: 8 Bom. L. R. 700 7 A. L J. 702: 33 I. A. 145 P C, 19 C. 513

Authority must be strictly followed.

——strict compliance with the law is necessary to validate an adoption by widow. 24 C. W. N. 905 P. C

——but the power to adopt need not be exercised at once 31 C. W. N 438 P. C.

——under the Bombay School the widow is bound to obey the mandate imposed by the will of her husband 47 C. 1012, 39 M L. J. 106: 25 C. W. N. 97: 22 Bom L. R. 1351: 57 I. C 1 P. C, and she can adopt unless there is express prohibition. 45 *B* 459: 23 B. L R. 1400: 59 I. C 800.

——where there is neither express nor implied prohibition to the husband, the mere fact that the husband refused to take a son in adoption at the time of his death does not deprive the widow the right to adopt 51 B. 217: 29 Bom. L. R. 236: 1927 Bom 151: 101 I C. 46, 7 B. H. C. R. 1 *Dist*

——an authority to adopt must be strictly passed and can neither be varied from nor extended. Where special reasons exist for placing restrictions on the authority and special instructions

(3D) Widow's authority to adopt—*contd.*

are given for the guidance of the wife [and restriction is placed on the authority they are to be strictly followed. 41 C L. J 55 · 1925 Cal. 619, 19 C 513 *Ref.*

——where a widow was authorised to adopt by a will which provides that "the widow should be absolute owner of the entire estate, the adopted boy having no right of interference during her lifetime" the distribution of the property in favour of the widow is binding and no surrender could be made by the widow except by express words in the deed of adoption 49 A. 579 : 101 I C 678 1927 All. 387, 108 I. C. 202 1928 Mad. 271

Consent of Sapindas and other persons.

——according to the Bombay School, the consent of the hus-
[illegible] widow
[illegible] 88 I. C.
[illegible] 127, 26
[illegible] 36 1922
I. C 216, Fol

—— but [illegible]

[illegible] n taken by the Bombay
which has followed 28
o 50 B. 815 : 100 I C.
0 Bom L R 859 · 1928
Bom. 307.

——where assent of the nearest *sapinda* is not obtained assent of some remoter *sapinda* is not valid · nature of assent (where
[illegible] isrepresentation made
[illegible] s necessary) to vali-
[illegible] 1 C. W. N. 345; 17
[illegible] C., 1927 Mad. 706;
102 I. C. 104.

——consent of majority will not do. 86 I. C. 269 : 1925 M W. N. 107 : 1925 Mad 635

——the consent of the husband's mother would validate an adoption by a widow in the absence of any other sapindas. 48 M. 1 : 1925 Mad 497.

——a sapinda cannot withhold consent from corrupt or improper motive. 51 Mad. 893 ; 1928 Mad. 994 : 55 M. L. J. 894 F. B.

——consent of the *sapindas* given for consideration is bad. 11 M. L. [illegible] onsent given by a *sapinda* on condition that the adop[illegible] claim the family property, but should be con-
[illegible] gets from maternal side, is valid consent

(3D) Widow's authority to adopt—*contd.*

——the consent required is that of a substantial majority of ... were capable of forming ... matter, such compliance ... essary for the validity of ... P. C.

... ante and the ... on H

——the husband may express his desire that in the exercise of power the wife should consult any particular person, 18 C. 385 and may make the exercise of the power contingent upon the consent of other person. 27 I. A. 128 : 27 C. 996 : 4 C. W. N. 549, **P. C.** When such consent cannot be obtained authority cannot be exercised 14 M. 65, 16 I A. 166 **P. C.** and the last case

——when authority to adopt is given subject to the approval of another but the latter person dies before adoption, adoption is not invalid because it was belated by the widow. 4 Pat. 67 : 1925 Pat. 442.

... his mother is sufficient ... son where ... 1929 Mad ... dered and

commented on.

——the daughter-in-law can adopt only with the consent of her ... his life 46 B ... 20, 29 B. 410, ... its effect corres ... ter his death. ... Bombay H C. ... adoption would ... had consented ... 1923 M. 22?.

36 M. 145.

——the right of the court to scrutinise the kinsmen's reasons extends only to those cases in which consent is *refused* 43 M. 876 : 59 I. C. 609.

——in case of adoption by widow of predeceased nephew with the consent of the widow of the last co-parcener, the subsequent adoption by the latter's widow becomes *invalid.* 45 B. 529 : 23 Bom. L R. 269

——the fact that the son of reversioner is to be taken in adoption in which the consent of the reversioner is necessary, will not make the reversioner incapable of giving consent. 51 M. 293 : 1928 Mad. 994 : 55 M. L. J. 894 **F. B.**

When there are several widows

——when authoriy is given to one of several widows, she alone can adopt. 15 I. A. 127 : 15 C. 725.

(3D) Widow's authority to adopt—*contd.*

——when power to adopt is given to two widows, the surviving widow may adopt, all powers are not to be liberally construed in equity. 17 C W N 319, 48 M. I . 1925 Mad. 497.

——but if power is given to the widows jointy, it cannot be acted upon by one of them unless the other dies 29 M. 437

——an adoption made by co-widows in case of joint power is [illegible] have been [illegible] becomes a [illegible] 727, 37 M. [illegible]

——unless power is given to widows severally the senior widow has the preferential right to adopt, the junior can adopt with the consent of the senior or when the latter refuses 16 C. W. N. 440; 39 C 582, 18 C 69, 12 I A 198 : 12 C 406, 45 M 266 42 M L. J. 101 : 30 M. L. T. 60

——when power is given to two widows successively the elder would have the preference 38 C. 694.

——where the authority contemplates simultaneous adoption by several widows, it is inoperative 19 I A. 108 19 C 513, 12 I. A 198, 12 C. 406, P C 9 C 50 · 11 C. L. R 297

Successive adoptions.

——"I strictly order you to adopt some boy to me, if the son who might be adopted under the authority should die in your life time you will have power to adopt another boy," this is general power to adopt any number of boys. 16 C. W N 675.

Condition attached to authority.

——condition may be attached as to the arrangement of property. 21 M 10, and restriction as to enjoyment of the property by the adopted son may be made. 6 I A. 196 2 M. 91 P C, 12 M. 490, 14 M. 172, 19 B 528, 21 M. 10, 27 M 577, 4 M 160, 16 I. A. 53 : 16 C. 556 P C. But widows cannot originate condition. 16 M. 400.

——the failure of disposition in a will does not affect the power of adoption 11 C W. N. 769 31 I A 107 · 31 B. 373.

Direction as to the selection of the boy.

——direction as to the selection of boy must be followed, 14 M. [illegible]

(3D) Widow's authority to adopt—contd.

When the power of the widow to adopt comes to an end.

——when there is authority of successive adoption it comes to an end when one adopted son after attaining full legal capacity dies leaving a widow, 8 C 302 : 8 I A. 229, P. C 32 C. 861 I C. L J 270, 33 C. 1306 : 11 C. W. N. 12 : 4 C. L. J. 357, 28 C. L J 403 : 23 C W. N. 177 P. C., 10 M. 205 p. 209 : 14 I A 67 P C 10 M I. A 279 : 3 W. R. P C., 17 C 122 : 16 I A. 166 P. C., 22 B 416, 33 M 228, 9 B 94, 11 B. 381, or leaves a son. 26 B. 526, 23 C W. N. 177 : 28 C L J. 403 P. C.

——where a Hindu dies leaving a widow and son and the son dies issueless but leaving his widow, the power of the former widow to adopt is at an end and cannot be revived Even when the son's widow remarries and the mother succeeds to the estate, she cannot validly adopt 89 I C. 345, *contra* 48 M. 1 : 1925 Mad. 437

——when the son dies after having attained his age of majority but witout leaving his wife, his mother can adopt a son to her husband, 46 M. 423, 41 M. 855 P. C., considered as obiter, 35 M. L. J. 789, 25 M. L. T. 204 *Dissented* 45 M. L. J. 161 ; 73 I C. 814, 31 B. 405, 32 M. L. J. 484.

——a widow of a deceased co-parcener cannot adopt after the property has vested in a widow or other heir of last survivor of the co-parcenary. (Mitakshara). 33 M. 228, 24 Bom L R 1102, 31 B. 483, 26 B. 526, 14 B. 463, 48 I C. 513 P. C. 47 B 110.

——a mother succeeding as heir to her married son, who died without leaving a widow or issue, is competent to adopt 5 C. W N 20, 25 B. 306 : 2 Bom. L R. 1011.

——an adoption which would have the effect of divesting an estate which is already vested in a person other than the adopting mother is not permissible. 23 C. W N. 358

[illegible] his widow power to [illegible] be exe[illegible] [illegible] family, [illegible] I. A 222 P

C. Dist.

——even where the property of the last owner has escheated to the Govt there is no bar to the adoption of a son by the widow of the last owner. 48 M. 1 : 1925 Mad. 67.

——a widow by re-marriage loses her power to adopt 31 B. 107, 24 B. 80.

——but her right to adopt does not depend on her inheriting her husband's property. 24 C. W. N. 57 P. C. contra. 24 Bom L R. 836, 32 B 499

——an unchaste woman becoming pregnant by concubinage cannot adopt. 5 B. L. R 462.

——an adoption made by an unchaste Sudra widow is not invalid. 45 B 459 : 29 Bom. L. R 1409, 31 Bom. L. R. 459 : 1929 Bom 246, provided she has not contracted an udki marriage 31 B.

(3E) Procedure in adoption.

——actual gift and acceptance of the adopted boy is necessary. 19 C. 452 : 19 I. A. 101 P. C., 6 C. 381 : 7 I. A. 250. 7 C. L R. 313, P. C. 13 M. 214, 11 M. 5, 25 W R. 192, 2 C. W N 254, 11 W. R 196, 25 C. W. N 403

——mere acknowledgment is sufficient 66 I. C. 38 (O).

——mere declaration of adoption by the adoptive father without the giving and taking does not constitute a valid adoption. 6 Pat 506 . 8 Pat. L. T. 34 · 1927 Pat 145.

——mere execution of a deed does not effect an adoption. 1923 *Bom. 302*

——both giver and taker must be of sound mind and must understand the significance of the act 2 C W. N 154, 19 C 452 p. 461, 19 I. A 101 p 105, 106, 10 I. A 420, P C.

——no document is necessary 5 W R. 109 P. C.

——the act must be free from fraud, co-ercion &c. 29 M 437, 6 B 524

——in case of adopter being woman, her understanding of the effect of adoption must be clearly proved 10 M. I. A p 433, P. C

——a person giving in adoption ought not to receive any consideration, but if he does, the adoption is not invalid 21 W R 381 13 B. L R. App. 42, 29 M. 161, 22 B. 199

——but such consideration cannot be recovered by suit. 21 W. R. 381 : 13 B L R. App 42, 35 B 169, 22 B 199.

——a grant of an annuity as consideration for the agreement to give a boy in adoption is invalid and un-enforcible. 24 Bom. L. R 414 . 67 I C 850

——natural father who gives in adoption cannot impose any condition invalidating the adoption 2 B 377

[illegible] ary 6 C.
[illegible] 3 M 214

[illegible] 6 C 381,
[illegible] 770 6 C.
[illegible] 11 M 5.
25 C 105.

——the Calcutta H C has held that for the purpose of adoption the Kayasthas of Bengal are *Sudras* and no *Putresthi jag* is necessary. 20 C W. N. 901, but the Patna H C has held that the Kayasthas of Bengal are not *Sudras*. 7 Pat 245 108 I C. 545 9 Pat L. T 123 and the same H. C has held that the Kayasthas of Bihar also are not *Sudras*. 6 Pat. 506 8 Pat L T. 34 1927 Pat 145

——*Putresthi jag* is not essential even amongst the regenerated classes An adoption is valid if *upanayana* is not performed in the natural family 2 Pat 469 4 Pat. L T. 427 72 I C. 230.

——in case of *Sagotra adoption no ceremony is necessary*. 24 B. 218, 7 M. 548, 13 M 214, 6 A 276, 49 B. 515 : 27 Bom. L R 365 87 I. C 472 : 1925 Bom 289, but previously in Bengal, there was no

(3E) Procedure in adoption—*contd.*

distinction. 15 W. R 300 : 7 B. L R 1, but now it is held that parties being *sagotra*, even amongst the Brahmins, no *Datta Homa* ceremony is necessary. 20 C. W. N. 19

——the only ceremony in adoption among the Agarwallas consists in tying a turban round the head of the young man who is [illegible]

J. 173 **P. C.**

——what ceremonies are necessary amongst the Jains discussed. 25 C. W. N. 273 : 1920 M. W. N. 627 : 61 I. C. 481 P. C. 72 I. C. 424

——the adoption of a *Karta Putra* is akin to an *adoption in* Kritrima form. Under this system of adoption the person on adoption does not lose his status in his natural family though he acquires a status as the son of his adoptive father 4 Pat. 824 : 90 I C 65 : 6 Pat L T 593.

——performance of the ceremony after the death of natural father or adoptive father does not invalidate the adoption. 7 M 519. 24 M. 214 : 4 C W. N. 304 : 27 I A. 162, **P. C.**, it may be delegated. 21 M 497, 22 B. 590.

——an invalid adoption cannot be validated by the consent of [illegible] or the reversioner 33 M [illegible] 23 B [illegible] B. 551 p. 555 *contra.* [illegible] he consent of the adoptive [illegible] 3. 551.

——a valid adoption can not be cancelled by natural or adoptive parents or renounced by the adopted son. 2 A. 366, 19 B. 2[illegible] 19 B 2[illegible] but he can renounce his interest in the property. 15 W. R. 63.

(3F) Dispute as to adoption.

(3F) (a) Who can dispute.

(3F) (b) Burden of proving and disproving adoption.

(3F) (c) Estoppel and resjudicata in suits to set aside adoption.

(3F) (d) Limitation period for setting aside adoption

(3F) (a) Who can dispute ?

——a presumptive reversioner may sue to invalidate an adoption 11 M. I A. 386. 7 W. R. 25, **P. C.**, where he does not sue, more distant reversioner can sue 8 C. 764 p. 772 ; 8 I. A. 14 p 22 : 8 C. L. R 381 p. 385, **P. C.**, 19 B. 614, 9 W. R. 463, 11 W. R. 468 p. 470, 18 M. 53, 32 C. 62 ; 9 C. W. N. 25, In that case next reversioner is necessary party. 6 C. 764 p. 772, 8 I. A. 14 p 2[illegible] 8 C. L. R. 381 p. 385 **P. C.**, 18 M. 53. 19 B. 614.

——when a reversioner sues to nullify an adoption and during the pendency of the suit dies, the next reversioner can represent him. 19 C W. N. 641, **P. C.**

3F) (a) Who can dispute ?—*contd.*

——suit by one reversioner will not be *res judicata* in a suit by another reversioner. 22 A. 33, 382, *contra*. 29 M. 396 · 3 I A. 72 p. 84. 25 W. R. 235 p 239, P. C

(3F) (b) Burden of proving and disproving adoption

—— the adopted son must prove the adoption 13 C. W. N. 370 .
9 ·
P.
28
28
34 I. A 129. 29 A 519 6 C. L J. 13 9 Bom. L R. 757 17 M L. J 354 · 4 A L J 497, P. C, 12 M I A 350, P. C.

——when the deft pleads that the plff. cannot inherit being adopted by another person, the burden of proving that adoption is on the plff but it may be shifted by the statement of the plff. 11 C W. N 321, P C.

——where the fact of adoption is admitted but it is alleged that the n
a Br
tion
999:

——when it becomes difficult to procure direct evidence of adoption for lapse of time, evidence of conduct and treatment in the adopted family is strong evidence of adoption 26 C W N 65 34 C. L. J 432, 36 C L J. 434, 67 I C. 31, 72 I C. 680 (C), 13 C. W. N 920 36 I. A 103 36 C. 780, 24 W. R 107, 18 W R. 77 p 80. 11 W. R. 380, 2 B L R App 51, 24 B 473: 2 Bom. L R 163, 15 C. W. N 524, 1923 Lab 374, 45 A 59 29 A 184, 419, and of authority to adopt. 89 I C. 817 1925 P. C 201

——probabilities help the proof and disproof of adoption 7 W. R. 71 4 M I A 414 p. 425, P C, 1 W R 144 p 150, 2 W. R. 232, 11 C W. N. 841 34 I A 129 29 A 519, P C, 7 M I A. 54 p 64, 67, P C, 25 W R 291 p 295 39 I A 154 p 177, P. C, 5 W. R. 109, P C

——where the name of the boy was not changed, no proof was produced to the expenditure of adoption ceremony and no mention was made as to the adoption when the widow s name was mutated. adoption was not proved 1922 Nag 185, 12 N L R. 164.

——in case of adoption by widow of immature age her free consent must be proved 24 Bom L R 726

(3F) (c) Estoppel and resjudicata in suits to set aside adoption.

——a person is not estopped from denying an adoption merely because he previously secured succession to properties on the footing

P. C.

(3F) (c) Estoppel and resjudicata in suits to set aside adoption—*contd.*

——previous admission may be proved to be mistakes and untrue unless another person has been induced thereby to alter his condit... *See above case.*

——reiterated declaration by the adopted son himself for many years that he was adopted is sufficient proof of adoption against him when he denies the fact of adoption. 96 I. C 836 : 1926 P C. 91 ; 1926 M W. N. 596 . P. C. 31 C. W. N. 217 P. C.

——estoppel operates merely as a personal disqualification and not as to others. 18 M. 145.

——active participation in the adoption may operate as estoppel 24 B. 473 p 481. (7 M. 53. 11 B. H. C R. 190), *Ref.* ...estoppel

sence of the reversioner at the ceremony would imply acqui... 94 M 636 · 96 I. C. 950 . 1926 Mad, 916.

——a Hindu widow who takes a boy in adoption alleging that she has authority from her husband to adopt, cannot deny it subsequently 15 M 486, 30 A. 549.

... 11 B. 391. executed ... es a witness ing adoption

14 B 512.

——an invalid adoption to be raised to the level of a valid adoption by conduct, there must be long continued course of conduct on the part of the adopting family, and the situation of the adopted son in his original family must then become so altered that it would be impossible to restore him to it. 18 M. 145, (15 M 486, 11 B 38), *Ref.*

——an erroneous expression of opinion as to the legality of adoption cannot operate as estoppel. 11 B. L R. 391 ; 19 W. R 12. 19 B. 374

... refers to the belief in a fact

28 C. L. J 91 · ...

C. W. N. ...

——every estoppel must be reciprocal, i.e. to bind both the parties. 24 C L. J. 541 20 C W. N. 1140, 6 C. L J. 621.

——when one party does not rely on the action of the other there is no estoppel. 23 C. W N. 521.

... viz. the validity of ... C. 653 · 1923 ...

...ased the party ...

... adoption 7 W R

57 p 62, P. C.

(3F) (c) Estoppel and res-judicata in suits to set aside adoption—*contd.*

——where a person made an admission in a document that he was adopted, and afterwards sued for the properties of his natural [illegible] ...t him but [illegible] ...deed 11 [illegible] ...Bom. L R. [illegible]

Res-judicata.

——a decision in a suit brought by a widow to set aside an adoption is binding against the reversioner, as the widow represents the estate. 23 C W N. 326, P C

(3F) Limitation period for setting aside adoption.

——a suit for declaration that an alleged adoption is invalid [illegible] years from the date of [illegible] 405, 27 B 614, 20 M [illegible] . 84 : 13 C 308, P C [illegible] it begins to run it runs against the whole body of reversioners irrespective of the fact that nearest reversioner was in collusion 39 M L. J 621 1920 M W N 783 29 M. L T 43 60 I C 98

——but limitation for suits to recover possession of property after the death of the widow is 12 years, running from the date of her death, although such suits indirectly invalidate the adoption (Art. 141 and not Art 118, L Act, applies). 15 C W N. 524, 16 C. W N 458 39 I A 19 14 Bom L R. 182, P. C, 10 C. W N. 1065: 33 I. A. 156 28 A 727, P C, 27 C 242 · 4 C W N. 405, 14 C. 401, 9 C. W N. 222, 25 C. 354, (8 A. 644, 9 A 203, 17 A. 167, 13 B 160, 21 B. 159, 376, 20 M. 40, 14 C 401) *Ref contra*, 21 B 378

——where the adoption is made to the widow herself and not to her husband, the rule of six years, limitation does not apply. 22 C. 609, 22 I A. 15 P C. 6 I A 110 · 6 C L R 12 P C

——when the right of the next reversioner to contest an adoption or an alienation by widow, becomes time-barred, the right of the subsequent reversioner is not time-barred 9 C. W N 25 32 C. 62, 22 A 33, *Relied*

——where the adopted son holds adversely to the widow of the adoptive father for more than 12 years the suit will be time-barred. 10 A. 485

——suit to declare adoption valid must be brought within 6 years by the adopted son, from the time when his right is interfered with, (Art. 119 of the L. Act. applies) 26 B. 720, but in suit for possession only this Art. does not apply 25 C 354, 26 A. 40.

——in a suit by adopted son claiming property alienated by the widow before adoption, time does not run before adoption. 19 B. 809

(3G) Effect of adoption

When the adoption takes effect.

——an adoption takes effect from its date. 9 C W. N. 735: p. 798 : 7 M. I A. 169. P. C. 3 I. A 154. P. C., 4 M 160 11 B 69 5 C. 251 : 19 B. 809 p. 814, others hold that it dates back to the death of the adoptive father. 31 M. 75 : 21 B. 319 : 25 C. C 159 *and time* of limitation of suits by adopted son against alienations by the widow runs from that date and not from the date of the death of the widow. 32 C. 165 : 26 M. 143 : 12 M. L. J. 197.

Valid and invalid adoption and its effect.

— [illegible] a left no property is not impos [illegible] , 103 I. C. 5, I M 69 P.C. [illegible] C., 10 M. 205 P C., 35 Bom [illegible]

——an adoption cannot be partly valid and party invalid. 25 Bom L R. 1403 : 59 I C 783.

——an adoption is valid though it divests the property already vested in the co-parceners *absolutely*. 11 C. W. N 769 : 31 B 373 : 2 M L. T. 295 : 17 M. L. J. 343 : 9 B. L R. 616 : 6 C. L. J. 1 : 34 I A. 107, P. C.

[illegible] motive [illegible] dopted [illegible] will [illegible] Hindu [illegible]

fol.

——where a proposed adoption is not made or where an adoption [illegible] ted son is [illegible] ife. 19 C [illegible] m. L. R. [illegible]

——the Hindu Law of *divestment* of widow's estate applies to the property which the widow inherits from her husband and not to the property which she holds in management under the *scheme* of an institution. 51 M. L. J. 652 : 1926 M. W. N. 793, but the widow is divested of the trusteeship *which* she *has* inherited from her husband. *1928 M. W. N. 53 : 55 M. L. J. 757.*

Propriety of adoption.

——the adoption of a boy is a religious act and is one which is necessary for the salvation of the soul. 97 I. C. 252 : 1925 Mad 1093 51 M. L. J. 366

——but amongst the Agarwallas an adoption is only a temporal act. 30 C. W. N 601 : 1925 P. C. 1181 P. C.

Effect of agreement before adoption.

——agreement between adoptive father with the father of adopted son that adopted son shall equally inherit with natural born son, is binding. 24 C. W. N. 794 P. C., 85 I. C. 852 : 1925 Mad 932 : 1925 M. W N. 632.

effect of adoption —*contd.*

——an agreement between adoptive father and natural father which in effect gave the adoptive father an absolute right to dispose of all his property even after the adoption in any way he pleased, is not binding on the adopted son. 27 Bom L R 1509 : 92 I. C. 4 1926 Bom 90.

[illegible]

——an adoption cannot be declared invalid by reason of any collateral arragement or contract intered into between the adoptee and the adoptee's natural father 97 I C 232. 1926 Mad 1093 51 M L J 366.

——a settlement by which the widow would enjoy the property for her life and the property would vest in the adopted son after her life or at her pleasure, is valid. 49 M. 636 96 I C 950 1926 Mad. 916

——condition postponing the vesting of the estate in the adopted son beyond two lives in existance is invalid 1923 Nag, 121

——an adoption cannot be conditional, ante-adoption agreement with the natural father is valid by custom to the extent of the creation of life interest of the adopting widow in the whole property 5 M 508 31 C W N 910 45 C L J. 620 29 Bom L R. 969 1927 P C 129

Power of adopted son to question alienation &c

——an adopted son is entitled to sue against the illegal alienations made by the widow before adoption. 32 C 165, 33 B 88 : 10 Bom. L. R 1029, 26 M. 143 . 12 M L. J. 197

——all the alienations made by a widow become ineffectual against the adopted son unless they are made for necessity. 73 I. C. 204.

——an adoption *pendente lite*, is not to be regarded in the same light as an alienation *pendente lite* to make the decree binding against the adopted son, he must be made a party like a natural born son 5 B. 630

——when widow in possession is ousted by the adopted son and is sued for mesne profits, [illegible]
sum for her maintenance [illegible]
expended for funeral ceren[illegible]
actually collected by her 2. [illegible]

——a son adopted under an authority given in will cannot dispute the bequest as to charity made under the will. 46 M. 300 : 32 M. L T. 47 · 73 I C. 991.

effect of adoption—*contd.*

Succession by adopted son and to his property.

——as to succession the right of the adopted son is equal to that of the natural born son, (Bengal), 5 C 615.

——an adopted son does not acquire any right greater than a begotten son, and the adoptive father can dispose of property by will. 3 C. W N. 415 . 26 I. A 83 : 22 M. 383 : 1 B. L. R. 277.

——in cases of distribution of joint family property (a Mitakshara family) by partition, an adopted son stands on the same footing with the natural born son; where there is competition between adopted son and natural born son of the adoptive father, the share of the adopted son is less. 23 C. L. J. 395 : 20 C. W. N. 702, P C., 16 Bom L. R 263, *Reversed*, 4 C. 425, *Overruled*, 9 W. R. 423 and 8 C L. R 77, *Approved.*

——under the Mitakshara law an adopted son takes a fourth share of what is taken by the subsequently born legitimate son. 1 C L. J 388, 17 B. 100, *Fol.* 4 C. 425, *Expl.*

——although an adopted son might have a lesser share in his adoptive father's estate because of the birth of a natural son so far succession to collaterals is concerned the adopted son and the natural born son take equally. 51 M. 893 : 1928 Mad. 994 : 28 L. W. 422 F B.

——an adopted son succeeds both lineally and collaterally and an adopted son occupies the same position as a natural born son, except in few instances. 8 C. 302.

——an adopted son ceases, by virtue of that adoption, to be regarded as the son of his natural father, and becomes for the purposes of inheritance or succession the son of his adoptive father. 11 C W. N. 321 ; 29 A. 184 : 34 I. A. 27 : 9 Bom. L. R 267 : 17 M L J 103 . 5 C L. J. 115, P. C., 25 Bom. L. R. 813. 55 I. A. 133 · 32 C W N 1009 · 26 A. L J 609 : 108 I. C. 673 1928 P. C 87, in this last case the right of the natural brother of the adopted son to the succession of his property has been dealt with.

——but where the property in the natural family vests in a person before adoption he is not divested of it by adoption like the Hindu widow who is divested of the limited interests in the property of her husband by remarriage or conversion. 5 N. L. R. 58 : 65 I. C. 362, 478, 542 . 72 I C. 309, 40 B. 429, 29 M. 437.

——under the Bengal School also person who has inherited the property of his father on the latter's death is not divested of that property, he being subsequently adopted by his paternal uncle. 33 C W N. 553 · 46 C L. J. 293 : 1929 Cal. 337.

——an adoption effected after the death of a collateral relative does not entitle the adopted son to come among the heirs of such collateral, even if the adoption was delayed by fraud. 12 C. 1... 12 I A 137 P. C.

——among Sudras of Madras the adopted son shares equally with subsequently born *aurosa* son. The Dattaka Chandrika has been long accepted in Southern India as high authority on the

effect of adoption—*contd*

Law of adoption 44 M. 656 34 C. L. J. 56: 41 M L. J. 33: 1921 M. W. N. 541 26 C W N 1. 19 A. L J. 621 3 Pat L. T. 1. P. C.

——on partition of Mitakshara family, an adopted son and an adopted son of a natural son stood exactly on the same position. 4 C. 425 : 3 C L R 534.

——an adopted son in a suit for partition with the after-born son takes one-fourth share in the Bombay Presidency 48 B 672. 89 I C. 984 · 1925 Bom 425

——an adopted son holds precisely the same position as a son born, as regards inheritance from the adoptive mother's relations. 33 C 947. 10 C W. N. 695: 3 C. L J 502, 10 C 232 10 I A. 138 : 13 C. L R 379, 9 C 70, 3 C 615 · 46 B 541, 48 M 1 1925 Mad. 497, reciprocally an adoptive mother and her relations inherit to the adopted son as to the natural son 33 B 404 13 B L. R 641, but when the adoptive father selects one of his wives to adopt in conjunction with him only she inherits 3 C. W N 730 : 26 I A 246 : 23 M. 1 P C.

——a son adopted by a widower does not inherit to the relation of his adoptive father's predeceased wife 85 I C 318 · 1925 Mad. 340 : 48 M. L J 126, *contra* 97 I. C. 145 1926 Mad 1203 : 1926 M W N 778 51 M L J 545 49 M. 941

——under the Hindu Law when the sole owner of ancestral property is adopted into another family his property in the natural family goes to his own heirs in preference to the heirs of his father, as he is the last male owner 49 B. 520 27 Bom. L R 414 . 87 I C 816, (34 B 669, 11 Bom L. R. 797, 43 B 774, 21 Bom. L R. 776, 25 Bom. L. R 274, 29 M. 437) *Ref and discussed*, 18 Bom L R. 258, *Dissented from*

——adopted person having no son born but having one in concepton, such son passes to the family 42 B 547.

——where a married man having son is given in adoption, the son does not become the successor of his father and his *gotro* is not changed. 33 B. 669

——where a son dies childless and the property vests in his mother, the adoption by step-mother cannot divest the former of the property. 12 C 246

(4) Caste

——caste is the result of birth and not of choice or volition, though a person may lose caste he cannot by any act of his rise to a higher caste 48 M. 1. 1925 Mad 497

——the consciousness of a community is good test of *Varna*. 48 M. 1: 1925 Mad. 497.

——wearing the sacred thread, though worthy of notice, is by no means conclusive on the question of caste 48 M 1, 1925 Mad. 497.

——there are no decisive rules for determining the caste of a particular family or group of persons. The popular view lays down

(6) Endowment—*contd.*

——a secular property even if acquired by a *sadhu* d[illegible] change its character unless dedicated. 5 Lah. L. J 351: 75 I.

——property can be dedicated so as to vest in the idol in such case no trustee is necessary. *81 I. C. 91*: 1925 Cal 14[illegible]

——bequest to trustees for the establishment of an im[illegible] valid. 14 C. W. N. 18 F. B.

——a dedication in fraud of creditors, is invalid. 44 C. 522 · 99 I. C. 917: 1927 Cal. 244, 27 C. 242 *Ref.*

Proof of trust.

[illegible]

used for the support of an idol may not be *proof* that that formed an endowment for the purpose, yet, it is a fact that [illegible] considered when the intention of the founder is to be gathered an ancient document expressed in ambiguous language. *30 C* P. C., 8 W. R 42 43, *Fol.*

——in dealing with a question as to whether properties al[illegible] to be debuttar are really debuttar or only nominally so the man[illegible] enjoyment of properties is the most important point for cons[illegible]tion. 12 C. W N. 98.

Absolute gift is necessary.

——to prove endowment it must be established that an abs[illegible] grant was made with the intention that the profits should be ap[illegible] [illegible]

——the mere fact of the proceeds of any land being used for [illegible] those lands formed [illegible] that may well be [illegible] if the founder has [illegible] C W. N. 1 P. C

Dedication is irrevocable.

——a dedication to a Thakur is irrevocable. *41 C. L. J.* 82 I. C. 840 : 1925 Cal. 442.

——a founder or his successor cannot revoke a validly cre[illegible] endowment 41 C. L. J. 22 . 82 I. C. 840, 17 W. R. *41*. *14* M I 289 10 B L R. 19 P. C.

——but a dedication to an idol can validly be revoked by a [illegible] wherein all the parties interested in the *deed of trust* [illegible] C. L. J. 522 : 99 I. C. 917 : 1927 Cal. 244.

Idol is a juridical person.

——an idol is a juridical person who *can* take and hold prop[illegible] 6 C. W. N. 178, 49 C. L. J. 321, 27 A. L. J. 414 : 33 C L. J. [illegible] Bom. L. R. 715 : 1929 : P. C. 65.

(5) Endowments—*contd.*

——an idol is a juristic person The Deity is not a moveable
the shebait. Will of
ough its guardian,
305 : 41 C. L. J.

mage can properly

——in dedications of the completest kind an idol is rightly regarded as a juridical person capable as such of holding property, but there are less complete endowments in which notwithstanding a religious dedication, property descends (and beneficially) to heirs subject to a trust or charge for the purposes of religion. 32 C 129 P. C, (8 M. I A 56, 5 C. 438, 6 I. A 182 P. C) *Ref.* 30 M. L. T. 101

——an idol has no juridical existence unless it has been consecrated and spiritualised. Before this, the deity of which the idol is the visible image, does not reside in the idol. 29 C 260 6 C. W. N. 267

——a family diety is not a moveable chattel 33 C. W. N. 96 1929 Cal 237

Idol need not be in existence

——formerly it was held by the Calcutta H C. that dedication to

——but the F B ruling reported in 37 C 128 13 C. W N. 18 which has been followed in 32 A. 337 has held, that bequest for worship of idol to be established after testator's death is valid.

——a deed by which a gift was made to an idol not existing, and possession of the property was made over to *Pujari*, was valid. 33 A. 253, (32 A 337, 37 C 128 14 C W. N. 18). *Ref*

——but under the Hindu Law general endowment for the worship of God, without giving the name of the deity for whose benefit the endowment is to take effect is void for uncertainty 23 C. W. N 645, 33 A 793 : 8 A. L J. 944, *Fol.* (37 C 128 14 C. W. N. 18 · 10 C L. J. 355, F. B , 32 A. 337, 33 A. 253). *Dist.*

——dedication not to any particular deity is void for uncertainty. 33 A. 793, (37 C. 128 : 14 C. W N. 18, F. B., 32 A. 337, 33 A. 253), *Dist*

——a trust for the spread of Hindu religion is vague and uncertain 46 M 300.

(5) Endowments—*contd.*

Substitution of new image.

——an image being broken another image may be replaced 17 C. W. N 1013, 41 C. L. J 128 ; 1925 Cal 648

——new image substituted in place of old image, difference between the two images, suit by co-shebait, right of the plff. should be worked out before passing a decree. 41 C. L. J. 128 · 1925 Cal 648

——an individual worshipper of a village temple cannot remove an idol alleged to be cracked and substitute a new one. 41 M. L. J. 90 · 72 I. C. 328.

Removal of idol.

——where no condition as to the location of the idol is imposed by the founder his successors can remove the idol during their *palas* 26 C. W. N. 909.

——the son of a founder of an endowment may restrict the location of the deity for its benefit. 27 C. W. N. 665

Private family debuttar property, incidents of.

——*debuttar* property not dedicated to public idol may be converted to a secular property by the consensus of the whole family. 12 C. W. N. 98, 15 C. W. N. 126, 16 C. W. N. 29, 2 C. 341, 4 I. A. 52 P. C

——in case of private family debuttar the shebaits cannot give the property a different turn. It is the members of the family who by the consent of all can convert the debuttar property into secular property. 27 C. W. N. 218.

——the mere fact that two branches of the family of the shebaits collected a half share of the rents of the endowed property separately did not prove that the property was treated as secular property. 15 C. W. N. 126

——*when a private debuttar property* had been partitioned between the members of the family for the better enjoyment thereof and there had been sales and mortgages of portions of the property by some members but there was nothing to show that there was a consensus to give the property a different turn, held that the original debuttar character of the property being established these facts did not destroy the debuttar character. 16 C. W. N. 29, 2 C. 341 P.C.

——in the case of private debuttar properties it is not unusual to describe them as "ancestral" or as "our debuttar properties" and the heirs of the founder describe their interest as shebaits according to the shares they have in secular properties. 41 C. L. J. 2 5. 1 C. 616 . 1925 Cal. 996.

Distinction between personal property and mutt property.

——distinction between personal property and mutt property, offerings by worshippers. 35 C. L. J. 188.

Subsequent benefaction is accretion

——subsequent benefaction is simply accretion or addition to the existing foundation and such benefactor is not the original founder. 36 C. L. J. 441 : 27 C. W. N. 422 : 50 C. 233 : 51 M. L. J. 7 M. 499.

(5) **Endowments**—*contd.*

' be accepted
wit endowments
mus ie new rules
mus 41 C. L. J.
22 :

Charitable gift.

——charitable gifts to recognised hospitals are good charitable gifts 6 C. W. N 321.

——perpetuity is nc
may be charitable like a

——when there is
accumulation is valid

Settlement of Scheme

——the court is to settle a scheme for the management of a religious or charitable endowment. 11 C. W. N. 442 : 24 I A. 78 : 31 M. 138, P C

——but the scheme is liable to variation for good reason shown 11 C W N. 442 34 I A 78 31 M. 138, 34 Bom. L R. 538, P. C.

——before the settlement of scheme an account of the trust property must be taken 14 C. W. N. 23 : 26 I. A 199 : 24 B. 50 P. C

——the rules laid down in the deed of endowment for the worship of the Thakur and for the management of the charities, if any, connected with the endowment, are binding 41 C. L. J. 22 82 I C 840. 1925 Cal 442

Appointment of Shebait

——an idol is a juristic person, the person founding the Deity and becoming responsible for His duties is *de facto* trustee and in common parlance is called *shebait* 52 C 809 : 30 C. W N. 25 : 41 C. L J 551 87 I C 305 49 M L J 30 P C.

the appoint-
the worship.
so or if the
ait so appoin-
n created or
fts, the donor
L J. 22 . 82

——when a person is appointed manager of the worship of an idol in pursuance of settling a dispute between the members of a family, he does not become a *shebait*. 37 C. L J 20.

——in case of the manager appointed by a widow not taking office the widow has a right to make another appointment to take effect immediately. 44 A. 590.

Succession to shebaitship.

——devolution should follow the terms of the grant. 9 C. W. N 914 : 27 A 581, 5 C. L. R. 73 . 12 W. R. 427 . 16 C. W N 109 :

(5) Endowments—*contd.*

in the absence of any direction, custom, practice and usage will regulate succession. 36 C. L. J. 356: 10 I. A. 32: 9 C 766: 11 M. I. A. 405 · 8 W. R. 25: 4 I. A. 76: 1 M. 235: 7 C. W. N. 145: 13 A. 256 · 15 M. 44: 9 A. 1: 13 I. A. 100: 10 C W. N. 835: 33 I. A. 139: 29 M 283: 36 C. L. J. 356.

——after the death of the settler the rules contained in the deed of endowment are unalterable by any successor in estate or office 41 C L J 22. 82 I C 840: 1925 Cal. 442

——when the family of the *shebait* dies out the *shebaitship* would, in actual course, revert to a member of the family of the original grantor. 15 C W N. 126, 11 C. L. J. 2, 36 C L. J. 356, 441, 478, 50 C. 292.

——the shebaitship both in the private and public endowment vests in the founder and his heirs unless he has otherwise disposed of it. 36 C L. J. 356, 441, 478, 40 C. 251, 5 C. 239, 40 M. 612, 20 C. L J 712, 50 C. 292.

——the founder has the full right to provide for management and administration of trust property if it is not inconsistent with the nature of the endowment. Immemorial user proves the intention of the founder conclusively. 36 C. L. J. 478, 32 C. 12, 35 A 20 C W. N 314 *Ref* 50 C 292.

——rules as to the appointment of shebaits and their successors in the document of endowment are binding. 41 C. L J. 22: 82 I 840. 1925 Cal. 442

——the succession to the office of a shebait is governed by the original grant and where no special direction or usage exists the heirs of the donor succeed 41 C. L. J. 22: 82 I C. 840. 1925 Cal 442.

——in the absence of express provision in the grant or usage or nomination by the person entitled to nominate, the right to nominate reverts to the founder or his heirs. 17 C 3: 16 I A P. C, 7 C. 304, 8 I. A. 46, P. C, 32 A 461, 23 A 663, 18 A. 227, 689, 5 C 229, 36 C. L J. 356.

——according to Hindu Law when the worship of a Thakur has been founded the shebaitship is held to be invested in the heirs of the founder, in default of evidence that he has disposed of it or otherwise, or there has been some usage, course of dealing or some circumstances to show a different mode of devolution 52 C 8 23 A L J 537 · 41 C L. J 551: 30 C. W. N. 25. 87 I. C 335: Bom L. R 1061 · 49 M. L J. 30 P. C.

——a donor cannot change the order of succession except a reservation to the deed creating the endowment unless he made a reservation 50 C 197.

——on failure of the line of original trustee the heir of the founder can create a new line of trustees 40 M. 612.

——under the Mitakshara Law when the right of management belongs to the family, a member on birth becomes a

(5) Endowments—*contd*

——provision in will that senior among the heirs of the *she-*[illegible]

[illegible] family of original shebaits to maintenance out of the *prasad*, are valid though beneficiaries may be unborn at testator's death. 85 I. C. 875 : 1925 Cal. 225.

[illegible] perty along [illegible] ite that he [illegible] t property

——the fact of the purchase of the temple site in the name of a person does not by itself show that he was the sole founder and so trustee-ship is not solely vested in his family. 73 I C. 381.

Purohit or Pujari, status of.

——the *purohit* is not the shebait of the temple, he is appointed by the shebait to conduct the worship and is not entitled to be continued as a matter of right in his office 36 C L J. 356, 56 C. 292, 25 C W. N. 201, 42 M. 618, 15 M. 183, 27 C. W N. 441 : 50 C. 233 : 72 I C. 686, 35 M. 681, 16 W. R 618, 36 C. L. J 411, 1922 M. W. N 442 68 I C 183, 36 B. 94, 4 B. 234. Office of the *archaka* and trustee should be separate 30 M. L T 101 64 I C 816

——a *Pujari* of *Thakur* cannot claim the right of a shebait. He is only a servant appointed by the shebait for the performance of the ceremonies, 41 C L J. 22 · 1925 Cal 442 · 82 I C. 840

——a condition that *Pujari* should forfeit office upon misconduct or neglect to be found by private tribunals is valid 25 C. W. N 201.

Status of woman relating to priestly office

——an hereditary priestly office apparently descends on default of males through female. 8 Bom. H. C A. 25, but she is incompetent to discharge spiritual benefit. 9 C. 766 : 10 I A 32 : 13 C. L. R 30 P. C., 19 C 513 · 19 I A. 108, P C.

Incidents of and succession to Mutt property

——a mourasi asthan is one in which the office of *mohant* is hereditary and apart from custom, devolves upon the chief disciple. Different customs prevail in different *mutts* 4 Pat. L. T. 285 : 71 I. C. 887

——it is consonant with the principles of Hindu Law, relating to a *mowrashi muth* that the senior *chela* should succeed, a *fortiori* in the absence of valid nomination by the reigning mohant. 52 C. 748 : 29 C. W. N. 931 . 89 I. C. 804 : 1925 Cal 1107, 43 C. 707 P. C. *fol.*

——but a *mohant* is not the owner of the *Muth* 16 C. W. N. 798.

(5) Endowments—contd.

——succession to *Muth* depends upon the custom of the particular *Muth*. 24 C. L. J. 116, **P. C.**: 20 C W. N. 802, 4 Pat L T. 285.

——a Mahant having a number of separate asthals which by usage have all been held by one man, has authority to provide for their division between his successors or to saddle the property of one or more of the component asthals with reservation in favour of the others. Customs and usage prevail in this matter. 49 C. L. J 321 114 I. C. 571 · 31 Bom. L. R. 715 : 33 C. W. N. 346 . 55 I A 104 · 1929 P. C. 65, 45 I. A 1 *Dist.*

——*a chela* is primarily entitled to succeed a *mohant* of the *sanyasi* sect who has to follow a life of celebacy, but where there are more *chelas* than one custom and practice intervene. 7 C W. N. 145

——*chela* may be selected by the *mohant.* 15 C. W. N. 1014

——a *guru of math* may designate a particular person as his heir. 46 B 655.

——an ascetic is a life-tenant and cannot alter succession. 7 C W. N. 145.

——a *sudra* cannot be an ascetic (*sanyasi*). 17 C. W. N. 517, a Brahmin who dresses as *sanyasi* but lends money, is not an ascetic. 18 C W. N. 60.

——though ownership generally rests with the spiritual head of the institution, the usage and custom may establish a different rule 24 C W. N 249 P C , 65 I. C 842.

Office of shebait, incidents of.

——*shebait right cannot be transferred even to a co-shebait or to* one who is next in succession. 12 C. W. N. 98, (4 I. A. 76 **P. C.**) I A 69 **P. C.**, 19 A. 428, 22 C. 989 **P. C.** *Ref.* 6 B. 295 *not fol.* 8 C L. J 499, 41 C. L. J 22 : 82 I. C. 840 : 1925 Cal. 442, so also the turns of worship. 34 C 818 . 11 C W. N. 782, 16 C. W. N. 129, 4 A. 8, but in special circumstances it can be transferred. 13 C. W. N. 242 1084, 19 C. W. N. 208.

——according to Hindu Law *neither* the office of the *mohant* nor the property of the *math* can be the subject of partition. 52 C. 713, 29 C W. N 931 : 89 I. C. 804 : 1925 Cal. 1107.

——a right as manager or to appoint a manager may be acquired by prescription. 37 C 885 ; 14 C. W. N. 859 : 12 Bom L R 631, 13 C. W N. 824 · 29 M. 353 . 33 I. A. 139 **P. C.**, 24 M. 219

——a widow after she becomes *shebait* does not lose the rights by living an unchaste life. *24 I. C. 266.*

Power of shebait.

——an idol is a juristic person, the person founding the Deity and becoming responsible for His duties is *defacto* trustee and in common parlance called *shebait*. The Deity is not a chattel property and cannot be therefore willed away by the *shebait*. Will of the founder is the will of the idol expressed through its guardian the founder. 52 C. 809 . 30 C W. N. 25 : 87 I. C. 305 : 41 C. L. J 30 : 41 C. L. J. 551 **P. C.**

(6) Endowments—*contd.*

——the position of a shebait is not the same as that of a trustee in English Law in whom the property is vested. The shebait is only a manager, the property being vested in the deity The possession and management remains with *the shebait* and *the right of suit is* vested in the shebait though the property is vested in the Thakur. 41 C. L. J. 396 88 I. C 616 1925 Cal 996

——all the shebaits acting together are at liberty to alter the [illegible]

——acquisition of trust estate by shebait by secret purchase is a ground for removing him from office. 48 C 1019 30 M L. T. 24 **P. C.**

Power of trustee.

——a *dharmakota* of a Hindu temple is a trustee, he has much less power than that of a shebait. 45 M. 565 : 27 C. W. N. 317 : 36 C L. J. 524 24 Bom. L R. 1214 **P. C.**

——a trustee cannot introduce a stranger into the trusteeship. 43 M L J 572 1922 M W. N. 428.

Possession and management belong to the shebait.

——even in religious dedication of strictest character the possession and management of the dedicated property belong to the *shebait*, in whom therefore, and not in the idol, the right to sue is vested 33 C 129 **P. C.**

——*shebait* represents the idol in suits and a decision against a *shebait* is binding against his successor 6 C. W. N. 178, and idol 35 C. 691 12 C. W. N 550 . 7 C. L. J. 514, 12 C. W. N. 739, 11 C. W. N. 489, 10 C. W. N 1000, 45 A 519, 38 A 735.

——in case of religious endowment although the property is vested in the idol the possession and management of the dedicated property belong to the shebait and any suit instituted for the protection of the property must be brought by him and not by the idol 44 C. L. J. 522 : 99 I C. 917 · 1927 Cal. 244, (32 C. 129 P C., 52 I A. 245) *Rel on.*

——in a suit for the right of worship of a family deity the female members and the idol are necessary parties. 33 C. W. N. 96 : 1929 Cal. 273.

——in case of many trustees all are to be consulted in matters of management. 42 M. L. J. 280 : 1922 M. W. N. 172 : 66 I. C. 396.

Adverse possession against shebait.

——a right of adverse possession may be acquired against a *shebait.* *37 C. 885 . 14 C. W. N. 889* : 37 I. A 147, 12 B. L. R. 632, 36 B 135, adverse possession against some *shebait* is adverse against all. 13 C. W. N. 805.

(5) Endowments—*contd.*

Alienation of endowment property.

——a *shebait* cannot alienate property of idol in his general character. 40 C. 895, 21 C. L. J. 42, 19 C. W. N. 652: for other cases see below

——the power of *Mohant* to alienate *debutter* property is like the power of manager of an infant, limited to cases of unavoidable necessity, in some cases permanent lease granted by the *Mohant*, though adequate at the time were held not to be binding on the successors 46 B. 481: 26 C. W. N. 47: 24 Bom. L. R 544 35 C. L. J. 421 **P. C.**, 36 C. 1003: 14 C. W. N. 1: 36 I A 148 **P. C.**, 2 I. A. 145, 14 B. L. R. 450 **P. C.** *Fol.* 34 C. 249, 11 C. W. N 261, 27 C. 77, 25 A. 296, 31 M. 47, 34, M. 535, 13 C. W. N 242, 22 C. 989, 28 M. 391, 4 I. A. 52 **P. C.**, 24 C. 77, 25 A. 296 25 C. W. N. 17 **P. C.**, 73 I. C. 275, 44 M. L. J. 187: 72 I. C. 709, 1 P. L R 73. 74 I. C. 134, and a shebait cannot purchase Debutter property in auction sale 24 C. W. N. 478.

——leases granted by *Mahant* in the ordinary course of business are binding on successor like that of the *karta* of the joint family 6 P. L. J. 638: 65 I. C. 290, 40 M. 709, 6 M. I. A. 393 **P. C.**

——a permanent lease of a trust property is voidable and not void 43 M. 433.

——manager of an endowment may incur debts for the proper expenses of the endowment. 2 C 341: 4 I. A. 52 **P. C.**

——to determine whether mortgage by shebait of Muth property is binding on the Muth, immediate necessity is to be considered 53 I. A. 253. 1926 M. W. N. 857: 1926 P. C 113 51 M. L. J. 822 31 C. W. N. 221: 44 C. L. J. 491: 6 Pat 139 **P. C.**, 2 I. A. 245 **P. C.**, *fol.*

——when the trustee of a temple borrows money on a simple bond for temple necessity the creditor is entitled to a decree against the temple-funds 45 M. 703, 32 M. L. J. 230 *Dist.* (31 M. 47, 43 M. 795) *fol*

——a permanent *mokurari* lease is an alienation *pro tanto* and such an alienation by *shebait* is beyond his competence and the possession of the lessee will be adverse to the lessor although the former pays rent. 33 C. 511, 10 C. W. N. 733: 3 C. L. J. 356

——but where the manager of an endowment grants a permanent lease in excess of authority the lessee cannot claim adverse possession during the life of the head. 27 C. W. N. 159: 36 C. L. J. 48. 44 M. 821, *Pat.*

——if the alienation by a *mohant* took place at a great distance of time, recitals of necessity is evidence. 1 Pat 475. 3 Pat L. T. 352, 46 B. 481: 26 C. W. N. 473: 30 M. L. T. 254, **P. C.**

——alienation by a *mohant* without legal necessity enures only for his life-time. 3 Pat L. T. 352: 1 Pat 475: 67 I. C. 41

——a gift in favour of a co-shebait is not invalid if it is for the benefit of an endowment. 41 C. L. J. 22: 82 I. C. 410. 1923 Cal 442 But see, 12 C. W. N. 98, 22 C. 989.

(5) Endowments—*contd.*

Suit relating to endowment property.

——even in religious dedication of strictest character the possession and management of the dedicated property belong to the shebait, in whom therefore, and not in the idol, the right to sue is vested 32 C 129 P. C, 44 C. L J. 522: 99 I C. 917.

——shebait represents the idol in suits and a decision against shebait is binding against his successor. 6 C. W. N 178, and the idol. 35 C. 691: 12 C. W. N 550: 7 C. L J. 514 · 12 C. W N. 739, 11 C. W. N. 489, 10 C W. N. 1000, 45 A. 519, 38 A. 735.

——in the absence of trustee or manager of a trust the worshippers may sue 44 M L J. 116: 71 I C. 463

——a *defacto* manager of the property of idol is entitled to sue to eject a trespasser 64 I. C 737 (C)

——time runs against idol as well as shebait. In the absence of shebait suit for possession can be brought in the name of the idol. 1925 Cal. 140. 84 I C 91.

——the right of manager to sue to recover property of the endowment unlawfully alienated by his predecessor commences at the date of his accession to office. 13 M. 277, 23 C. 536, (Art 134 or 144 L Act will apply).

——a manager can sue for money on behalf of the temple though he states in his plaint that some money is due to himself by the temple, 24 Bom. L R 1308

——there is no distinction for the purpose of limitation between the office and the property of the endowment, and Art. 144 L Act, applies to a suit for possession of hereditary office. 4 C W. N. 329 23 M. 271, 27 I A 69: 10 M. L. J. 29 P. C.

Compromise binding debuttor estate when valid

——a compromise binding debutter estate, if prudently made, is legal 11 C W. N. 261.

Right of worship cannot be partitioned.

——the right of worship of idol cannot be made the subject of partition. 41 C. L J. 551: 53 C. 809: 49 M. L. J. 30: 87 I. C. 305 27 B. L R 1064 P C.

——but the right of management if belongs to a coparcenary, may be partitioned by allotting an alternate recurring period of worship. 34 M 470, 34 C. 828 · 11 C. W. N 782, 14 B. L. R 166, 22 W R 437, and the court will also give effect to it. 10 C. W. N. 824 · 33 I. A. 139: 29 Mad. 283 · 8 Bom. L. R. 998, P. C.

(6) Gift.

——every step taken towards proof of a gift is in itself *pro tanto* a negation of a trust because a trust retains the actual ownership in the trustee which by a gift the owner is divested of the property which passes to the donee. 33 C. W. N. 493: 49 C. L. J. 335: 114 I. C. 565: 31 Bom. L. R. 710: 1929 P. C. 77.

——when the parties to a deed of gift are intimately related there is a presumption of the exercise of influence by the donee

(6) Gift—*contd.*

and it is for him to prove that the transaction was the spontaneous act of the donor. Where the parties were related to each other as aunt and nephew and the former who made the gift was illiterate and under the influence of the former the gift was not valid. 33 C. W. N. 205 - 1929 M. W. N. 105 : 115 I. C. 733 : 26 A. L. J. 1381 : 1929 P. C. 3.

——delivery of possession under a deed of gift validates the gift under the Hindu Law in cases not governed by Tr. P. Act. 31 C. L. J. 432, 67 I. C. 31.

——under s. 123 Tr. P. Act, a deed of gift must be registered. 24 C. W. N. 346, **P. C.** but under the Hindu Law there may be gift by conduct only. 17 C. W. N. 62.

——a deed of gift though it cannot affect immoveable property as being unregistered is admissible to show possession as absolute owner. 38 M. L. J. 313 : 43 M. 244 : 24 C. W. N. 346 : 18 A. L. J. 274 **P. C.**

——a gift by way of *Sankalpa* made by a father to his daughter at the time of marriage should be made by a registered instrument. 26 A. L. J. 944 : 1922 All. 699.

——gift of shares in company can be made only by entry in the books of the company. 48 C. 986.

——the onus of proving oral gift is upon the person who sets it up. 1923 P. 165. 67 I. C. 451.

——under the Hindu Law delivery of possession of immoveable property is not essential to the validity of a gift thereof. 66 I. C. 450 : 1922 All. 44, 37 A. 169, 25 A. 358.

——A Hindu in Bengal can give away his property so as to deprive the widow of her share on partition. 17 C. 886, but she cannot be in any way deprived of her right to maintenance. 12 C. W. N. 803 p. 816.

——where there is a gift by a native of India to a class some of whom are not born and so cannot take, it should enure to the benefit of those members of the class who are capable of taking. 15 C. W. N. 393, 38 C. 468 : 38 I. A. 54 **P. C.** which was an appeal from 9 C. W. N. 749 : 32 C. 992, 24 C. 646 : 1 C. W. N. 573.

——under the Mitakshara law the widow's gift of a reasonable amount to her daughter on the occasion of marriage out of the estate of her husband, is valid. 13 C. W. N. 994 : 1 I. C. 945.

——gift received by a member of joint family is his separate property. 12 C. W. N. 103.

——a member of Mitakshara family cannot execute a deed of gift of the joint property as he has no defined share. 6 C. W. N. 851, 7 M. 357, 11 M. 162, 27 M. 162, 5 B. 48 : 7 I. A. 181 **P. C.**

——an absolute gift with a condition restricting alienation is void as regards restriction only. 15 C. 409 : 15 I. A. 37 **P. C.**, 11 C. 684 : 12 I. A. 103 **P. C.**

——a clause that the donor was to become entitled to the properties on the happening of a specified contingency is not invalid or opposed to Hindu Law. 69 I. C. 673 : 1922 Mad. 67 : 43 M. L. J. 340 : 16 L. W. 552.

(6) Gift—*contd.*

——an absolute gift to wife with power of alienation may be created by words of sufficient aptitude, express declaration is not necessary. 45 M. 320 : 26 C W. N. 713 · 35 C. L. J. 545 : 24 Bom L. R. 963 P. C.

——a Hindu can create a life estate or successive life estates or any other estate for a limited term. 9 C 952 · 10 I. A 51, P. C. 18 W. R. 369 : 9 B. L. R. 377, P. C , 16 C. 383 · 16 I A. 29, P. C. 22 W. R. 409, 2 I A. 7 P. C.

——property obtained by a woman by way of gift is her *stridhan* 19 W. R. 264 : 11 B L. R. 286, 8 C L. R. 309

——a gift by a widow even with the consent of the reversioner to any one but the next reversioner is invalid, but the widow is estopped from disputing the gift 32 A 176, 6 A 116

——donee must be given such possession of the property as is possible under the circumstance 4 A. 4, 18 B. 688, 9 C. 854, 16 A 185, 11 I A 218, P. C , 7 B 131, 452

——possession can be taken by the guardian on behalf of the minor, 27 B. 31, when donor is himself the guardian, the donor's possession will presumably enure to the benefit of the minor donee 3 C L R 247

——an absolute estate given by a gift cannot be restricted by condition repugnant to it 8 B. L R, 377 . 18 W R 359 P. C.

——a gift which is not accepted can be revoked. 9 O. and A. L. R 460 74 I. C 818

——at the date of gift the donee must be in existence. 28 C. 720 5 C W N 806 28 I A. 152 P. C.

——grant of annuity, validity, gift to unborn person, application of the *Tagore Case* 36 C L. J. 428 : 50 C 66. 72 I C. 109, 13 C. L J 81, 39 C 87 *Ref.*

——gift to a class of which no member existed at the date of the gift is not valid. 52 B. 176 : 32 C. W. N. 925: 47 C L. J 198: 26 A L J. 560 30 Bom. L. R. 282 107 I. C. 119 1928 P. C. 33

——a series of life-estate in tail male is repugnant to Hindu Law The expression *putra poutradi krame* occuring in a gift of an annuity to a Hindu lady means that it will be perpetual and her son will take absolute estate after her death. 64 I. C. 518 (C)

——where a gift is made to two persons jointly and one cannot take or the gift is invalid with respect to him, the other takes the whole. 16 C 667: 16 I. A. 44 P. C.

——gift to adopted son. *persona designata*, adoption declared invalid. 24 Bom. L. R. 794

——a Hindu father under the Mitakshara Law can make within reasonable limits gifts of moveable property to a daughter. 45 M. 489 26 C. W. N. 929: 24 Bom L. R. 1209 : 20 A. L. J. 339 P C.

——ulterior diposition is not valid. 50 A. 375 : 55 M. L J. 42 : 55 I. A. 180 P. C.

(7) Guardian and Minor.

——the test of the binding nature of the alienation by a natur guardian upon the minor is whether it was for the necessity for the benefit of the infant. 75 I. C. 561 : 1923 Bom. 213 : 6 M A. 303 P. C. *Ref.* 71 I. C. 491.

——the H. C. can under its general power apart from th provisions of the Guardian and Wards Act appoint a guardian fo the minor's property when the managing member of a joi Mitakshara family applies to be so appointed. 50 C. 141.

——the father may appoint a testamentary guardian of h minor son as regards his separate or *self-acquired* property. 46 M 873 : 45 M. L. J. 481.

——testamentary guardian of property cannot be appointed b father. 85 I. C. 457 : 1925 Mad. 371 : 47 M. L. J. 765.

——a Hindu minor is bound by all acts of his guardian if don *bona fide* and for benefit. 5 N. L. J. 1 : 67 I. C. 866.

——a defacto guardiah under the Hindu Law is in the same position as *de jure* guardian so far at least as acts done by him for the benefit of the minors are concerned and as regards such acts the same test is to be applied as are applicable in cases of alienation by legal guardian. 108 I. C. 529 : 1928 Mad. 226, 6 M. I. A. 593 *fol.* 1929 P. C. 11 *Dist.*

... the natural ... tion of ...

the property by the mother was for legal necessity on paying back that part of consideration the property might be recovered from the vendee. 1922 All. 316.

... sale by a guardian ... Rs 1185, ... e proper ... the land ... 927 Mad ... W N.

——on the death of a Hindu leaving sons, all of whom are minors, their mother is the natural guardian in respect of their property 47 A. 784 : 89 I C 27 : 1825 All. 595 : 23 A. L. J. 625

——*defacto* guardian can create charge on property *bona fide* for the benefit of the estate in the same circumstances as *defacto* and *de jure* guardian. 1225 Nag. 134

... dian *de facto* there ... person who ever ... guardian cannot ... property of the ... not a guardian ... 1414.

——where a Hindu father mortgages the joint family property during the minority of his son the latter is not personally liable

(7) Guardian and Minor—*contd.*

under the mortgage nor his separate property is liable. 32 C. W. N. 1149 : 109 I. C. 574 : 30 Bom L. R. 852 : 1928 P. C 165.

See other cases under "C. P. C. Or 32" and under "Guardian and Wards Act."

(8) Impartible estate.

——any special custom modifying the ordinary law of inheritance must be ancient and invariable and established by clear and unambiguous evidence. Onus of proving the impartibility of the estate is on the person asserting it 55 C. 403, 49 C L J 150 · 107 I. C. 7 · 30 Bom. L. R 251 1928 M W. N. 942 · 1928 P. C. 10.

——the fact that a *Raj* is impartible does not make it separate or self-acquired property. 43 A 228 : 23 Bom L R. 654 29 M. L. T. 358 · 33 C L. J 388 : 2 Pat. L. T. 257 **P. C**

——an impartible zemindary is the creature of custom and it is of its essence that co-parcenary in it does not exist consequently the widow succeeds as against an undivided agnate 24 C. W. N 857 · 28 M. L T. 105 12 L. W. 349 **P C** *contra* 43 A 228 40 M. L. J. 387 **P. C**

——in order to establish that an impartible estate has ceased to be joint family property for the purpose of succession intention expressed or implied on the part of the junior member to give up their charce of succession must be proved 51 M 189 : 108 I C 354. 1928 P. C. 68.

——in Southern India evidence as to separate food and the [illegible]

[illegible]

P. C. 68.

——where the relatives of the former zemindar claim maintenance in an impartible estate they must prove the custom. 62 I. C 198.

——it is open to the holder of an impartible zemindary to incorporate with his zemindary his self acquisition such as those [illegible] eep them separate.

[illegible] the zemindary, if [illegible] 61 I C 242

[illegible] ct to the ordinary Hindu Law of succession or descends according to the rules of primogeniture must be decided in each case according to evidence 10 C W N 95. 2 C. L. J. 231. 1 M. L. T. 12. 7 Bom L. R 907 : 2 A L. J. 845 **P. C.**

——custom negativing alienability must be proved by evidence of instances when but for custom alienation would have been made. Absence of instances of alienations is evidence but insufficient. 1925 Cal. 116.

——it is settled law that unless considerable age can be ascribed to any particular zemindari of which ever class it may be it cannot

(8) Impartiable estate—contd.

claim to be governed by either ancient or invariable custom C. 403 : 32 C W. N. 621 : 47 C. L. J. 150 : 24 N. L. R. 25 : 1928 M. N 942 : 1928 P C 10.

family custom or otherwise. *above case.*

——there can be no coparcenary in an *impartible esta* 62 I C 610

absence ... esta
is aliena ... , 99
29 Bom ... L.
136 102 I. C. 599 1927 P. C. 159. (15 I. A. 51 **P. C**, 10 A 2 **P C**, 26 I A. 83, **P C**, 9 M. L J. Sup. 1 **P. C.**) *fol.* (48 I. A. 193: M. L J. 387 **P C.**) *Dist.*

——whether a particular estate is *impartible* or not must decided according to the circumstance of each case and the eviden given in it. 5 N L J 25. 1922 Nag 52.

——the produce of the impartible estate ordinarily does no belong to and form an accretion to the original property. 28 C W. N. 98 37 C L. J. 287. 44 M. L. J. 503 : 25 Bom. L. R. 676 4 Pat. L T. 319 **P C**

——an estate may be the family property of an undivide family and at the same time impartible. The impartibility of th estate does not destroy its nature as joint family property or rende it a separate property of the last holder unless there was somethin like partition 67 I C 686 : 1922 P. 322.

——succession to impartible estate by survivorship, succession ... ying for personal decree under ... Pat. 387 : 70 I. C. 23 ... of a joint family to separate ... also true with regard to an impartible estate 28 C W. N. 98 : 39 C. L. J. 287 · 25 Bom L R 676 44 M L. J 503 2 Pat 319 · 4 Pat. L. T. 319 P. C.

——where an impartible estate has been acquired by the last holder or his branch as a self acquisition the other undivided members of the family ... it descends as the separate property ... Sivagonga case It is also ... ible estate which was to be ... a member thereof might beco... is to lose his right to succe... I. A. 61 : 1 Mad 312 **P. C.**, ... 4 : 9 Pat. L. T 347 · 32 C. W. N. 565 P. C.

——the burden of proving that an impartible estate was the separate or self-acquired property of the last owner is on those who assert it, 4 Pat. L. T. 473 : 2 Pat. 685 : 74 I. C. 668 : 46 C 362. 25 C. W N. 564 : 15 C. 471 *Ref.*

(8) **Impartible Estate**—*contd.*

——where by family arrangement junior line is substituted for the senior line the senior line takes by survivorship. 1923 M W. N. 15 : 17 L. W. 107 . 71 I. C. 533

——when impartible property passes by survivorship from one [illegible] parcener nearest in blood, [illegible] senior line. 10 C. W. N. [illegible] R. 907 P C., 8 C. W. [illegible]

[illegible] by survivorship 27 M. [illegible]

[illegible] partible estate, primogeni- [illegible] 20 A L. J. 443 P. C.

[illegible] 55 C. [illegible] Bom [illegible]

[illegible] books [illegible] is not [illegible] ibility.

——there can be no incorporation of moveable properties with an impartible one In order that there may be incorporation, the property to be incorporated must be of the same nature. *above case.*

——Royalties and rents which represent the produce of an impartible estate does not necessarily belong to and form accretions to the impartible estate *above case*

——the mere fact that a junior member asserted rights in excess of what he had in the *Korposh* by setting up of permanent rights [illegible] *above case*

[illegible] both of the [illegible] not acquire an interest by birth as in the ordinary joint Mitakshara family. *above case.*

——apart from custom and relationship to the holder, a junior member of the family has no right to maintenace out of the impartible estate. 54 C 995 29 Bom L R 1136 31 C W N. 943 . 46 C. L. J 136 8 Pat. L. T 623 . 102 I C. 599 : 1927 P. C 159 ; 45 I A 148 P. C *fol* 6 Pat. 638.

(9) Joint family.

9 (a) Jointness.

——under the Mistakshara a joint family is a corporate body in the sense of having a continuous existence notwithstanding the death of an individual member 28 M. 544, 20 W. R. 189 11 B. L R. 397, 25 M. 149

——under the Mitakshara Law a Hindu acquires by birth or adoption a vested interest in all co-parcenary property 4 A 190 P. C. . 33 C. 507, 29 A. 667, 32 B. 479, 5 C. 148 : 6 I. A. 88 P. C , 27 300, 10 A. 272 . 15 I. A 51 P C.

9 (a) Jointness—*contd.*

——each branch of the family whose original stock has been divided may continue to be a joint family. 12 C. 262, 9 C. 815, 12 C. L. R. 356, *Fol*

——the principle of joint *tenancy appears to* be unknown to Hindu Law expect in the case of *co-parcenary between* the members of an undivided family. 42 C. L. J. 200: 30 C W. N. 39: 90 I C. 523.

——every Hindu family is presumed to be joint in food, worship and estate. I W. R. 30. 9 M. I. A. 66 **P. C.**, 12 W R. 21: 12 M. I. A. 523. **P. C**, burden as to separation is on the person who alleges it, 22 C. 85: 21 I. A 131, **P. C.**, 42 A 368: 38 M L J. 521. 28 M L T. 5 18 A. L J. 532: 22 Bom. L. R. 596: 56 I. C 306 **P. C.**, 65 I C 559, 1942 Pat. 91: 4 U. P. L. R. 18, 66 I. C. 637.

——every Hindu family is presumed to be joint unless division is proved. 1925 Cal. 257.

——there is no presumption that a Hindu family has any joint property. 103 I. C. 479: 28 Punj. L. R. 610 · 9 Lab L. J. 223, 100 I C. 937 . 1927 Bom. 110, 37 A. 677.

——where the evidence in a case showed, properties were purchased sometimes in the name of one member, at *other time in the* ... another, common ... nily is a joint ... not rebut the ... 29 C. W. N. ... 1 · 23 A L J

589 **P. C.**

——Hindu Mitakshara family is presumed in law to be a joint family until it is proved that the members have separated. *The* ... among themselves co-parcen... re en separate ... rt the titled to p... ained mere fact ... amily does not ... 4 · 23 had *separated.* One member can separate from others ... W. N 846 **P. C** A. L J 746 · 27 Bom. L. R 735: 87 I. C. 333: 29 C W. N 846 **P. C**

——onus is on the claimant to prove that *there is* an arrangement to make him partner in a business owned by a joint family 26 C W. N. 273: 15 L. W. 404 **P. C.**

——under the Dayabhaga law there is no jointness in property between the father and the son 31 C. 448; *because so long as* the father is alive he is the master. The *sons may acquire separate* properties of their own, but they have no concern with *the joint* family property if any property can be so called *during the life* time of the father. Whether the sons continued as a *joint family* after the father's death depends on whether they were joint in *food, worship and estate.* 46 C. L. J. 175: 1927 Cal. 776. 104 I C. 694.

——it is necessary to establish the existence of *a nucleus of* joint family property before the property in the *possession of*

9 (a) Jointness—*contd.*

any one member can be presumed to be joint family property Burden of proof in case property is purchased in the name of one member discussed 30 C. W. N. 588, 1926 Cal. 813 : 95 I. C. 426.

——but there may be joint property without pre-existing nucleus 32 B. 479, 10 Bom. L. R. 175.

——where a Hindu father and his sons acquire their property by their joint labours and are joint in food and worship they must be regarded to constitute a joint family although there may have been [illegible] 50 B. [illegible]

[illegible] *evenue* [illegible] a sepa- [illegible]

——the presumption is weakened by the evidence of separate business funds &c., 3 C. W N 134, 64 I. C 906

——the presumption cannot be safely relied on in a case in which the disputed property was in the possession of the persons under whom the deft claimed and was ostensibly that person's own property at the time of his death 24 I C. 90.

——when one member separates from the others, there is no presumption th[illegible] the remaining [illegible] re-unite must [illegible] 130 : 7 C W. N [illegible]

——but a separation of one member of a joint family does not in all cases give rise to a presumption of a general division of the family 31 M. 482, 59 I C 499, 25 C W N 990

——an expression of an unequivocal intention to separate suffices to dissolve the joint status of a joint Hindu family 50 B. 815 ; 1927 Bom. 68 100 I. C. 147 28 Bom L. R 1446

——if a member of a joint family wants to get himself divided he can do so by simply making a statement in a will "I want to get myself separated and want to execute this will" 1927 Mad. 1066: 104 I. C. 650.

[illegible]

I. C. 35 ; 1928 All. 422 · 26 A L J. 857.

——under the Dayabhaga Law a separation of food, residence and properties for 40 years has been held to amount to formal partition between the parties 46 C. L. J. 237 1927 M W. N. 706 ; 1927 P. C 208.

——joint family house being repaired by any member with his self-acquisitions does not become his self-acquired property. 97 I. C. 505 ; 1926 Sind 216, 45 C. 666 **P. C.** *Ref.*

9 (a) Jointness—*contd.*

after m :

96 : 101 I

wife to her son is the self-acquired property of the son. 32 C. W. N. 272 : 1928 Cal 255.

—illegitimate son ... no co-parcener ... 8 P. C. but a ... -parcener, if ... urse. 5 A 32...

...ncubine is ... ritance, as th...

... female siste... putative fath... 28 C. 194. ...

—where in *Mitakshara* (*Sudra*) *family*, *father dies leaving* a legitimate and an illegitimate son, ordinary rule of survivorship applies. 18 C. 151 : 17 I. A 128 P. C.

—a Hindu wife cannot be a co-parcener. 31 C. 476, (13 A 315 23 A 86), *Dist.*

—an insane member cannot be a co-parcener. 8 C. 919, but when property has once vested, subsequent insanity cannot divest him of the property. 22 C. 864.

—the removal of disability subsequent to the opening of the inheritance does *not* entitle the affected person to claim the heritage. 4 C. L. J 323.

—where certain members of the family were minors and guardian of their property had been appointed under the statute, it is an entirely novel doctrine to say that the minor ceases to be a member of the joint family. 41 C. L. J 535 : 88 I. C. 1025. 1925 Cal 1153

—although a partition ... of joint family property is ... t being brought into ... 47 A. 746 : 23 A...

—there is ... which a daughter's son ... be members of a joint ...

... Mitakshara who has ... is no presumption of law that he has separated from his sons also. 29 C W. N. 773 : 5 Pat. L. R. 255 : 85 I C. 2 : 1925 M. W. N. 13 : 27 Bom L. R. 713 P. C

—where a Christian and his Hindu relations lived as members of a joint family and it was found that there was no intention to keep the various properties separate and that all the properties

9 (a) Jointness—*contd.*

were treated as common property of the whole family, held this necessarily implied an agreement between the members that they were all to share the properties alike 90 I. C. 1016 1925 Mad. 1195 : 22 L W. 116.

——the true view of the Hindu Law would seem to be that the [illegible] joint family, though [illegible] of the family or to [illegible] imposes an obligation [illegible] any reference to any property or share possessed by him, where the joint family is [illegible] d not [illegible] but [illegible] I C [illegible]

[illegible] was proved that they had agreed not to continue to be a joint Hindu family. 29 C W N 775 . 3 Pat L R 255 , 27 Bom L. R 713 1925 M. W N 13 : 48 M. L. J 236 P C , 30 C. 725, *Expled*

——a mere ascertainment of shares of the members is not conclusive evidence of separation though the burden of proof shifts on the person asserting jointness. 50 A 180 : 108 I. C 721 . 1928 All 39 · 25 A. L J. 1014.

(9B) Re-union.

——parties may re-unite to constitute a joint family. 7 C W. N. 642 130 C. 725 : 30 I. A 130 5 Bom L. R. 469 P. C., 35 C. 721, 12 C. W. N 511, 19 C. 634, 33 M 165.

——according to Mitakshara, re-union is restricted to three classes of cases, (1) between father and son, (2) between brothers' (3) between paternal uncle and nephews. 33 C 371 10 C W N. 236, 3 C. L J. 98, 106 I C. 877 : 9 Lah. 324 : 1928 Lah. 122

——a re-union after partition can only be established by proof of an intention of the parties to re-unite in estate and interest 30 C. 738 : 30 I A. 139 : 7 C. W. N 578 : 5 Bom. L. R 461, P. C

——there cannot be a valid re-union between two joint cousins who were originally joint but had subsequently separated 33 C. 371 : 10 C. W. N. 236 : 3 C. L J. 98.

——the question of re-union is a matter of law. 59 I C. 706.

——re-union restores original joint status 1921 M. W N. 742 41 M. L. J. 503 14 L. W 668

——a re-union cannot take place with any person indefinitely but only with a father, brother or a paternal uncle; a re-united member is entitled to succeed on a preference to separated brothers and their children. 2 Pat. L. T. 299 · 63 I. C. 833.

9 (C). Self acquisition.

——business started with the small nucleus of joint famil[y] funds but completed by the labour of some members, is their sel[f] acquired property. 13 C. W. N 1133 : 3 I. C. 102.

——self-acquired property thrown into the common stoc[k] becomes joint-family property 33 C. 1119 : 10 C. W. N. 765, [.] B. 424, 27 A. L. J. 9 · 49 C. L. J. 93 : 33 C. W. N. 435 : 19[.] P. C 1.

——where the members of a joint family having control ov[er] joint estate, blend that estate with properties in which they ha[ve] separate interest, the whole property becomes joint. 50 C 419 · [.] C. W. N 997 · 25 Bom. L R. 683 : 37 C. L J. 525, 44 M. L [.] 561 P. C.

——the test to whether the property is self-acquired or not, [is] from what source the value has been paid : in case of propert[y] standing in the name of son, when no separate fund is proved, th[e] presumption is that it was acquired by the father in the name of h[is] son. 18 C. W. N. 428 P. C.

——when the family is joint and a nucleus exists the onus is [on] the person who claims as separate property 27 C W. N 562 [:] 46 M. 373 : 37 C. L J 435 P. C . 18 C .L. J. 548, 11 C. W. N 478 : [.] C L. J. 358 P. C , 31 M L. T 136 : 69 I. C. 123 P. C.

——when the members are joint and acquire properties th[e] presumption is that they were acquired for the benefit of the famil[y] 35 C L. J. 348.

——the presumption with respect to acquired property is tha[t] it is joint. 10 M I. A. 490 P. C., 27 M. 32, 3 C 315 P. C, 25 [C.] W. N 534 · 33 C L J. 355, 40 M L J. 327 : 23 Bom L. R 671 [.] 2 Pat L. T. 201 : 19 A. L. J. 249 · 2 Lah. 40. P. C , 25 C W. N 541 [.] 33 C L J 201, 35 C. L. J. 348.

——the gains of science are exempted from this rule only whe[n] the education which made such gains possible is affirmatively show[n] to have been acquired without detriment to the family property [.] Lah L. J 93 : 111 I. C. 596: 1928 Lab. 397: 1917 P C 105 19[.] P. C 35 Fol.

——the presumption does not apply when the business is carri[ed] by some member without any aid of the family fund 25 M. 149, 43 A [.] 19, 1923 M. W N. 57 : 71 I. C. 130.

——when the family is joint and a nucleus exists, the onus is o[n] the party setting up a case of separate property. 34 C. L. J 55[.] 18 C L J. 548, 11 C. W. N. 417 : 29 A. 244 : 2 M. L. T 317 [.] 5 C. L J. 304 ; 9 Bom L, R 597 P. C., 2 I. C. 526, 5 C L J. 33[.] contra 16 L. W. 936, 33 A. 677, 27 M. L. J. 677, 35 A. 564, 27 M [.] 228, 2 Lah 40 Ref.

——in case of Mitakshara family proof of nucleus is necessary 31 A 477 3[.] but none is necessary in case of Dayabhaga family. 31 A 477 3[.] A 677, 31 C 448

——property acquired as a result of litigation by a member wit[h] the funds of the joint family is not necessarily joint family propert[y] unless it was thrown into the common stock. 1932 M. W N. 437

9 (c) Self acquisition—*contd*

——a bond in the name of the managing member of a joint Mitakshara family is presumed to be joint family property. 26 C. W. N 406 : 3 Pat L. T. 295 : 20 A. L J 495 P. C. Gains of science made without any detriment to father's estate are excepted. 25 C W. N. 534 : 33 C. L J. 355 40 M L. J. 327 · 2 Pat L. T. 201.

——property acquired by an individual member by his own exertions, or from separate capital, without any help from the joint family is his separate aquisition. 27 M. 228, 28 M. 386, 9 W. R. 61, 14 M. 163, 29 M. 121, 11 Bom L. R. 606, 25 C W N 534 33 C. L J 555, P C.

——self-acquired property ceases to be such and becomes joint property, if thrown into common stock (Dayabhaga case), 33 C. 1119 10 C. W N. 765, 36 B 424.

[illegible]

95 ; 33 C. W. N 433 · 27 A. L. J. 9 : 31 Bom. L R 280 . 113 I C. 897 : 1929 P C 1.

——acquisition of separate property with the aid of joint funds and joint labour gives the acquirer right to a double share thereof. 33 C. 1119 10 C. W. N. 765

——where the acquisitions of a son are made with the help of the joint property or not, the father always takes a double share : if the acquisitions have been made by the use of the joint funds, the father takes two shares, and the rest of the brothers one share each , but if the acquisition have been made without the use of the joint funds, they are divided half and half between the father and son. 33 C 1119 . 10 C. W. N 765, 6 W. R 291, *Ref*

——a son cannot remain in occupation against the wishes of the father though the former has made improvements to the value of which he may be entitled 33 C. 1119 · 10 C W. N 765.

——when property stands in the name of a female member there is no presumption that it is joint family property. 28 C. W. N. 131

——after one member of the joint Hindu family had separated off from the family, properties were acquired in the names of one or other of the members of the family, held even assuming [illegible] were not inconsis- [illegible] t that the convey- [illegible] the members was [illegible] they were separate

[illegible] name of a third person [illegible] with the income of joint [illegible] joint family property. 25

9 (c) Self acquisition—*contd*

——property bequeathed by husband to wife and by the wife to her son is the self acquired property of the son. 32 C. W. N 272: 1928 Cal. 285.

——in case of property standing in the name of son the test is from what source the money was paid; when no separate fund is proved the presumption is that it was acquired by the father in the name of the son 18 C. W. N. 423, P. C.

——the presumption of law that while a Hindu family remains joint all property including acquisitions made in the name of individual members is joint property does not apply to the case of joint family consisting of father and son governed by Dayabhaga When considering whether property is self aquisition or not the criterion is to consider from what source the money comes In the absence of evidence that the junior member had any separate funds, the presumption is clear and decisive that it is not his self acquired property 42 C. L J 486

——if any property is purchased by a son in his name during the father's life time and the son has independent source of income and sufficient means for the purpose, the presumption will be that the son acquired it for himself and that it was not the family property. 41 C L J. 374: 86 I. C 734: 1925 Cal. 1034, 16 Bom. L R 103 P. C

——when joint family property is put up to revenue sale and purchased by one member it becomes his own property unless it is purchased out of joint family purse. 22 Bom. L. R 1297: 59 I C 569

——there can be no presumption of jointness when the disputed property stands in the name of a non-parcener, such as female member This is also the rule of Dayabhaga School. 25 C. W. N. 541. 33 C L. J. 201, 27 M. L. T. 325: 63 I C. 220.

——a testamentary disposition of joint family property in favour of wife is invalid because on the date of the death of the testator when the will takes effect, his share in the property passing to the other co-parcener by survivorship there is nothing for the will to operate on 43 M. 824 · 1920 M. W. N. 529 · 59 I C. 681.

——presumption of joint property cannot be relied on in case in which the disputed property was in the possession of the person under whom the deft claims, and was ostensibly that person's own property at the time of his death 24 I. C. 90, 3 C. 315 P C.

——money received by a member at marriage is not joint family property. 12 C. W. N. 103.

——when the ancestral property is so mixed up with the self-acquired property that it is impossible to differentiate between the two, the whole of it is to be regarded as self-acquired. 35 C. 1039: 35 I. A. 206: 12 C. W. N. 1049 · 8 C. L. J. 356, P. C.

——accretions to and savings from separate property is self-acquired property 19 W. R. 223.

——a member of an undivided Mitakshara family can alienate his self-acquired property, at his pleasure. 2 C. W. N. 273: 20 A. 267. 25 I. A. 54 P. C, 1 A. 394, 6 W. R. 71: 10 B. L. R. 183, *Ref.*

9 (c) Self acquisition—*contd.*

——where the sons of a daughter of a Hindu governed by the Mitakshara school, succeed to his property, it has the character of ancestral property in their hands, although it was self-acquired property in the hands of their grandfather. They take the property as joint owners 7 C. W. N. 1 : 25 M 678 29 I A. 156 . 12 M. L. J 229, **P. C.**, 9 M. I. A. 539, *Ref.*

——a son is joint owner with father if the property comes to the latter from his adoptive mother's father 27 M 382

[illegible] ants-in-common [illegible] ip, and maternal [illegible] are self-acquired

10. Marriage,

——so far as the eight forms of marriage referred to in the Sastras are concerned, it is now accepted Law that all except the Brahma and Asura form are obsolete 49 M 1 1925 Mad. 497

——the classification of eight forms of marriage by Vijnaneswar is not logically exhaustive. It is possible to conceive of a form of marriage which is a mixture and is not strictly identical with any of the eight forms. There may be customary forms of marriage which are perfectly valid 90 I. C 358 : 22 A. L J. 981.

——in order to constitute a lawful marriage among Hindus, it is essential that certain nuptial rites should be performed otherwise the marriage is only a *Gandharba* marriage which is obsolete 48 M. 1 1925 Mad 497

——the mere designation of sword wife does not raise any necessary implication of marriage. 48 M 1 1925 Mad 497

——the foundation for infant marriages is the supposed *religious* obligation of parents to provide a husband to their daughter when she is *matura virgo* 1 C 289 3 I. A 72 25 W. R. 235 **P. C**, but there is no legal obligation. 26 M 505.

——when a marriage was assailed on two grounds that (1) forms and ceremonies to constitute a valid marriage had not been gone through (2) husband was by reason of insanity incapable of entering into marriage, but it appeared that marriage couple had been recognised by all concerned, strong presumption of valid marriage would arise and question of mental capacity was one of degree 15 C. W N. 790 38 I. A. 122 38 C 700 **P C**

——marriage between Vaishya male and the illegitimate daughter of a Vaisya born of Sudra waman is valid. 24 Bom L R. 5 : 65 I. C. 602

——among Sudras of the *velama* caste in the Madras Presidency a marriage [illegible] M. 830 : 39 [illegible]

——int[illegible] been held t[illegible]

10, Marriage—contd

——intermarriage between a Kayastha and a *Tanti* was held to be legal 48 C. 925 · 20 C. W. N. 901: 13 I. A. 141 P C, 14 I. A. 346 P. C., 15 C. 708 : 32 C. L. J. 333 *Ref.* 1 C. I. *Dissented from.*

——inter-marriage and adoption between sub-divisions of *Sudra* caste are valid 25 C. W N. 634, 639, 47 A. 169 : 1925 All. 26.

——inter-marriage between persons not belonging to the same primary caste is void. 23 A. 458 : 9 W. R. 552 : 2 Bom L. R 13

——there can be no legal marriage between a sudra and a Vaishya 48 A 670 97 I. C 347 : 1926 All. 66 : 24 A. L J. 757.

——illegitimacy, under Hindu Law, is not absolute disqualification for marriage. 18 C. 264

——the ceremony of *Bridhi Shradha* is not absolutely essentials 12 C. 140

——amongst the *Vaishnabas* a marriage by what is known as the *Kantibadal* ceremony is valid. 24 C. W. N. 958 : 59 I. C. 882

——a marriage between a *Khatri* male and a *Brahman* female may be valid by custom but is void under the Hindu Law, 73 I. C. 299.

——want of consent of Guardian does not invalidate marriage, the doctrine of *factum valet* applies. 12 C 140, (14 M 316, 22 B 509, 812), *Ref* 28 C, 37 · 5 C. W. N. 195.

——where the fact of celebration of a marriage has been established, strong presumption will be in favour of marriage 12 C 140, (9 M 466 22 B. 509), *Ref.* 28 C 37, *Dist,*

——when in a suit for restitution of conjugal right the legality ... urt is not to presume from mere ... that all rites and ceremonies ... id valid marriage, were performed.

——a Hindu wife cannot repudiate her marriage as soon as she comes of age or before consummation merely on the ground that the marriage has been performed during her minority. 13 P. L. R. 1922 : 64 I C 356.

——guardian may sue for an injunction against a marriage of his ward without his consent. 8 C. 166 : 10 C. L. R. 91, 11 B 247, 13 B. 110, 12 B. 480

——although father is the proper person to give the daughter in marriage, a marriage duly solemnised and otherwise valid cannot be rendered void for want of consent of guardian. 2 Lah. 253 : 64 I C. 500.

——the mother is after the father, the gurdian of her minor daughter ... lateral uncle is not nece...

——m... of direct testimony presented as to that can only be rebutted by the most cogent contrary inference from the circumstances of the parties 27 C. 971 27 I. A. 142 ; 4 C. W. N. 685, P. C.

10. Marriage—*contd*

——*the Hindu Law does not contemplate divorce, but in certain* localities and among certain low castes it is allowed according to custom. 3 C. 305, 17 M 235

——marriage under the Hindu Law is more religious than secular in character, the husband is the lawful guardian of the wife when minor, it is the bounden duty of the wife to live with her husband, wherever the latter may choose to reside and to submit herself obediently to his authority. 28 C 751 · 5 C W. N 673

——the wife is not bound to live with her husband who habitually treats her with cruelty and so ill treats her as to endanger her personal safety 19 C 84

——but if the wife quits the home of her own accord, either without cause or on account of such ordinary quarrels as are incident to married life in general, she can set up no claim of ... er home except ... there or such ... in the English

——the husband must honour the wife and treat her with affection and courtesy 29 C 84.

——the conduct of the husband in taking a low caste Hindu ... e with ... house. 34 C.

——there is no presumption that transactions which are in the name of the wife, are the husband's transactions 2 C. W. N. 367, or that the property in the possession of wife is the husband's property. 26 C. 871 · 26 I A 227 · 4 C W N. 1 P C

——the position in the Hindu household of permanently kept concubines who often reside in the same building is very analogous to the married wife 48 M 1 1925 Mad. 497

——a sword marriage is an institution peculiar to Kshatriyas and it is not common to persons of other castes. 48 M. 1 1925 Mad 497.

——it is not necessary for the validity of a marriage of a khatri widow that all the usual ceremonies of first marriage should be performed 90 I. C. 1056 26 Punj L. R. 744

——where the widow of one brother married the second brother according to the custom prevalent in their caste, she was entitled to inherit the property left by both the brothers. 86 I C. 893 : 1925 All. 440.

(11) Partition

——an agreement for consideration and for limited period of time not to partition coparcenary property is valid. 28 C 769, 3 C. W. N. 126, 12 C. W. N. 793, 20 C. W. N. 92 n. but it is not binding upon heirs or their assignees. 6 C. 106.

——agreement not to partition in perpetuity is bad. 3 C. W. N. 126.

——direction in a will not to partition is void. 15 C. 409: 15 I A 37 P. C.

——under the Dayabhaga law a widow can claim partition of both movable and immoveable properties of her husband. 31 C 214 : 8 C. W N 11, 9 C. L J. 421 : 13 C. W. N. 911. but if there is charge of wastage of the moveable by her, sufficient provision should be made for the protection of those properties 31 C. 214 8 C W. N. 11. (2 C. 262, 9 C .560, 12 C. 209), Ref.

——co-widows can enforce partition against each other, but it will not affect the reversioner, no permanent change can be made by such partition 8 C. W. N. 658, 9 C. L. J. 421 : 13 C. W. N 611

——the courts in India have direction to refuse partition between minors on the ground that it would not be beneficial to them. 11 C. W. N. 769 : 31 C 373 : 6 C. L. J. 1 : 17 M. L. J. 343 : 9 Bom. L. R 646 P C

——the share of a minor pltf. suing through next friend for partition is not liable to be diminished owing to the birth of another son to his father conceived after the date of the filing of the plaint but born before the date of the preliminary decree 4 M. 465. 88 I. C. 424 : 1925 Mad. 717 : 48 M. L. J 354 ; 21 L. W. 675, 41 M 442, 42 A 461 Dist. 49 M. 489, 39 M. 158 Ref.

——an arrangement fair in method and result, made by beneficial guardian, will bind the minor's estate. 43 C. 1059.

——when in a Mitakshara family an agreement was that the whole or part of the ... be enjoyed by the different mem... division of the rights in the ... ... ily was changed although there was no division of the prop... y metes and bounds 13 C. W. N. 983 : 6 A. L. J. 597, 10 C. L. J. 121 : 11 Bom. L. R. 878, P. C , 43 A. 193 F. B.

——it is well established that those who allege that the members of a joint Hindu family had separated must prove it unless it is admitted that there was a separation at some material time A separation proved to have taken place at a time subsequent to the material time does not shift the onus of proving separation at the material time on the opposite party. 41 C. L. J 591 : 29 C. W N 1037 ; 88 I. C. 385 ; 1925 M. W. N. 421 P. C.

—— ... Revenue and village papers by ... of separation in ... to the presump- ... had separated,

11. Partition—*contd.*

The Collector's books are kept for the purposes of revenue and not for [illegible]

perty the
bur[illegible] property
is o[illegible] L. R. 280:
10 [illegible] 929 P. C
1.

——a valid agreement for partition may be made during the minority of one or more coparceners. But if the partition be un- [illegible] by [illegible] 38.

[illegible] rti- [illegible] or [illegible] ion

[illegible] ere acreage is not a good test of value as much depends on the productivity of the lands allotted to each share 33 C W. N. 407: 114 I C. 568 · 1929 P C. 81.

——by partition each becomes the owner of the part which is allotted to him, when by mistake, fraud or otherwise any portion is left unpartitioned, it will be subsequently divided amongst the coparceners, 35 C 961. 12 C W N. 127 6 C L J. 735, 29 M L T 139 1921 M W. N 168. 62 I. C 376

——a re-union after partition can only be established by proof of the intention of the parties 30 C 738 30 I A 139 7 C. W. N. 578: 5 Bom L R. 461 P C.

——parties may re-unite to constitute a joint family 7 C W. N. 642 30 C 725 30 I A. 130 5 Bom L R. 469, P C., 35 C 721: 12 C. W N. 511, 19 C. 634, 33 M. 165

——according to Mitakshara, re-union is restricted to three classes of cases, (1) between father and son, (2) between brothers, (3) between paternal uncle and nephews 23 C 371 10 C W. N 236, 3 C L J 98.

——the *karta* is liable for the accounts of the existing property only. 34 C. L J 563

——a suit for partition continues to be pending till the passing of the final decree. If a coparcener dies after preliminary decree the court can re-adjust the shares and award them under the final decree 59 I. C. 872.

——a destruction of status of jointness may take place by agreement without division of the estate by metes and bounds. 29 M. L. T. 71 · 39 M. L. J. 18: 22 Bom. L R 1348 · 66 I C. 253, P. C., 2 Pat. L T. 299 63 I. C. 833, 15 N. L. R. 165 13 L W. 112: 53 I C. 866 P C., 47 B. 773.

——a suit by a member for declaration of title, specific share cannot be declared in the absence of partition being claimed 83 I. C. 227: 1925 All. 211

11 Partition—*contd.*

——by arrangements there may be partial partition 25 C. W. N. 990.

——the members may enter into a partial partition holding the rest as joint and undivided. 43 M. L. J. 423 : 45 M. 499 : 26 C. W. N. 929. 20 A. L. J. 839 : 24 Bom. L. R. 1209 P C. 851 C. 503 : 1925 Mad. 333 ; 47 M. L. J. 908.

——in a partition suit where the right of residence of the widow in the dwelling house is admitted by all the parties the widow need not be made party to the suit. 45 C. L. J. 41 : 101 I C. 409 1927 Cal 262 In the same case it has been held where in a partition suit the rights of the idol are not disputed the suit may be tried in the absence of the idol

——son's share of family property allotted to him in a bona fide partition is not liable for debts incurred by the father Father's debt does not make such partition mala fide. 29 M. L T. 265 : 40 M L. J 473 1921 M. W. N. 261 : 62 I. C. 280. 40 M L. J. 473

——father represents the sons in partition. 23 O C 339. 59 I C. 564.

——though a mother cannot compel partition yet if a partition takes place between the sons she is entitled to share equally in the co parcenary property. If the mother has obtained stridhan from her husband or father-in-law its value should be deducted but stridhan received from father should not be deducted. 34 C L. J 29, 66 I. C 121.

——it is competent to a member to separte himself from the joint family by a clear and unequivocal intimation of his intention to sever and it is so with respect to an impartible estate, clear and strong evidence is necessary to prove such separation 37 C L J 187, 26 C. L. J. 101 39 A. 496 : 44 I. A. 159, P. C., 43 C 1031 : 24 C L J. 207 43 I A. 151 P C. Ref

——in the case of ordinary joint family estate, the income, equally with the corpus, forms part of the family property, and if the owner mixes his own monies with the monies of the family property, his own earnings share with the property with which they are mingled the character of the joint family property. But the income of the impartible estate does not necessarily belong to and form an accession to the original property. 37 C L J. 237 P. C

——the purchaser of a co-parcenary interest is entitled to partition. 23 Bom. L. R. 777 ; 64 I. C. 115, 46 B. 28, 24 Bom. L. R. 428 67 I. C. 833.

——where there is partition in a family there is presumption that there is a total partition and not merely a partial one 1923 M W. N. 487 : 1922 Mad. 423, 36 C. L. J. 434, 89 I. C 344 : I. L R. 6 All 512, 18 I C. 1012 : 6 P. L. T. 764 : 1925 Pat 823.

——in ordinary cases of partition between Hindu father and his sons, the grandsons, though no doubt they take an interest in the family property as from their birth, can only derive that interest through their fathers with whom, the presumption is, they

11. Partition—*contd.*

remain joint after partition 27 Bom. L. R. 426. 87 I. C. 936, 1925 Bom. 350.

——if the co-parceners mess separtely it does not mean that the possession of one is adverse to the other co-parceners 67 I C. 300 (C), 33 C. L. J 344.

——*jyeshta bhagam* is not recognised in Madras Presidency 45 M. 648

[illegible] quent marriage expenses [illegible]

[illegible] is not entitled to *mesne* [illegible]

——creditors if necessary parties to partition 45 M 194

——under the Mitakshara law an unequivocal declaration by a member of his intention to be divided in status is sufficient to effect a severance without any separate agreement between the co-parceners 67 I C. 812, 43 C 1031, 35 A 80 40 I. C. 36 45 M L. J 600, 2 N L R 165 45 M. 489; 26 C. W. N. 929 20 A. L J 839 **P C**, 47 B. 773

——this intention may be intimated by sending notice 45 M. 489: 26 C. W. N. 929 20 A L J 839 **P. C.**

——an agreement amongst co-parceners to constitute a particular person to partition the joint property is sufficient to effect severance and to put an end to survivorship on the death of one 31 M. L J 46: 27 C W. N. 179 · 37 C L J 73 25 Bom L. R. 1 **P C**,

——the death of a member during partition proceeding does not affect the final partition 20 A. L J. 957

——in a suit for partion the fact there were joint properties in which other persons are interested who are not parties to the suit does not bar decree being granted in respect of the properties which belong entirely to the parties to the suit 1925 Cal 754 · 85 I. C. 662.

——a share obtaintd by a mother under the Beugal School on partition among her sons is in lieu of her maintenance and on her death it becomes part of the shares out of which it came. 48 C. 1059, 49 C 1043, 31 C. 262, 16 C 758, 36 C. L J 217

——there is no presumption that certain properties were excluded from partition. 36 C. L. J 434

——separate possession of certain property is not conclusive evidence of partition 36 C. L J 434, nor separate transactions, 1923 M. W N 225. 72 I C. 548

——a common passage reserved during partition cannot be subsequently partitioned 47 B. 389, 36 B 379, 382.

——when all co-parceners were minors, partition effected by their respective brothers acting as guardians though unusual and unfair but was acted on by the minors after majority, was held valid. 1925 Mad 427

——in a suit for partition among the members of joint family it is competent to the father to act as guardian or next friend of his minor sons and cannot be said that his interests are adverse to those of the minors 87 I. C. 42: 1925 Mad. 734: 48 M. L. J. 417.

11. Partition—*contd.*

——effect of partition decree in favour of infant son against father: 44 M. L. J. 728 : 27 C. W. N. 299 : 37 C. L. J. 457 **P. C.**

——if the sons effect a *bona fide* partition at a time anterior to a debt contracted by the father the creditor cannot proceed against the divided share. 46 M. 64, 41 M. 138, 22 M. 519 *Ref.*

——property given to guardians out of affection does not vest in them as joint-tenants with rights of survivorship but they take it as tenants-in common. 50 C. 370 : 37 C. L. J. 233.

——when separation is effected between brothers but a business is carried on by them it becomes an ordinary partnership business, which is dissolved by the death of one. 45 M. L. J. 355 : 25 *Bom. L. R. 1256* . *74 I. C. 462* **P. C.**

——where after partial partition some lands are left joint in the possession of one member his possession is not adverse till he repudiates the title of the other. 45 M. L. J. 476: 1923 *M. W. N. 636. 74* I. C. 1018

——a[illegible] manager is liable to account for [illegible]perty of the existi[illegible] [illegible]ation or his past [illegible] gross reck[illegible]

——when one co-parcener separates from the other [illegible] there is no presumption that the latter remains united. An agreement of such union must be proved. 45 M. L. J. 355 : 25 Bom. L. R. *1256* : 4 Lah 350 : 21 P. L. J. 582 **P. C**

——partition between brothers does not *necessarily create* partition between the brothers and their sons. 23 C. *W. N.* 775 : 27 Bom. L. R. 713 . 1925 M. W. N. 13 : 3 Pat L. R 255 **P. C**

——when a partial partition is allowed by the Lower *Court* on the ground of convenience and it appear that a suit *for* final [illegible] parties can *be* adjusted [illegible] final partition 55 [illegible] *A. L. J.* 1215 : 1928 [illegible]

——there is no absolute rule that in a partition suit among the members of Hindu joint family a claim for mesne *profits is* unsustainable. Where any member has been excluded such claim surely lies. 92. I. C. 364.

——the right of worship of an idol cannot be made *the* subject of partition. The joint owners of such a right are entitled to perform their worship by turns. 41 C. L. J. 551, · 30 C. W. *N. 25* : *52 C.* 809 . 87 I. C 305 : 23 A. L. J. 537 · 1925 M. W. N. 431 **P. C.**

(12) Powers and liabilities of manager or karta

- **(12 A) Accountability.**
- **(12 B) Power of alienation.**
- **(10 C) Power of incurring debts and other liabilities**
- **(12 D) Power of representation.**
- **(12 E) Power of starting Business.**

(12 A) Accountability.

——except where misappropriation is proved, the manager of a joint Hindu family is liable to account only for what he has actually received and not for what he ought to have received. 44 M. 656 : 41 M. L. J. 33 . 26 C W N. 1 . 34 C L J. 56 . 23 Bom. L. R. 920 19 A L J. 621 P. C , 46 B 327

——the manager is not liable to account for his management in the past but is liable to give an account of the assets of the family at the time of part [illegible]
against him 41 M L. J [illegible]
50 M. 866 104 I C 472 19[illegible]
not liable to pay interest [illegible]

——manager must keep accounts for showing savings. 2 Pat L. T. 365 62 I C 83

——in an ordinary suit for partition in the absence of fraud or other improper conduct, the only account the *karta* is liable to is as to the existing estate of the property. the parties cannot look back and claim relief against the past inequality of enjoyment of the member or other matters 26 C W N 517, 34 C L J. 563, 13 L W 262 61 I. C 772

——the manager is not freed from liability of rendering accounts by simply pleading the non-existence of any account book. 1923 Lah 551

——where the manager of a joint Hindu family kept a concubine and spent moneys belonging to the joint family estate in improving the property of the concubine, it is not open to the other members to claim those moneys. 86 I C 251 21 L. W. 183 1925 P C. 38.

(12B) Power of alienation.

——an act for which the character of "legal necessity" or "benefit to the estate" can be claimed must necessarily be a defensive act, *something undertaken for the protection of the estate already* in possession, not an act done with the purpose of bringing fresh property in possession and which may or may not be successful under the chances attending upon litigation. 47 A 381 1925 All 333 ; 23 A L J. 204

——the managing co-parcener cannot alienate or burden the estate *qua* manager except for necessity It is not affected by the question whether the father who contracted the debt or burdened the estate is alive or dead 46 M L J 23 21 A L J 934 33 M. L T. 457 P. C.

——a sale for the payment of an antecedent debt which is invalid is not just The antecedency should be both in time and fact 44 A. 368 43 M. L J 98 24 Bom L R 1231 27 C W N 150 3 P. L. R. 1922 3 Pat L T 363 P C *and the above case.*

——the alienee is to prove the necessity of sale 20 A. L J. 935 ; 4 Lah 208 ; 1 Pat 715 : 70 I C. 226 44 A. 756 69 I. C. 845.

——to make an alienation by the manager of the joint Hindu family binding on the other members the party relying on the

(12B) Power of alienation—*contd.*

alienation must show it was either for the benefit or interest family. 89 I. C. 100, 90 I. C. 594.

——the benefit to be conferred upon the estate is somethi tinct from mere need or the pressure upon it. 48 A. 592 24 A 633 : 1926 All. 511.

——expenditure for the maintenance of children falls legal necessity, but money borrowed for building a house f purposes of the education of the children is not such necess I. C. 594.

——a transfer can be made by the manager of the family for legal necessity or for the family benefit. 87 I. C. 27 : 47 A 23 A. L. J. 209

——a father of an undivided family of the Mitakshara Scho full power of disposition over his self-acquired immovable pro 94 I. C. 492 ; 1926 Lab. 395, 20 A. 267 P. C., 10 Bom. 528

——where the father transfers *property* incorrectly desc it as self-acquired the alienation can be upheld if there was ssity justifying it. 1923 M. W. N. 57 : 71 I. C. 130, 16 L. W. 9 A. 296 P. C. *Dist.*, 28 I. C. 395 *Ref.*

——a sale of joint *family property* will not be set aside m because a portion of the *proceeds of the sale* is not proved to ... whether th acted hone the price ... nt for the a C 246 Su ,3 - 25 A. l R 855, 101

——the manager of the Hindu joint family has authori raise money needed to carry on the business and it is for hi decide whether the money should be raised by mortgage or sale whether it is better to raise money to continue the business, latt ...nable to t nature L J. 59 131

——alienation of ancestral property by the manager b good wi ... for legal necessity fo a small ... not 192 522, 27 ... major port of the p ... 195, 30 B L R 16

——in such cases it must be proved or reasonably presu that the sale of lesser area for the exact amount required for t cessity was feasible. 3 Lah. 426 : 1923 Lah 268, 26 I. C. 418 : 3 L 357, 1 B L. R. 201 *fol* 192 A. 235.

——the Law of Mitakshara is to be interpreted in Berar in t same manner as in Bombay and accordingly a co-parcener b

(128) Power of alienation—*contd*

power to sell his share in the joint family property without the consent of others. 43 M. L. J. 676 27 C W N. 179 5 N. L. J. 202, P C, 50 C 84: 24 Bom. L. R. I. P. C

——the purchaser of immoveable property from the manager can sue for specific performance including the minor's share 18 N. L. R. 67: 68 I C. 346, 39 C. 232, 35 A. 499, 30 C 539 *Dist.*

——the minor member is not bound by any alienation 1922 P. C. 397.

——where the sale is not at a public auction the alienee is to prove antecedent debt or legal necessity 45 A 575

——an alienation cannot be justified on the ground of advantage only. 25 Bom L R 508. 73 I C 1017: 44 I A. 147 *Ref.* or on the existence of debt, but pressure of a present necessity for the discharge of the debt should be proved 21 A L. J. 354 73 I C 1010.

——when joint family properties are mortgaged at a high rate of interest the mortgagee must prove that the sale is justified and that there was necessity for it 92 I. C. 679.

——a suit against the members of the joint family for specific performance of contract of sale entered into by the Karta of the joint family was dismissed under the circumstances of the case 45 C. L J 313 31 C W N 469 6 Pat 323 29 Bom. L R 796 100 I C 56 1927 M. W N 69 38 M L T. 74 1927 P C 18

——purchaser of co-parcenary right in execution sale acquires a right of partition only and not joint possession 2 Pat 386

——in the absence of any special undertaking with the manager the court has no power, in a suit brought to set aside an alienation, to direct that share of the manager be available for the alienee, the transaction being altogether void 4 Pat L T. 64 73 I C 1053

——in a suit by other co-parcener for a share of the alienated property the court can, on the application of the alienee, decree a general partition and that the whole of the alienated property should be, without affecting the interest of others allotted to the alienee. 40 C 966 25 M. L J 512 P C, 44 M. L J 309 32 M L T. 263, 46 M. 815

——where a suit is brought to contest an alienation of joint family property it is from the date on which the cause of action arises that period of limitation must be reckoned Subsequent birth of co parcener does not create a fresh cause of action or a new starting point from which limitation should be reckoned 29 C W N 666, 47 A 165 - 23 A. L. J 176: 1925 M W N 262 27 Bom. L R. 175 P C

——in a suit to set aside alienation the burden *prima facie* lies on the plff. to establish the case 45 A 311, 718

——alienation without legal necessity is not void but voidable at *the instance of the interested co-parceners* 45 A 654 74 I. C 931 purchaser from the co-parceners of the right of redemption of a mortgage does not acquire the option to question the mortgage. 45 A 692

(12B) Power of alienation—*contd.*

——as the sale by father or managing member is good till avoided the pltf is not entitled to mesne profits before suit. 45 M 449, 4 U. P L. R 19 65 I C. 345.

——sale being by the manager the pltf. was not entitled to mesne profits before the date of plaint. 46 M. 815 75 I C 406 45 M L J 203.

——where the proceeds of alienation are divided amongst the junior members at a family partition the alienation cannot be impeached 32 M L T 277 : 72 I C. 322

——junior member cannot recover his share only. 2 Pat 925 1 Pat L R 373 74 I. C. 758.

——a son born before the decision of a suit to set aside an alienation of ancestral property brought by another son acquires a right to set aside the sale 10 O. L. J. 353, 19 A. L. J. 978 F B.

——where joint family property is sold in execution of a money decree obtained against the father alone, the son cannot get rid of the sale without proving that the debt was for immoral purpose 87 I C 654 1925 All 781, 13 C. 21, 1924 P C. 50 *fol* (1924 All 11, 1924 All. 169), *Ref.*

——alienation made by the father of Hindu minors not only as the manager of a Hindu family but also as their guardian are *prima facie* binding on them 1925 M. W. N. 777 : 1925 Mad 1248

——the son may set aside the alienation of ancestral property made by father which was not for the payment of antecedent debt or for any family necessity 67 I. C. 89, 39 A. 485, 28 A. 328, 53 P R 1901, 5 N. L. J 73 · 66 I C. 239.

——where the alienation of ancestral property was partly invalid for want of legal necessity a decree for possession may be granted conditional to the payment of consideration which was for necessity 45 A 429, 1923 Mad. 120

——a purchaser from a co-parcener has only an equity as against the others to work out his interest by a suit for general partition. 45 M. 449, 44 M. L J. 309 : 72 I. C 81

——mortgages can be antecedent debts which would justify for their liquidation a sale of family property. 47 A. 795 · 1925 M. W. N 852 . 1925 P C 264

——where a Hindu father who was under no obligation to raise any money for the protection of his estate mortgaged the joint ancestral property in order to acquire other property by pre-emption, held that he could do so and encumber the ancestral joint family estate 47 A. 381 23 A L J. 204 : 86 I C. 769.

——where a mortgage was created by the *karta* of a joint family on the family properties for securing overdrafts on the banking account of limited company of which the *karta* was a member, and where the adult members of the family were aware of the mortgage and the money advanced was used for the family purpose, held that in a suit on the mortgage a receiver could not be appointed 41 C. L J 203 87 I C 375 : 1925 Cal. 664.

(12B) Power of alienation—*contd*

——the manager can lawfully dedicate a small portion of the joint family property to a temple on the occasion of the funeral of a deceased member 1925 M W. N 653 1926 Mad. 128

——the manager cannot alienate property for embarking on speculative transaction 90 I C 553.

——the manager of a joint Hindu family cannot alienate family property to pay a debt which is barred 91 I C 1023

——sale of joint property for discharging valid mortgages of joint property is binding on co-parceners. 91 I. C. 471 23 L W 220 : 28 O C. 371 P C.

(12C) Power of incurring debts and other liabilities

——the manager has authority to borrow money upon reasonable commercial terms for purposes of necessity and all terms of the mortgage in excess thereof are beyond the scope of his authority 38 C L J. 25, 41 M. L J 615, 4 Pat L T 29; 1923 M W. N 382 · 25 Bom L R 568 P C

——the expression "to borrow upon reasonable commercial terms" is used in contra-distinction to such term as would be in excess of the necessity and therefore in excess of the authority of the manager of a joint Hindu family 7 Pat 394; 26 A. L J. 364, 1928 M. W. N. 242 108 I C 337 32 C W. N. 957: 30 Bom L R 793, 47 C L. J. 403 1928 P C 64

——high rate of interest stipulated by the manager of joint family cannot be recovered 23 C W N. 700

——when the manager administers the property for the benefit of the family, he is not bound to economize or save. 13 C W. N. 309, his discretion should not be narrowly scrutinized 2 M 339 p 341.

——where the manager has contracted debts for a proper joint family purpose the coparcenary property is liable 9 C W N 879.

——the son is not bound to pay the debt of his father which was barred against him 33 M. 308

——sons are under pious obligation to pay their father's debts even in his life-time 3 Pat. L J 764 88 I C 1012, 1925 Pat 823, 52 B 376 1928 Bom 232, 30 Bom L R 539 110 I C. 269, 46 M. L. J 23, 21 A L J 934 P. C, *contra*. 43 A 496, 64 I C 75, 45A 90, 50A. 137

——it is not open to the son to avoid the liability by a partition made during the progress of suit to enforce such liability. 52 B. 376; 30 Bom L R. 539, 110 I C 269, 1928 B. 232.

——the British Indian Courts have held that the son and grandson are not liable for any debt unless they receive assets and that the obligations of each of them are co-extensive. 48 A. 518, 44 C L J. 321, 1926 M W. N. 816, 1926 P C 105, 51 M. L. J 792 P. C, 1924 P. C. 50 · 46A. 95, P. C, 19A. 26 F. B.

——a father as karta has power to sell or mortgage joint family property for legal necessity or benefit as also for payment of antecedent debt. 3 Part. L T. 147: 62 I C. 116, 23 O C, 374: 60 I. C. 647, 2 Pat. L. T 407: 1921 Pat. 245: 62 I. C. 132 F. B. 6 Pat. L. J.,

(12e) Power of incurring debts and other liabilities—*contd.*

51 : 62 I. C. 905, 2 Pat. L. T. 572 : 63 I. C. 570, 55 C 210, 104 I C 19, 1927 Cal. 870.

——in order to establish necessity for alienation it is not enough to prove that a debt raised by a father by mortgaging family property was used in discharging a prior mortgage on it. It must be proved that the prior mortgage was also for necessity. 1925 Cal. 545

——when a single member acts in his own name but really as the agent of the manager the case is one of undisclosed principal and as the manager is bound so all the members are bound 41 M L J 554 1921 M W N. 830

——sons are not liable after partition for the debts incurred by father before partition 29 M L. T. 265 : 1921 M. W N 261, 40 M L J 473 - 62 I C. 980, 25 A L J 829 · 104 I. C 406 : 1927 All 714, 22 M. 519, 41 M. 136 *contra*, 39 M. L J. 486 : 28 M L T. 308 59 I C 685

——after a partition between a father and son, the latter is not liable for a simple money debt incurred by the *former*. In such a case there are no assets of the father in the hands of the son and hence nothing to follow 4 Pat 469: 6 P. L. T 613 88 I C 813 1925 Pat. 688.

——but a Full Bench of the Madras H C. have held that a simple creditor of the father in a joint Hindu family is entitled to recover the debt from the shares of the sons after a *bonafide* partition has taken place between the father and sons 51 M. 361 : 110 I C. 141 · 1928 Mad 657 : 54 M L J. 726 **F. B.**

——what are antecedent debts 6 Pat. L J. 72 : 2 Pat. L T. 17: 61 I C 102, 39 A. 437, 42 M. 711 **F. B**, 41 A. 235, 46 M L J 23. 21 A L J. 934 **P C.**, 1923 Lah. 669, 19 N. L. R. 81, 6 N. L. J 239, 45 A 407, 71 I. A. 465, 1 Pat. 506, 69 I. C 569, 69 I C. 765, 21 A L J. 934, : 46 M L. J. 23 **P. C.**, 1923 M. W. N 57 71 I C 130, 44 A 368 . 27 C W N 150 24 Bom. L R. 1231 ; 3 Pat L T 363 : 31 M L. T. 50 **P C.**, 3 Pat L. T. 709, 5 N. L. J 238, 44 A 3·2, 16 L W 936, 64 I. C 718, 6 Pat L. J. 526 **F. B**, 5 P. L J. 130 *overruled*. 42 M 711, *fol* 39 A 437, 25 A 407, 31 A 176 *Ref* 51 I A 122 Pat

——the word debt includes mortgage debt. 1928 All 596, **F. B**

——where the father alienates property to discharge antecedent debt but the antecedent debt is otherwise paid and the sale proceeds are spent by the father for other purposes the sons can set aside the sale 48 A. 152 43 C. L. J. 374 . 93 I C. 216 : 30 C W N 698 . 1926 P. C 16.

——but when only a small amount is spent for other purposes the sale binds the sons. 48 A. 183 · 24 A. L. J. 52 ; 1925 All 624

——the obligation incurred by a father in order to be binding upon his sons must have two attributes namely first that it must have been incurred antecedently to the transaction in suit and secondly, it must have been incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such a joint estate. 1925 Cal. 545.

(12c) Power of incurring debts and other liabilities—*contd.*

——where the debt has been incurred by the *Karta* of a Mitakshara family for family purposes, and the property of the family has been alienated to defray the debt the son cannot question it unless the debt was for some immoral purpose 34 C. 184, 11 C. W. N. 294, 34 C. 735. 11 C W. N. 613, 27 C. 762, 5 C. 855, 13 I. A. 1 P. C, 15 I. A 99 P C. *Contra.* 31 A. 176, 507, 33 A 783

——where a debt which was charged by the mortgage bond on the joint property of the family, was incurred by each of the heads of the then four branches of the joint family and all the defts who were members of the joint family whether sons or grandsons, held that there was no reason why the charges should not be held as binding upon the family property 42 C L. J 592 : 50 M L. J. 1 1925 P. C. 280

——when joint family property is sold in execution of a money [illegible] are not impleaded as parties [illegible] ndable at the instance of the [illegible] that the debt was illegal or [illegible] W N 767 98 I C. 31 · 51 [illegible], 44 C 524 P C.

——where after the father has become insolvent the minor sons institute a [illegible] Official Assigne [illegible] of the sons but [illegible] 51 M 417 : 1928 [illegible]

——the interest of the sons in a joint Hindu family would not [illegible] 102. [illegible] the [illegible] the [illegible] own [illegible] 50 [illegible]

——the decision of the Judical Committee in 24 C W N. 698 · 44 I. A 126 does not prevent a creditor taking execution on the family property to satisfy a decree for money against the father personally 24 C W N 938, 949 . 48 C 341.

——manager paying more than his share is entitled to contribution 20 C 18, 29 C 583 6 C W. N 370

——there is no presumption that the manager has, in borrowing debts, acted on behalf of the joint family, 21 B 808, 18 B 510, 5 C. 32 or that he has authority to do so 7 C W N. 705

——where the manager borrows money in his own name for the [illegible] creditor can [illegible] W N. 139 · [illegible] may elect to [illegible] the family, [illegible] of proving [illegible] 87 I. C. 292 ·

(12c) Power of incurring debts and other liabilities—*contd*

——a *karta* cannot cast the obligation of a personal bond on his co-parceners : the co-parceners may become liable on the bond if the *karta* was acting as their agent or if they subsequently acquiesced in it 9 C W N. 923.

——the father represents the sons without express written authority and is considered to be the accredited agent of the joint family He may sue and be sued and may bind the family by the *result of the litigation, (Mitakshara)* 12 C. W. N. 687

——when in execution of a money decree obtained against a Hindu father joint family properties are sold in execution, the sons can set it aside only on proving immorality. 87 I. C 654 : 1925 All 781, otherwise not 27 Bom L R 1451.

——the liability to pay the debts of a grand-father is co-extensive with the liability in the case of father's debts and hence interest is payable thereon 6 P L T. 497 : 4 Pat 478 ; 1925 Pat. 470 86 I C 721

——payment of interest by the manager of a joint Hindu family consisting of himself and his minor brothers, is a payment by duly authorised agent of the minors and saves limitation 37 C 46, 14 C W N 741

——a manager or *karta* can acknowledge the debt under s 19 L Act so as to bind the family 41 C L J. 535 : 1925 Cal 1153 88 I. C 1025, 17 B 512, 5 M. 169, but he cannot revive barred debts to bind others 5 M 169, 20 B 155, 17 M. 221

——a *karta* of a joint family cannot bind the members of the family by his signature alone on a promissory note, no other names appearing upon the document as those of persons to be charged 41 C L J. 535 88 I C 1025 , 1925 Cal 1153, (1923 Bom 241, 1923 All 116) *fol* 46 C 663 **P. C.** *Dist*

——the power of the Mitakshara father as *karta* of the family to bind his infant sons relating to disposal or management of joint family property are wider than those of other *kartas* and rest upon an implied consent on the part of all members and a presumption that what is done is for the benefit of the *family.* 55 C 210 104 I C 219 1927 Cal 870.

——when sons are liable for the debts of their father 2 Pat L T 572 63 I C 570, 19 A L J. 613, 63 I C. 218, 6 Pat L J 451 62 I C. 905, 3 Lab. L. J 563, 68 I C. 794, 68 I C 794 (A), 20 O C 305, 46 M 64, 45 A 545

——the pious obligation of Hindu sons to pay their father's debt does not arise during the lifetime of the father. 50 A 137, 43 A. 495 64 I C 75, 45 A 90. *contra* 46 M. L J. 23, 21 A. L J. 934 P C. J Pat L J 764, 88 I C 1012, 1925 Pat 823

——agreement to pay the barred debt of the father is not illegal 1928 Mad. 1201.

——sale of joint family property for the discharge of valid mortgages of joint property is binding on the coparceners 30 C. W. N 701 91 I C 471 : 1925 P. C. 264.

(12c) Power of incurring debts and other liabilities—*contd.*

——an alienation by a *defacto* guardian under the Hindu Law is not *per se* valid apart from any question of necessity but only voidable 49 M. 768, 1926 M. W. N 238. 92 I. C 827: 1926 Mad. 457.

——two things are settled, (1) the authority of the *Karta* to borrow on the security of the family property is limited one, (2) in the case of a loan to them the burden of proof in the first instance rests upon the lender to show that both the borrowing and the terms were within the authority which *Kartas* can exercise 55 I A 85 1928 M. W N, 242 47 C L J 403 32 C W N. 657 108 I C 337: 1928 P C 64.

——the burden of proof lies upon the person who alleges that the *debt was contracted for immoral purposes (Mitakshara)* 39 C. L J. 256, 43 M L J 745, 41 M 136, 140, 38 M L. J 462, 39 A 437, 43 M L J 98 69 I. C 602, 45 A 545

——in the case of an alienation by father it is only when the onus has been shifted by *prima facie* proof of necessity that the sons can be called upon to show that the transaction was illegal or immoral 8 Pat L T. 704

——although the initial onus is on the creditor to prove legal necessity it is shifted on the son who contests it 20 A L J 658 68 I C. 805, 5 N L J 66 65 I C 658

——where it was proved that the vendor made due inquiry as to the necessity and such necessity had been proved to the extent of Rs 3000 out of the total price of Rs 3500 and it was also proved that the sale was for adequate consideration and a long time had elapsed between the date of the sale and the time when it was sought to be questioned, held that the sale was valid and the vendee was not bound to refund Rs 500 *i e*, the portion of the price which was not proved to be for necessity 31 C W N 462 8 Pat L. T. 210 45 C L J 386 49 A 149 38 M L T 48 100 I C 130. 29 Bom. L. R 825 1927 P C 37

——sons born subsequent to a mortgage executed by all the members reciting necessity for loan cannot question the binding character of the mortgage 45 A 49 33 A 283, 44 A, 193 *Ref*

——a long series of renewals of mortgage transaction without any protest raise fair presumption of necessity 45 A. 692 74 I C. 325.

——junior member is presumed in a transaction to be with the senior member under s 114 Evi. Act. 6 N. L J. 269.

——the purchaser in execution of the interest of a co-parcener cannot take possession of the joint property, he acquires the right to compel a partition 6 Pat L. T 742 1925 Pat. 452 85 I C. 1014

——an execution purchaser of-parcener's interest gets under certain circumstances good title to what he purchases. 29 C W. N. 797: 1925 M. W N 1. 23 A L J 85, 27 Bom L R. 135: 84 I C 883 P. C.

——where the managing member of a joint family misappropriated the interest of the joint family business money of a

(12c) Power of incurring debts and other liabilities—contd

public trust, the other members of the joint family were jointly with the managing member and severally liable to repay the amount with the interest which the trust would have reasonably secured. 29 C. W. N. 775, 85 I C 2 : 1925 M. W N. 13 ; 3 Pat. L R. 255 : 48 M. L. J. 236 P. C

——debts incurred for speculative litigation is not for legal necessity 45 A 390.

——the decree holder of money decree against father can bring to sale the whole family property unless the debt was tainted with immorality or illegality. 44 A. 649, 3 Lah. 288 : 66 I. C. 485, 45 A. 545, 39 A 437

——the son has no pious obligations when the father contracts debts while his estate is under the Court of Wards. 44 A 388

——in the absence of legal necessity or pious obligation the son is not bound to pay the debt of his father. 20 A. L. J. 208 65 I. C. 967, 73 I C 607 (A), 45 A 545

——the son has a pious obligation to pay off the debt of his father contracted in lieu of time-barred debts. 44 A 628

——the liability to pay antecedent debts applies only to sons and grandsons 6 Pat L J. 526.

——application of the doctrine of pious obligation to grandson 3 Pat. 336 P C.

——a grandson can question the alienation by grand father although he was not born on the date of alienation. 98 I. C. 1012, 1927 All 127

——even great grandson by birth acquires interest in joint family property and son, grandson and great grand-son are all liable to pay the debts of their ancestors to the extent of the assets they have received 31 C. W. N. 298 : 28 Bom. L R. 142 : 7 Pat L T 815 25 A L J. 1 P. C

——marriage expenses of the male members of the joint family is a necessity and debts contracted for such expenses is binding on family 3 Pat L T 759 : 65 I. C. 315, 37 M. 273, 32 A. 675, 32 A. 81 *Fol.*

——debt contracted for the business of the joint family is recoverable from that family property. 45 M. L. J. 44, 72 I. C 815

——a judgment debt is *prima facie* evidence of necessity. 4 Pat L T 377 71 I C. 489.

——a son cannot recover joint family property sold in execution of mortgage decree against his father without showing that it was for immoral or illegal purposes. 48 C. 34, 42 A. 38, 39 A 437, 18 A. L J 683, 4 Pat. L T. 102 71 I. C. 843

——when the father is adjudicated an insolvent the interest of the son also rests in the Official Assignee. 69 I C. 729, 3 Lah. 29 P C

——the party supporting mortgage executed by manager must prove the legal necessity which is easier to be proved in case of joint trade than in case of mere agriculturists. 47 B. 637.

(12c) Power of incurring debts and other liabilities—*contd.*

——necessity to borrow money in the alleged rate of interest must be proved by the creditor. 2 Pat. 488 : 4 Pat. L. T 707 : 74 I C 695, 3 Pat. L. T 367 1922 P. 356 67 I. C. 790, 1923 A. 235, 69 I C. 758, 45 A. 484, 38 C L. J. 25 P. C

——when only personal decree is asked for no question of legal necessity arises 66 I C 687, 41 A. 571, 39 A 437, 19 O. C. 159 *Ref*

——the defence in a criminal case is legal necessity. 1 Pat. 171 · 1922 P 553, 1923 Lah 660, 45 A 311, 26 M. L J. 528 : 34 A, 4 *Ref.*

——after-born son has independent rights to contest the mortgage made by the father and is not bound by the decision in suit brought by another son 44 A 190 *contra.* 5 N L J. 66, 658, 65 I. C 404. 61 I C 801, 24 O. C. 530.

——under the Hindu Law, a son is liable to pay the amounts misappropriated by his father as trustee, even though the misappropriation amounted to a criminal offence 1926 M. W N. 194 50 M L. J. 353, 7 Pat. L T 42 , 1926 Pat 14

——a Hindu son is liable in a case of a surety bond executed by the father for payment as distinct from obligation as surety for appearance and for honesty 23 L. W 193 ; 50 M. L J 208.

(12 D) (Power of representation)

——the tendency of modern decision specially of Judicial Committee is in favour of recognition of the representative character of the joint Hindu Mitakshara family subject to the operation of relevant statutory provisions 36 C L. J 234 ; 27 C W. N. 372

——the manager is not the agent but represents the family and a negotiable instrument executed by the manager alone is binding against other 45 A 484, 44 A 393, 46 C 663 *Dist contra* 25 Bom L. R 151 72 I. C 242

——a managing member can maintain a suit for a debt, due to the joint family 1922 Mad 407, 35 M 685, 36 A 383, 28 Bom. L. R 711, 96 I C 281 1926 Bom. 414,

——on the death of a managing member who entered into contract the next managing member can sue. 28 Bom. L R 711 96 I. C 271 1926 Bom 414

——the manager of the joint family cannot mortgage the joint family property without the consent of others unless there is legal necessity. 3 Pat. L. T. 401 : 66 I C 149

——a manager cannot pay a barred debt 6 Pat L J. 256 . 2 Pat L T 318 ; 61 I C 20, 3 Pat. L T 149

——where a compromise entered into by the father is declared invalid in a suit brought by a son, after-born sons are also entitled to the benefit by the declaration. 45 M 298 26 C. W. N. 646 : 36 C. L. J. 319 20 A. L. J. 83 . 24 Bom L R 1191 P C , 74 I. C. 765

——a female owner in possession represents the estate fully for the time-being and so long as there are debts binding on the estate *and forming a charge on the same it is her discretion to decide* whether she should pay them or not It is not further incumbent

(12 D) Power of representation—*contd.*

on the transferee to establish that some other consequence would have ensued if the debts had not been discharged 85 I C 568. 1925 A B. 621

——when a manager of a joint Hindu family is adjudicated an insolvent the power which he had before his insolvency to dispose of family property cannot be considered to have vested in the Receiver or Official Assignee 49 B 785 27 Bom. L. R. 934; 1925 Bom 416

——when certain money is deposited in court in respect of the family property on account of the Land Acquisition Proceeding and the *Karta* dies before drawing the same succeeding *Karta* and not the minor son of the previous *Karta* is entitled to draw that money 32 C W. N. 815.

(12 E) Power of starting business.

——it is not competent to the *karta* to impose on a minor coparcener the risks and liabilities of a new business started by himself, but the law relating to ancestral business is distinct 43 C 561 26 C W N 164 35 C L J 498; 43 M. L J. 41; 20 A L J 469 24 Bom L R 700, **P. C**

—— in starting a new business the manager should take the consent of adult members. 45 M. 281.

Maintenance, see, "Maintenance"

(13) Reversioner.

Reversionery right cannot be transfered.

——contract to sell the future expectancy of a Hindu reversioner upon the death of the widow is void in law. 50 C 929; 28 C. W. N. 713 **P C**, (27 C W N. 50, I C. 69 **P C**, 39 M. 554) *Ref*

——reversioner's right is a contingent one which cannot be disposed of 45 B. 1167 23 Bom L. R 500 62 I C 650, 2 Pat L T 471 63 I C 633 24 Bom L. R 351.

——the right of a reversioner cannot form the subject of any contract, surrender or disposal. 48 C 536 25 C W. N 496 33 C L. J 457 59 I. C 496, 2 Lah 199; 62 I C. 932, 6 Pat. L J 604, 24 Bom L R 351, 2 Pat 554. 73 I. C 542

——but the reversioner who joins with the widow in the alienation of the property is estopped from disputing the alienation subsequently 54 I A 396 52 B 1; 32 C. W. N. 88; 46 C L J 267 105 I C 708 · 1927 P C 227 1925 Cal. 1205; 87 I C. 790.

——a contract between the life tenant and the then expectant heir giving the latter an absolute interest is not binding on the persons who become heirs when succession opens out. 6 C W. N 169 **P C**

When the reversioner derives title from another and when not

——remote reversioner derives title through nearer one 4 Lah. L J 201 50 M L. J 18 52 I. A 398; 1925 P C. 272.

——a reversioner should not be regarded to have derived his interest from his father in whom no interest vested. 68 I. C 565, 22 A 33, 28 M 57 *Ref.*

(13) Reversioner—*contd*

Suit by reversioner against alienation by widow.

——a reversioner may treat an alienation, without legal necessity a nullity without the intervention of court 39 C.L. J. 194 P C, 34 C. 329, 5 C L. J 334 P C

——[illegible]

269, 43 A

——

possibili

widow c

immediate possession after her, unless the husband has left the power to adopt But the *spes* is common to them *all*: so is the danger by the widow's act against the interest of the reversioners. The right to sue to set aside the common danger is given to the person, who if the widow died at the moment would take the estate, but the result, favourable or otherwise, affects the reversioners as a body. 50 M. L J. 18 · 3 O. W N 1 1925 P. C. 272 52 I A. 398 P C, (38 M. 406, P C., 39 M 634, P. C, 1924 P C. 247,) *fol.*

——suit can be maintained by reversioner before the expiration of life-interest to protect the property from alienation. 20 C W N. 1323, 24 C L J 309, P. C. but the result of such suit will not be *res judicata* in a suit brought by another reversioner after the widow's death 43 A. 558 *contra*., 19 A L J 749 and the above P. C ruling

——if the reversioner loses one case against alienation by widow he may bring another suit on fresh alienation. 21 C L J. 26 · 19 C W. N 197, P C.

——before the expiry of the life-interest it cannot be declared who will be the next reversioner 20 C W N 1923, 24 C. L J 309 P. C, 20 A. L J 282

——a reversioner may sue to invalidate an alienation by a widow during her lifetime 37 M. 275, but he is not bound to sue during her lifetime. 7 W R 357

——if the next reversioner does not sue colluding with the widow or for some other reason, reversioner of the second decree can sue. 21 C L J. 26 : 19 C W N 197 P C., 65 I C 820, 6 C 764, 49 C. 45 *contra* 20 A L J 702 68 I C 776, 49 A 815 102 I C. 296 · 25 A. L J 636.

——one of the two co-widows cannot without consent of the other alienate the latter's share of her husband's property even for the purposes beneficial to the estate 1925 M W N 622 90 I C. 881 · 1926 Mad 6: 49 M. L J. 479

——partition between daughters operates as a transfer by way of relinquishment by each of the daughter to the other in case she predeceased her sister and the reversioner may sue for declaration of the invalidity of the alienation 45 M L J 1 1923 M. W. N. 952 74 I. C 58.

——the institution of a suit for possession is sufficient to nullify a lease. 33 C L J 193 : 25 C. W. N. 420, 1922 Pat. 353 and limitation period is 12 years. 2 Pat. 217.

(13) Reversioner—contd

——where part of the consideration benefits the estate, the reversioner in setting aside the alienation must restore the money. 47 B. 1.

——setting aside of alienation by widow by the reversioner,—form of decree. 49 C 45 64 I. C. 980.

——when the presumptive reversioners join in a lease granted by the widow and one of them dies before the widow, his heirs are not necessary party in a suit by surviving reversioners as he had merely a contingent interest. 27 C W. N. 521.

——suit by next reversioner, during the life-time of the holder of the limited interest, for declaration that the alienation made by the latter is void, is governed by Art 125 L. Act. (12 years from the date of alienation), but a suit for possession after the death of the holder of the life-interest is not barred, 12 C W. N. 857, and also the right of the subsequent reversioners is not barred, even when the suit by the next reversioner becomes barred 32 C 62 9 C W N 25 22 A. 33, *relied on*

Suit by reversioner does not survive.

——when a reversioner dies his suit abates and does not survive to the next reversioner 37 M. 406

When consent of the reversioner validates the alienation

——considered as a rule of evidence the doctrine of validation by assent is founded on the doctrine that a person may well be presumed not to act against his interest and that where a person who would be entitled to avoid a transaction, unless certain conditions are satisfied, assents to it to his prejudice, the inference to draw is that the conditions existed 23 C W. N. 777 p, 797 P C.

——alienation by the widow and the reversioner is operative 30 C L J 6, 10 C 1102, 17 C. W. N. 701 : 17 C. L. J. 499 49 C 721 F B, *Fol* 87 I C 790 1925 Cal 1205, 22 C W. N. 350, 32 C W. N 88 46 C L J 267 105 I C 708 : 1927 P C : 227 P. C

——a widow can sell a portion of the property left to her to the then reversioner so as to confer on the latter an absolute estate in such portion 14 C W. N. 216, *contra*, 31 M. 366

——alienation with the consent of the next reversioner raises the presumption either that there was legal necessity or that the purchaser made reasonable inquiry and acted in honest belief 23 C W N 777 P C, 17 C W N 701 · 17 C L J. 499 : 40 C 721, F B 35 C 939 12 C W N 837 *overruled.* 19 C 236, P. C., *discussed*, 23 C. W N 1025 1923 Nag. 265, 42 M 523 P. C., 87 I. C 790: 1925 Cal 1205, 1925 Mad 789 ; 1926 Mad 29, 64 I. C, 80, 30 A 1, 44 A. 95, 35 M L J. 493, 46 B 292, 70 I C 815 : 1923 All. 28

The effect of the above rulings is that upon the death of the widow the actual reversioner can question the alienation with the next reversioners consent But it should be remembered that the consenting reversioner himself and his representatives are estopped to question the alienation subsequently. See Notes below under the heading "*When consent of the reversioner operates as estoppel*"

——such consent only raises the presumption of the propriety of the transaction, but it does not confer an absolute title on the

(13) Reversioner—*contd.*

purchaser. 17 C. W N. 1062 nor does it validate the alienation as against other reversioners 43 A 534 63 I. C. 556 : 30 A. I, P. C., 42 M. 522, P. C.

——reversioner's consent gives rise to the presumption that [illegible] 245 . 64 I. C. 80

[illegible] versioner only on [illegible] as entitles him to

——The Smritis and the commentators thereon do not sanction the view that the widow and the next reversioner can do what they like with the estae, the mritis never contemplated alienation by a widow except for necessary or spiritual or charitable purpose and gave her absolute powers in some cases and powers subject to the advice and guidance of her husband's kinsmen in others There is nothing to justify the conclusion that the mere assent of one who would be the heir if the widow dies at the particular moment would entitle the widow to make alienation at her pleasure or squander the estate on purposes which the Smritis would have emphatically condemned 23 C W N. 777 P. 796 P C. —the burden of proving legal necessity or *bonafide* inquiry is on the vendee 30 C. L J 56, 14 A 420 19 I A 196 P. C

——in the absence of legal necessity, a widow may alienate property with the consent of the nearest reversioner, ordinarily the consent of the whole body of such reversioners should be taken but in special cases the strict enforcement of this rule is impossible, 12 C W. N 74 30 A 1 6 C. L J 766 · 35 I. A 1 9 Bom. L. R 1048. P C *but this P C case has been discussed and distinguished by the Privy Council in 23 C W. N 777 and at page 789 after reviewing all the cases some propositions have been laid down which should be carefully noted (1) An alienation to be valid as a surrender must be of the widow's whole life estate so as to vest the inheritance at once in the alienees (2) where the alienation is only of part of the estate the consent of the next presumptive reversioner is evidence of the necessity or propriety of the alienation and in the absence of any evidence to the contrary the court shall presume that the alienation was proper, (3) the assent of a reversioner will, if given bonafide and for consideration, estop and bind the reversioner so consenting and then claiming through him apart from any question of necessity or propriety, (4) Whether it is a case of surrender or partial alienation the consent must be bonafide and not a device for the purpose of enlarging the widow's estate , (5) the assent has a double aspect not merely raising a presumption but also raising an estoppel against the person assenting even though he might not have received any consideration or benefit.*

——in the above P. C case it has also been held that the immediate reversioner, not having a vested interest, does not together with the widow represent the whole estate.

——*ijara* for 60 years to save the property and sanctioned by expectant reversioner is valid. 18 C. W. N. 673, P C.

(13) Reversioner—*contd*

——if before adoption the widow alienates property with the consent of all the reversioners, the adopted son cannot question it 3 W R 14

——a gift by a widow to sister's son cannot be validated by the consent of the next reversioner 34 A. 129, 207, 32 A 176, but the consenting reversioner cannot impeach a gift 23 Bom. L R 1040 46 B 292

——*consent of next reversioner to a will executed by a widow* cannot validate the transaction, 18 C. L J. 162 : 21 I. C 714

——consent of the reversioner to be operative must be shown to have been with the knowledge of its effect 2 C. W. N. 729 · 21 A. 71 : 25 I A 183, P C

When consent of the reversioner operates as estoppel.

——the consent of a reversioner will, if *given bona fide* and for consideration, estop and bind the reversioner so consenting and those claiming through him apart from any question of necessity or propriety The assent has a double aspect not merely raising a presumption but also raising an estoppel against the person assenting even though he might not have received any consideration or benefit. 23 C W. N 777, P 798 P C

——Where a Hindu along with the next reversioner makes an alienation, he cannot after the death of the widow challenge the transaction as he is estopped There is no distinction between a reversioner giving consent to an alienation by the widow and joining in such alienation Nor is there any practical difference between the consent given by word of mouth or conduct or attesting the document or joining in it 87 I C 790. 1925 Cal. 1205.

——an alienation by a Hindu widow in excess of her powers is not altogether void but only voidable by the reversioner who may either singly or as a body be precluded from exercising their right to avoid it either by express ratification or by acts which treat it as valid or binding 32 C W N 88 : 46 C. L J 267 : 105 I. C 708, 1927 P. C 227

——joining with the widow in the transfer estops the reversioner from questioning it 8 C. L J. 123 (12 C. 560, 20 C L J. 368, P C. 20 C. 236, P. C , 5 C L. J 115, P. C ,) *Ref.* 1920 M. W N. 679 60 I. C 635, 44 A 35, 51 B 475 . 29 Bom. L R 326 : 102 I. C 232 1927 Bom 260 F. B., 45 A 339 F. B , 46 B 292, 1929 Mad 502 . 1929 M. W N. 323 29 L W. 818 F B , 31 B 475 F B.

——when the reversioner elects to hold good the deed of alienation even before the succession has opened he cannot afterwards make a claim inconsistent with his own solemn act. 45 A 339 P C

——when a co-parcener as managing member consents to a mortgage by the widow on behalf of the family, a son born to him subsequently cannot question the mortgage the consent being binding on him 32 C W N 528 : 47 C. L J. 189 ; 29 Punj L R 182. 1928 M W N 933 30 Bom. L R 267 · 107 I. C 20 . 1928 P. C. 20

——where the reversioner entered into an agreement with the widow declaring her to be the absolute owner of the property he was estopped from subsequently denying the title of the purchaser from the widow 87 I. C. 787 : 1925 All. 453.

(13) **Reversioner**—*contd*

——a reversioner may be estopped from contesting the widow's alienation by giving consent for consideration. 23 Mad. L. J 363. 25 Bom. L. R 813.

——a reversioner releasing claim for consideration, is estopped from claiming it again 2 C. W. N. 132.

——mere attestation by reversioners does not operate as estoppel 24 C. L J. 487 21 C W N. 225 42 C 876 P. C

——a boy of age but studying in College and having no idea of the effect of the deed is not bound by attestation 10 C W N. 931. 1 I. C. 315.

——where a widow makes an illegal *ijara* the reversioners are not bound by that simply by getting themselves substituted as the legal representatives of the widow in the suit for arrears of *ijara* rent. 23 C W. N 64

What amounts to consent of the reversioner

——attestation of reversioner neither creates estoppel nor implies consent : it proves no more than that the signature of an executing party has been attached to a document in the presence of witness. 21 C W. N. 225 : 24 C L J 487 : 42 C 876, P. C.

——to give any weight to the consent of the next reversioner or other kindred of the deceased in an alienation by widow it must be shown that they did so with the knowledge of its effect 2 C W. N. 729 : 21 A 71 : 25 I A. 183, P C

——where a mortgage deed executed by a Hindu widow who was illiterate was signed by the next reversioner (who was her daughter's son) on her behalf, held that on this ground alone the consent of the daughter's son should not be considered as proved. 88 I. C 502 · 6 Pat L T, 826 1925 Pat 467

——mere attestation is not equivalent to consent in absolute transfer. 13 C W N 931, 1 I. C 415

——the power of giving consent cannot be delegated by the reversioner to his executor 31 C 698

——the reversioners may be precluded from exercising their right to avoid the alienation either by express ratification or by acts which treat it as valid or binding 32 C. W N 88 46 C L J. 267. 105 I. C. 708 1927 P C. 227 P C

——when a Hindu widow along with the next reversioner makes alienation, he cannot after the death of the widow challenge the transaction as he is estopped There is no distinction between a reversioner giving consent to alienation by the widow and joining in such alienation. Nor is there any practical difference between a consent given by word of mouth or conduct or by attesting the document or joining in it 87 I. C. 790 1925 Cal 1205

——a decree on a simple bond executed by the widow for legal necessity is her personal debt and cannot bind the next heir even if the latter signed the name of the widow. *12 C. W. N. 769.*

(13) Reversioner—contd.

What the transferee or creditor is to prove.

——the vendee can resist the claim of the reversioner only on proof of legal necessity *or such bona fide inquiry* as entitles him to protection from a Court of Equity. 30 C. L. J. 56.

——due enquiry and existence of *bona fide* on the part of the alienee are two requisites for constituting a widow's alienation binding against the reversioner. 31 C. W. N 65, 27 C W N 269 P. C, 7 M. I. A. 393 P. C.

——purchaser from widow is to prove that (1) the conveyance is genuine, (2) the lady had full knowledge (3), either that the alienation was for legal necessity *or that he was satisfied of necessity* upon reasonable inquiry. 35 C. 420. 35 I. A. 48 : 12 C. W. N. 393 : 7 C. L J 335 ; 10 Bom. L. R. 230. P. C.

——the burden of proving legal necessity or *bona fide inquiry* is on the vendee. 30 C. L. J 56, 14 A. 420 : 19 I. A. 196 P C

——burden of proving legal *necessities* is on the alienee, but he may be protected if he honestly did all that was reasonable to *satisfy himself* that the required necessity existed *even though there may* not be legal necessity in fact. 39 C. L. J. 194 P. C

a transferee for value from the alienee and with notice ... had, 39 C. L. J 194, 31 C.

... sity is on the *purchaser* ... t proof of its existence 18

... rcumstantial *evidence may* ... 66 I. C 561. 44 C. 186 P C

For other cases on the point see " Legal necessity "

——in case of mortgage by widow for " meeting future expenses" ... on the creditor. 1926 Cal 243

... the reversioner *must suffici*... al statement of necessity will ... to see the direct application of the money. 33 C. 1079.

... no *funds in the hands* ... state 23 C. 139 : 24 ... I C 496 ... cessity, the *contest* ... C W. N 729 : 21 A 71 : 25 I. A 183 P C.

Reversioner may treat the alienation as a nullity

——after the limited owner's death, the reversioner may treat the alienation made without necessity as a nullity without the intervention of court. 39 C. L. J. 194. 34 C. 329 ; 5 C. L J. 334 : 34 I. A. 87 P C. and he may bring a suit for possession within 12 years. 8 Pat. L. T. 797 ; 68 I. C. 394.

(13) **Reversioner**—*contd.*

——the limited owner has no power to grant a tenancy beyond her life-time and such tenancy may be terminated by the mere election by the reversioner. 2 Pat 171 : 4 Pat. L T 396.

Reversioner can sue when the widow deliberately refuses to sue.

——reversioner may also sue when the widow deliberately refuses to impeach a transaction made by prior estate-holder 45 A. 255.

Suit by or against widow when binds the reversioner.

——where the estate of a deceased Hindu has vested in a female heir, a decree fairly and properly obtained against her in regard to the estate is, in the absence of fraud or collusion binding on the reversionary heir. 28 C L J 519 P C, 19 C W. N 1284, 9 M I A. 543 P. C. (*known as the Shivagunga case*), 6 C L J 490, 10 C 985, 11 I A 66 P. C, 11 C 186, 11 I. A 197, P. C, 21 C 8 : 20 I. A 183 P C

——where an estate vests in the widow, a decree fairly and properly obtained against her relating to the estate is, in the absence of fraud or collusion binding on the reversioner 23 C W. N 325. L R 3 A 457 70 I C. 862, 48 M. 883 42 C L J. 563 49 M L. J 769 30 C W. N 313, P C

——*bonafide* suit by or against widow representing the estate binds the reversioners 30 C W N 313 42 C L J 563 48 M 883 . 49 M L J 769, P C.

——where in a suit the merits are tried and the trial is fair and honest, a Hindu lady, otherwise qualified to represent an estate in the suit does not cease to be so qualified merely owing to a personal ... 519 P C.

judicata only ...

er, even if th...

——a mortgage decree against widow making reversioner a party binds the subsequent reversioner if the decree be not collusive 25 C L J 390, 21 C W. N 765 P C

——a suit for possession by widow in her own right does not operate as *res judicata* in a subsequent suit by reversioner 35 C. L J 348 68 I C 322

——execution of decree against widow can bind the reversioner under certain cases. 12 C W N 96 n

against the limite... rsioner He was no... N 385. 33 C L. ...

——but sale in execution of a personal decree against widow cannot bind reversioners, not even if the widow and the reversioner be jointly sued or mortgage the property 19 C W N 265

——where a creditor files a suit against a limited owner (her daughter) as such and not against the estate of the last male owner and in execution of a personal decree property is sold it does not bind the reversioner *although the foundation of the decree was a liabilit*...

(13) Reversioner—contd.

which might be binding on him. 1927 M. W N. 93 : 45 C. L J. 454 : 29 Bom L R 759 . 105 I. C. 469 : 1927 P. C. 41, P. C

——a reversioner is not the legal representative of the widow and is not bound by her claim before Land Acquisition Officer 42 M. L. J. 298

——assuming that by the revenue sale only the widow's life estate passes, the remoter reversioner cannot claim the property on the death of the widow. 43 A. 613.

for other cases see "pp. 242—244"

A decision against one reversioner if binds another.

——a decision in a suit by a reversioner against the widow to get rid of a common apprehended danger to the interests of the general body of reversioners, affects the reversioners as a body and a fresh suit by another reversioner on the same cause of action becomes *res judicata* being covered exactly by the explanation VI to s 11 of the C P. C 47 A 893 : 43 C L J. 51 . 33 C W. N 626 · 50 M. L. J 18 : 1926 M W. N. 83 . 91 I. C. 370 · 28 Bom L. R. 1110 : 1925 P. C. 272 P. C., 42 I. A. 125., 38 M. 406. 23 I C. 291. 9 W R. 505 509, 43 I. A , 207. 39 M. 634, 51 I. A 391 : 82 I C 9nd 47 M L. J. 824 : 1924 P. C. 147 P. C. *Ref. on.*

——it has been held that the law of *res judicata* as provided in s 11 of the C. P C is not exhaustive and decision against one reversioner binds another though the second does not claim through the first. 27 M 390 P. C .

——a remote reversioner is entitled to revive a suit brought by a near reversioner. 42 I. A. 125 P. C

——but it has been held that the idea of an eventual reversioner claiming through any one who went before him is opposed both to principle and authority 23 C W N. 7773 (17 C. W N. 701 49 C. 721 F. B , 21 M 128 F B). *Approved.*

Relinquishment or surrender by widow,—doctrine of acceleration

See notes under the heading "(17) widow's"

Relinquishment by reversioner.

——where a next reversioner relinquishes his right in favour of the widow he cannot after the death of the widow question the title of the purchaser from the widow before the relinquishment 2 C W. N 132.

——but with the consent of the presumptive reversioner she cannot convert her life-interest to an absolute estate. 22 C 354.

Reversioner cannot ratify the action of the widow after her death

——acts performed by the reversioner after the death of the widow cannot amount to ratification as the widow is not the agent of the reversioner. 8 C. L J. 45 : 13 C W. N. 291.

Effect of acknowledgement of debt by widow

——an acknowledgment of debt by a widow is not binding on the reversioners, under s. 18 of the L. Act, 17 C. L. J. 433 P C.

(13) **Reversioner**—*contd*

Reversioner cannot sue for contribution

——reversioner making payment of money to avoid a sale for roadcess arears has not right to sue for contribution 25 C. W. N. 1029.

Reversioner cannot follow proceeds in the hands of third persons.

——a reversioner cannot follow the proceeds in the hands of third person. 1921 M. W N. 434 14 L W. 33.

(14) **Shradh ceremonies.**

——where the son is too young the widow may perform *shradh* ceremonies. A boy of seven is too young to perform *shradh* ceremony. 63 I C 296

——the importance of the *shradh* ceremonies from a legal point of view cannot be over-rated The competence of person to offer these oblations forms the test of his title to the inheritance 48 M. 1 ; 1925 Mad. 497

——a reasonable expense of *shradh* ceremony of the widow should be paid by all reversioners 19 C W N 1181.

(15) **Stridhan.**

General.

What are stridhan properties.

——*stridhan* means that over which the woman has control. 17 C W. N 670, F. B 17 C L J 459. 11 C L J. 124

——property belonging to a woman before marriage 11 B. L. R 286 ; 19 W. R 264, gifts by husband and other relations. 8 C. L R. 309, 1 M 282, property acquired by investment of absolute property, 19 W. R 292, 1 M 281, 28 M 1, and property acquired by adverse possession, 29 C 664 6 C W N. 657 29 I A 132, P. C 22 C 445 22 I. A. 25 P C. 23 C 942, 25 A. 435 are *stridhan* properties.

——according to Mitakshara whatever is lawfully acquired in any manner by a woman married or not, is her *stridhan.* 21 M. 100, 24 B. 192.

——under the Hindu Law of Benares School, property which a woman has inherited from a female is not her stridhan , under that School no distinction can be drawn between what has been inherited from a male and what has been inherited from a female. 7 C W N 231 [illegible]

inherited from her father, and on her death it devolves on her daughter in preference to her son 31 B. 463 9 Bom. L. R. 834, 30 B. 299 . 7 Bom. L R 936

——when property is given to a Hindu female when married, it becomes her *ayautuka stridhan*, and her only unmarried daughter is entitled to succeed in preference to her husband. 33 C. 23 : 32 I. A. 181 : 10 C. W N. 1 : 2 C. L. J. 238, P. C.

(15) Stridhan—*contd.*

——a gift of ornaments made by a Hindu in favour of his wife and daughter constitutes their *stridhan* properties 89 I C. 424.

——ornaments received by a woman as presents from the husbands' grandmother before marriage and those received from the husband after marriage are *ayautaka* stridhan which the son is entitled to take in preference to the daughter. 32 C. W. N. 133

——a lease-hold property granted by father to daughter after her marriage is *stridhan* and it is called *Anwadheya Ayautaka Stridhan* 33 C. 315 : 3 C L J. 15 : 10 C. W. N. 510

——post-nuptial gift by father in Berar become her *anwadheyak* *stridhan* which passes to her son and daughter. 19 N. L R. 193, 4 N. L. R 31, 5 N L R 13, 9 N. L R. 102 10 N. L. R 24

... of her maintenance ... such property ... 6 Pat L T.

... hand it is ... 45 A. 115 ... not become her stridhan 24 A L J 742. 1926

——where a widow acquired some properties through the exercise of the right of pre-emption it was her separate property 43 A. 375 . 19 A L. J. 129 . 61 I. C 3. F. B

——when a husband makes a gift of immoveable property to his ... to her heirs and not ... daughter ... er's son ... 30 Bom

Savings from widow's estate if stridhan.

... presumed to be accretions ... were treated as *stridhan*. ... 7 : 1925 Pat. 460, 49 M L

Properties acquired by widow by adverse possession if is her stridhan

——the general proposition that a Hindu widow in possession of any property by adverse possession takes it as her separate stridhan property requires some limitation if the property is acquired by her as claiming as the widow of her husband The property in the latter case becomes an accretion to the husband's property and on her death passes to her husband's heirs. 37 I. C. 473 : 3 Pat. L R 251 : 1925 Pat. 523 : 6 Pat. L T. 206

Properties standing in the name of Hindu Female.

——there is no presumption that a property standing in the name of a Hindu female belongs to the joint family and is not her stridhan. 39 C L J. 140 : 28 C. W. N. 131, 32 C L. J 490 P. C.

(15) Stridhan—*contd.*

When the husband can use the stridhan

——a husband can in times of pressing need only, use his wife's *stridhan* without her consent. 23 W. R. 184 274.

[illegible]

1031 : 1927 M. W. N 846

Succession to Stridhan

——*the doctrine of spiritual benefit does not apply to the succession of stridhan* 4 C W. N. 743 . 1 A 46 *Ref.*

——unchastity is no bar to inherit *stridhan* property. 30 C 521: 7 C. W N 121 26 M 509.

——in the absence of the heir of *stridhan* specified in the texts, the nearest kinsmen who take, are those nearest in blood, whether cognate or agnate 15 C W N 1036

——*sapindas* or the nearest relations of the parents mean the *sapindas* of the father who are also those of the mother by reason of her identity with the husband. 15 C W N 1056

——the son of a rival wife is a nearer *sapinda* than a husband's brother's son 13 M 138.

——under the Bengal School, a widowed daughter having son who is dumb but not shown to be incurably dumb, is entitled to succeed to her mother's *stridhan* in preference to a daughter's son. 18 C. 328

——sons are preferred to married daughters in the succession to the *Pitridatta jyautaka stridhan* of their mother 12 C W N. 924 . 36 C 86 8 C L J 200, 10 C W. N 510 *Ref* 22 C. W N 990

——ornaments received as presents from husband s grandmother before marriage and those received from the husband himself after marriage are ajautuka stridhan which the son is entitled to inherit in preference to daughter. 32 C. W. N. 133 1929 Cal 42, daughter's daughter is preferred to son's son for succession to the grandmother's stridhan 48 A 648 96 I C 757 1926 All. 557 24 A L J. 742, 45 A. 715 *fol* 25 A 468 P C, 23 A 369 *expl.*

——unmarried daughters are preferred to married daughters but no preference is given to a daughter's unmarried daughter over a daughter's married daughter. 48 A, 648 : 96 I C 757 : 1924 A. 557 : 24 A L. J 742

——under the Bengal School, brother is preferential heir to the [illegible] after marriage [illegible] l, *Ref* [illegible] rential heir to [illegible] led to succeed in preference to the son of the brother of her husband 7 Bom L R. 622

——a brother of the half-blood of the husband of a deceased woman must be postponed to the sons of the brother of the deceased. 4 C W. N. 743.

(15) Stridhan—contd.

——where Hindu sons living as members of a joint family succeeded to the stridhanam properties of their mother they take as tenants-in-common 1925 All 447 : L. R. 6 A. 243.

——under the Mitakshara law sister and sister's son are heirs to *stridhan* of a *maiden* in preference to a father's brother's son 15 C W N 1036

——the succession to a maiden stands on the same footing as that to a childless widow married in a disapproved form. 15 C W N 1036, 5 N L. J 249, 36 B 339, 43 M. 32, 14 N. L R. 84

——in berar a daughter inheriting from father takes an absolute estate. 5 N L J. 187 · 65 I. C. 671

——according to the modification made by customs and usages of the Agarwalla community relating to stridhan, son is entitled after his mother's death to whatever belonged to his mother 33 C W N. 491 27 A L. J 406 : 49 C. L. J. 335 : 114 I. C 565 : 1929 P. C 77

——where a Hindu woman dies leaving dowery properties and her husband and a number *of daughters*, the husband cannot dispose of the properties by will. The properties would descend to the daughters 1925 M. W. N. 284 · 87 I. C. 621 : 1925 Mad 861

——illegitimate sons of a sudra have never been regarded as heirs to their putative father's collateral relation and hence they cannot succeed to the stridhan properties of their putative father's *legally* married wife. 49 M. L. J. 568 · 1926 Mad. 84.

——where a woman married in an approved form dies without issue, her *stridhan* is inherited by her husband and his *sapindas*, while if the woman was married in a disapproved form, it goes to her parents and their relations. 90 I C. 358 : 23 A L. J. 891 : L R 6 A 557.

——under the Mitakshara law, Benares-School, *stridhan* passes to husband's heirs in preference to her own, unless the marriage is shown to have been in an unapproved form 25 C 354, 11 M L A. 139 · 10 W R 31, P. C, *Ref*

——in case of *stridhan* the property would in the first instance go to her husband's heirs till her blood relations were entitled to succeed to it in preference to the Crown 45 B. 1116 : 23 Bom L. R 462 62 I C 109, 37 M 293.

——under the Mitakshara daughter's daughter is preferred to daughter's son 45 A. 715.

——under the Mitakshara, a co-widow inherits *stridhan* in preference to husband's brother and brother's son. 10 C. W. N 802 30 B 431 : 16 M. L J 211 : 3 A. L. J. 484, 8 Bom. L R. 416, 4 C L. J 9 33 I. A. 176 P. C.

——under the Mithila Law, *stridhan* property of woman in one of the approved form of marriage goes to her husband's brother's son in preference to her sister's son. 12 C 438

——under that law the husband's sister's sons are to be preferred to the husband's paternal great grand father's great grand-son, in the succession to *stridhan* 21 C. 344.

(15) Stridhan—*contd.*

——step sister's son is preferential heir to *stridhan* to the daughter's son of the great grandson of the great-grand-father of the husband 16 C W N 1094

——a woman by prostitution does not cease to be a Hindu and her brother's sons may inherit her 17 C L. J 438 17 C W. N. 679, F. B., 17 C L J. 459, 11 C. L J. 124, 25 C 254, so also her mother 4 U P L R 8 65 I C 593.

——succession to the *stridhan* of a degraded woman is to be governed by the ordinary Hindu Law of inheritance and daughters are not preferred to sons in the line of succession. 29 C. W. N. 624. 89 I C 141 1925 Cal 748

——in the absence of any local custom or usage to the contrary, a woman of the town is no heir to her deceased sister who was also a woman of the town 25 C 254 12 M. 277 *Dist*

——a woman of the town who is Hindu by birth does not cease to be a Hindu by reason of her degradation, and succession to her property is governed by Hindu Law. 25 C. 254

(16) Succession (General).

(16 A) Custom
(16 B) Disqualification
(16 C) Principles of succession under the Mitakshara and Dayabhaga
(16 D) Succession under the Mitakshara Law
(16 E) Succession under the Dayabhaga Law

(16 A) Custom

——custom of primogeniture prevails. 24 C W N. 601

——it would be dangerous to seek to extend custom by such logical processes as analogy 73 I C 239

——very strong proof is necessary to prove custom in contravention of Hindu Law as it affects the community 75 I C 657: 1923 A 341

[illegible] girls by which sons [illegible] 45 M W. N. 228.

[illegible] less there is custom. 35 C L J 34.

——a sister's son is an heir unless there is custom to the contrary 35 C. L. J. 34

(16 B) Disqualifications

Onus of proof.

——the burden of proof of disqualification is on the person who asserts it. 18 C 111 17 I. A. 173, P. C., 50 C 604.

Blindness, deafness, dumbness

——blindness, deafness and dumbness must be congenital and incurable 45 C 17 : 22 C. W. N. 74, P. C, 14 B. L. R. 273, 1. B. 177, 45 M. 949, 18 C. 327, 46 B. 455, 51 B 50 : 29 Bom. L. R. 64:

(16 B) Disqualifications—*contd.*

100 I. C 586 : 1927 Bom. 103, 101 I. C. 650 : 1927 Nag. 235, 19[illegible] Nag. 151.

——the rule of exclusion on the ground of congenital blindness [illegible] not absolute 43 M. L. J. 596 F B, 69 I. C 313. 1923 M. 21 6 N. L. J. 81 : 19 N. L. R. 69 : 71 I C. 566, 22 C W N. 74 P C

——a person suffering from congenital and incurable dumbness [illegible] excluded from inheritance. 23 Bom. L R. 1320, 80 I C. 173 (B)

——affectionate treatment and kindness shown to a membe[r] who is born deaf and dumb does not entitle him to inherit. 18 C [illegible] 341 : 18 I. A. 9 P. C

Change of religion.

——the onus of proving that a party was congenitally blind s[o] as to be excluded from a share in their joint properties lies on th[e] party asserting it 47 A 327 : 1925 All 366 : 86 I C. 551

——change of religion or loss of caste, does not *per se* exclude from inheritance. 23 M 171, 3 W R. 206, 15 C W N. 545 38 I A. 87 · 13 Bom. L. R 427 P. C, 29 A 487, *reversed.*

——a Brahmin who described himself as *sanyasi* but lent money, is not an ascetic and he inherits. 18 C. W. N. 60

——a Sudra cannot be an ascetic and is not excluded from inheritance 17 C W. N. 517, 22 M. 302, 1922 Bom. 295

——conversion of a Hindu woman to Mahamedanism after she becomes a widow will not affect her rights of inheritance except to her Hindu husband 1925 M. W. N. 285 : 87 I. C. 621 : 1925 Mad 861

Idiocy.

——idiocies must be complete, absolute and congenital 12 A. 530, 18 C. 111

Illegitimacy.

——an illegitimate offspring by a Mahamedan mistress is not a Hindu and cannot inherit. 25 Bom. L. R. 829, 73 I C. 412.

[illegible] classes do not inherit.

[illegible] kes half the estate of his putative father in competition with the widow. 46 M. 167 : 27 C. W. N. 1021 : 37 C. L J 363 : 25 Bom L. R 577 P. C, 1923 Nag 67

——among Sudras an illegitimate son in competition with a legitimate or adopted son takes a half share of what he would him self take if he were legitimate son and not half of what the other participants actually take. The decision in 34 M 277 has been overruled by the Privy Council decision reported in 46 M 167 P C, 48 M. 1 : 1925 Mad. 497

——an illegitimate son is not entitled to a share in the family property when there are collaterals 53 M. L. J. 861 1927 M. W. N. 750, 27 M. 32, 50 M. 340.

——amongst *sudras* an illegitimate daughter succeeds to her mother in default of any near heir. 45 B. 557 : 22 Bom. L. R. 1306, 59 I. C 561

(16 B) Disqualifications—*contd.*

——illegitimate daughters are not entitled to maintenance from their father's family. 53 M L J 861 . 1928 M W N 750

——under the Bengal School an illegitimate son of Sudra is entitled as a *dasiputra* to share of inheritance provided his mother was in continuous and exclusive keeping 25 C. W. N 433 · 32 C. L. J. 333 · 48 C 643 F B , 19 C 91 *overruled*.

——an illegitimate offspring of the *churi* married cannot inherit. 18 N. L R 115 . 64 I. C 897.

——illegitimate son, collateral succession 46 B. 424

——an illegitimate son has right only in his father's or mother's property, he cannot succeed to any collateral 21 A 99, 10 M 334 : 25 M 429, 519, 34 B 521 12 Bom L R 204, but among the sudras illegitimate son surviving the legitimate son succeeds him, 18 C 151 17 I. A 128, P C

——illegitimate sons of regenerate classes are not co-parceners 22 A 191 27 I A 51 P C , 4 W. R 132 7 M I A. 18 P. C ,
and be a co-parcener,
tuous intercourse 6 A.

uous concubine is not regarded as occupying the same position, as to inheritance, as the son of a slave-girl by *Sudra* 28 C 192

——the illegitimate son of a *Sudra* by a continuous and exclusive concubine is entitled to maintenance for his life from his putative father's joint family estate even in the hands of his co-parceners 50 M 340 100 I C 655 1927 Mad 386 52 M L J 229

——an illegitimate son of a *Sudra* not born of a female slave,

23 A 86). *Dist*

Insanity

——to exclude from inheritance insanity need not be congenital. 47 B. 707 25 Bom L R 404, 38 A 117, 43 M. 464 5 A. 509, 18 N L. R. 80 , 68 I C 111, 8 C. 149, 919, 10 C 539, 38 A 117

——madness or insanity need not necessarily be congenital to disqualify a person from inheritance A person who has become insane while in possession loses his right to a share on partition. 8 C 149 : 9 C L R 457, but blindness must be congenital 22 C. W. N. 74 P. C.

——proof of insanity at the time of the opeing out of the succession is sufficient, to exclude a person from inheritance under the Hindu Law 10 C. 639, 13 M. I. A. 519, 14 M. I. A. 176, 5 A. 509, 33 A. 117. 40 M. 464

(16 B) Disqualifications—*contd.*

——*if the interest be vested by birth or inheritance (Mitakshara)* it cannot be divested by subsequent lunacy; 28 A 247, 22 C 864 nor does the lunacy affect after succession has opened out. 14 W R 329, 14 M. 289.

——an insane member cannot be a co-parcener 8 C 919, but when property has once vested subsequent insanity cannot divest him of the property. 22 C. 864.

Leprosy.

——to exclude from inheritance leprosy must be of a virulent type and agonising and serious. 22 C. 843: 22 I A 9, P C, 4 C L. J. 323, 28 M 251, 9 Bom. L R. 1149.

——in order to operate as disqualification, leprosy must be of a virulent type. 50 C. 604, 22 C. 843 · 22 I. A. 94 P C, 4 C. L J 323, 9 Bom L R 1149, 38 M. 251, 19 M. 74, 1 B. 554, 27 C. W. N. 909, 29 C W. N. 129 P. C

——subsequent attack of leprosy does not divest 40 A. 77.

——other incurable diseases also disentitle. 38 M. 250

Murder.

——a murderer or an accessory to murder cannot inherit 29 C. W. N 271: 86 I. C. 324: 1924 P. C 209. 31 M. 100, 27 M. 591, 23 B. 275, 45 B 768, 3 Lah. 242, 68 I. C. 769, 48 B 569 P. C.

——such exclusion includes the direct lineal descendants also 3 Lah 242: 4 Lah L J 245, 68 I. C. 769, 41 P. R. 1906, *fol.* 15 W R 70, 17 C. W. N. 341, 27 M. 591, 31 M. 100 *Ref.*

Unchastity.

——an unchaste widow cannot inherit the property of her husband 13 B. L. R 1 p. 11: 19 W. R. 367 p. 371, 3 Pat. 152.

——*unchastity is no ground of exclusion of any female heir* except a widow. 31 M. 100: 18 M. L. J. 70: 2 M. L. T. 533, but under the Bengal School a daughter is excluded by reason of unchastity, 22 C. 347, 32 C. 371; 9 C. W. N. 1003: 2 C. L. J. 97, 22 C. W N. 16 n.

——unchastity disqualifies a Hindu wife *but it must be physical* unchastity which occurred during the lifetime of the husband. 73 I. C 875.

——unchastity disqualifies woman from inheritance and maintenance but if the husband condones it during coverture, then she is entitled. 16 C. W. N. 964, 22 C. W. N. 566, 22 C. 347, 32 C. 371, 4 C. 550

——a widow who has been unchaste but who is proved to have given up the life of unchatity should be given bare maintenance. 49 B. 459 · 27 Bom. L. R. 13: 1925 Bom 153.

[illegible] ...udes *her from inheritance* 22 W. N. 1003 2 C. L. J 97

C [illegible] a woman to inherit stridhan

pre [illegible] 6 M. 509.

(16 B) Disqualifications—*contd.*

——an unchaste Hindu wife is not entitled to maintenance 23 M. L. J. 289, 16 C. W. N. 964, 19 M. 6, 24 W R 428, 26 B. 707, 17 C. 674, 17 M. 392

——the only qualification necessary for inheritance is physical chastity; refusal to come to husband's house when sent for after he had married a second time does not disentitle her from inheritance and maintenance 16 C. W. N 964 but she loses her right of maintenance by deserting her husband without just cause. 31 M 338, or [illegible] W. R 475

[illegible] e to be a Hindu and her [illegible] 17 C. L J. 438 . 17 C. [illegible], F B

——a widow inheriting the estate of her husband does not lose it by subsequent unchastity 5 C. 776 7 I A. 115 . 6 C L. R 322, 24 M. 441.

——in Bengal, unchastity excludes any woman from inheritance. 33 C 871 · 9 C W N 1003, 23 C 347, 4 C 550, 13 B L R 1, 19 W R 367, 20 C W N, 16 n But under the Mitakshara law only the widow is so excluded 26 M 509, 4 B 104, 5 M 149, 31 M. 100, 32 A 155, 32 A 702, 97 I C 604 51 M L J 387 1926 Mad. 1017 1926M. W N 661

——in the absence of unchastity, in order to exclude her, there must be malignant or unjustified hostility on the part of the wife 73 I C. 875

Want of Limb or organ

——want of any limb or organ if congenital is a disqualification, 26 M. 133

Result of disqualification

——disqualification is personal 32 B 275.

——the birth of son to disqualified person does not divest the estate from a person who has taken as heir 32 A 455 10 Bom L. R 559, 5 A 509.

——when an heir is disqualified the next heir succeeds 13 M. I. A 519 P C

——the removal of disability subsequent to the opening of the inheritance does not entitle the affected person to claim the heritage. 4 C. L. J 323.

(16C) Principles of succession under the Mitakshara and the Dayabhaga.

[illegible]

(16C) Principles of succession under the Mitakshara and the Dayabhaga—*contd.*

——propinquity is the ruling principle of the law of inheritance according to Mitakshara. 33 M. 436.

——propinquity has been accepted in the Bengal School as a principle of succession and spiritual benefit is not always the guiding principle 35 C. 721 : 12 C. W. N. 511.

——in cases where there are no express texts under the Dayabhaga Law, the court would have recourse to the theory of propinquity as adopted in the Mitakshara and would recognise all such *bandhus* as heirs also in cases governed by the Bengal school 35 C 721, 725-727 ; 12 C. W. N. 511.

——but a somewhat contrary view has been expressed by J Mukerji,—the scheme of the Dayabhaga is radically distinct from and to some extent incompatible with the scheme of the Mitakshara and the one cannot be made to supplement the other so far as the law of inheritance is concerned. 54 C. 171 : 44 C. L. J 470 : 1947 Cal. 11, 97 I. C. 845 : 16 C. L. J. 14 *Rel on.*

——in Berar the Mitakshara is paramount and the Mayukh is of secondary consideration being relied upon only when the Mitakshara is silent or doubtful. 1925 Nag 329 : 22 N. L. R 183

——in the absence of texts of Dayabhaga recourse must be had to the Mitakshara 35 C. 721 : 12 C W N. 511.

——under the Bengal School so far as the near relations are concerned, inheritance depends on consanguinity ; but in case of remoter relatives, the law falls back on the principle of spiritual benefit. 30 C. 521 : 7 C. W, N. 121

——a fluctuating body of persons can own property, under the Hindu Law. 24 C. W N 206,

——a Hindu family residing in a particular province of India is presumed to be governed by the law of that province but when it migrates it carries with it the law and custom as to succession, the latter presumption may be rebutted by shewing that the family has adopted the law and usage of the place of migration, 24 C W N 215, 25 C. W. N. 243, P. C.

——under the Mitakshara Law separated sons and grandsons succeed per *stirpes*. 47 B 556 : 25 B L R. 197.

——husband and wife are *sapindus* to each other according to Mitakshara. 10 C. W. N 802 : 30 B. 431, 4 C. L J. 9 . 31 I A 173. 16 M. L. J. 211, P. C.

——a sonless widow cannot inherit the turn of worship 33 C L. J 151.

——when a son is too young the widow may perform *sradh* ceremony. A boy of seven is too young to perform *sradh* ceremony. 63 I. C. 296

——a posthumous son is not bound by an alienation by his father of his paternal state before his birth 34 C. L J. 323.

——unborn child though treated as born for his own benefit is not regarded as so for the benefit of third person. 34 C L J 323

(16C) Principles of succession under the Mitkshara and the Dayabhaga—*contd.*

——there can be co-parcenary of dancing girls with rights of survivorship 86 I. C 633 : 1925 Mad. 902 - 21 L W 259.

——where a dancing girl had two sons and the grandson of one son sued as reversioner to recover the estate of the great-grandson of the other sons, the rule of collateral succession of Hindu Law applied to the case as the dancing girl was a Hindu and her children followed the Hindu religion 48 M 944 1925 M. W N 613; 49 M. L J. 684

——when a family is already separated the heirs take the property only as tenants-in-common and not as joint tenants 27 Bom. L R 426 87 I C 936 1925 Bom. 350.

——mode of succession contrary to law cannot be prescribed. 47 A 186, 88 I. C 255 1925 All. 155

——among *sapindas* up to the seventh degree the relation of the whole blood excludes the relations of the half blood, provided they otherwise equal in degree. Beyond the seventh degree there is no difference between the whole blood and half blood. 89 I C 178

(16 D) Succession under the Mitakshara Law

——under the Mitakshara as used in verse 3 s 5 Chap. II, the word *sapinda* is used in the sense of "connection by particles of one body" and not in the sense of connection by funeral oblations" In order to determine whether a person is *sapinda* of the propositus, it is necessary to see whether they are related as '*sapindas*' to each other through themselves or through their mother and father 6 C. 119 6 C L R 510, F B

——whenever the word *sapinda* is used there exists between the persons to whom it is applied a connection with body either immediately or by descent. 5 M 241, 19 B 631

——the distinction of whole blood and half blood applies to sapinda relations other than the brother and his sons 19 A 215 F. B

——a paternal uncle's grandson is a gotaraja *sapinda* and is a nearer heir than a sister's son who is only a bandhu 22 Bom. L. R 1092; 59 I C 125

——a man to be a heritable *sapinda* of the propositus must be so related to him that they are *sapindas* of each other 22 C 339.

——under Mitakshara law the claimant must show that he is the next heir and within fourteen degrees 28 C L J 530 P C

——the word sons include grandsons 33 C L J 264, P. C, 22 C. L J 541 37 A 604 42 I A 208 P. C

——collateral reversioners take separately. 87 I C 938 1925 All. 79

——a Hindu must, in order to be heritable in the female line, fall within the fifth degree from common male ancestor and so related to the deceased that they were mutually *sapindas* of one another. 25 C W N 842 33 C L J 263 2 Pat L T 97 6 Pat. L. J. 140; 40 M. L J 270 1921 M. W. N 153. 23 Bom. L. R 692, 60 I. C. 251 P. C.

(16D) Succession under the Mitkshara Law—*contd.*

——according to Mitakshara Law the only female liable to exclusion from inheritance by reason of unchastity is the widow. 4 B. 104, 31 B 495, 510, 5 M. 149, 31 M. 100, 32 A. 155, 31 A. 702.

——under the *M. L. the mother is preferential* heir to the father 9 O. L. J. 435.

——when there is competition between a rich sister and a poor sister, the expression "unprovided for" as contradistinction to the term "enriched" *must be construed in the sense of* indigent as opposed to "*possession of means*" irrespective of the source of provision or non-provision. 47 A 403 : 23 A L. J. 181 *1925 All 375*

——in Bombay Presidency daughters inheriting from the father take an absolute interest and if there is *no* division they take as tenants-in-common and not as joint tenants. 27 Bom L. R 679 1925 *Bom 424 : 89* I. C. 196.

——in Mithila unmarried daughter is *prefered to* one who is [illegible] daughters are entitled *to* succeed [illegible] ughters who have or are likely [illegible] ssue and are not likely to have [illegible] 466 ; 7 Pat. 820 : 9 Pat L T 456

——a paternal uncle's daughter is *not* a gotraja sapinda · 22 Bom. L. R. 1162 · 59 I. C. 511.

——son's daughter's son is preferred to sister's daughter 44 B 541

——in the Bombay Presidency a *sister* would be preferred to a son's daughter 44 B. 541

——son's daughter is an heir. 28 A. 187 · 2 A L J 654

——a maiden daughter who has become prostitute inherits to *the father's* property in default of her unmarried *or* married sisters 31 B. 495 . 9 Bom *L R. 774*

——a daughter in-law is not an heir. 9 C 315.

——brother's widow is nearer heir than *father's brother's son.* 29 B. 57.

——but brother's widow is not an heir under the *Benares School* *16 C. 367.*

——a *daughter's* grandson is nearer to the *propositus than a* sister's grandson *48 M. 1 : 1925 Mad 497*

——daughter's son excludes the daughter's son's son. 42 M L. J. 124

——where the estate *of* the maternal grand father passes to the sons of a daughter living in joint family there is no right of survivorship as between them. 4 Pat L. T. 335 : 2 Pat. 607 · 73 I C 823

——*step-mother* does not inherit step-son. *86* I. C *819* : *1925* All. 417.

——step-mother cannot succeed to a stepson as gotraja sapinda. 38 M. 45

——the step-son of a step-sister is not heir. 45 M. 257 42 C 351. 6 C 119, 22 C. 339, 8 M. 107, 37 M. 286, 18 M. 168, 2 B. 334, 16 M 716, 23 M. 1 P C 12 M. I. A. 448 P. C., 43 C. 944, *Ref.*

(16D) Succession under the Mitakshara Law—*contd.*

——in the Bombay Presidency the distinction between the whole blood and the half blood observed in the case of brothers and their sons does not extend to the uncles of the deceased *i e.*, the sons of the grand father 51 B *194*. 38 *M.* L. *T* 167 : *29 Bom* L. R. 1 : 1927 Bom. 97 ; 100 I C 430 **F. B.**, 24 B 317 *approved*, 42 I C 177 **P. C**, *Discussed* (46 I A. 72 **P. C.**, 19 A 215, 28 M. L. J. 1, 6 C. L. J. 190) *Ref.*

——consanguine brothers are preferred to uterine brothers. 46 B. 716 : 24 Bom L. R. 229

——*brothers and nephews of same blood exclude those of the* half blood 3 Lah 242 . 4 Lah. L. J 245 : 68 I. C. 769.

——an undivided brother is a preferential heir to divided brother. 89 I C. 164

——a brother's son takes with the brother but the same analogy does not apply in the case of distant sapindas 47 B. 940, 25 Bom. L. R. 929

——the full brother of a Hindu woman would exclude her half sisters with respect to succession to her absolute estate. 1925 M W. N. 285 · 87 I. C 621 · 1925 Mad. 861

Bandhu.

——*the term "bandhu" is defined in the Mitakshara as a "bhinna gotra sapinda" i e* one sprung from a different family and connected by common corporeal particles or by consanguinity 22 C 339, 4 C. L. J. 110

——though only some *Bandhus* are enumerated in the Smriti text the enumeration is not exhaustive Apart from any text the *Bandhus* will naturally fall into 4 groups The rules regarding the determination of priority amongst *atma Bandhus* are, (1) propinquity should be the governing factor , (2) if both are equal in degree the [illegible] al benefit conferred may be used as a test *for preference* The [illegible] 's sister's son. 48 [illegible] I C. 609.

[illegible] [M]itakshara are not [illegible] and *Matribandhu* and *Pitri Bandhu* exclude *Matri Bandhu*. 25 *C.* W. N 842 : 40 M. L. J. 270 : 2 Pat L T. 97, 33 C L. J. 263 ; 23 Bom. L. R. 692 **P. C.**

——the enumeration of Bandhus in the Mitakshara is not *exhaustive Maternal uncle is a nearer Bandhu* than maternal uncle's son. 1926 All 541 95 I. C 626

——priority of *Bandhus*, 29 C. W N 271 86 I C 324 · 1924 P. C 209.

——all male *bandhus* are to be preferred to *female bandhus*, 45 B. 768 . 23 Bom. L R 213, 97 I. C. 314 : 1926 Mad 1163.

——according to Mitakshara, sister's son, who is *bandhu* and not a *sapinda* similar to daughter's son, cannot inherit until the direct male line down to and including the last *samanodaka i. e.*, 14 degrees of the direct male line, has been exhausted. 9 A. 467.

(15D) Succession under the Mitakshara Law—*contd.*

——sister's daughters are not *bandhus* as used in Mitakshara 18 M. 193.

——brother's daughter's son is a preferential heir to a son's daughter. 97 I. C. 314 ; *1926 Mad. 1163.*

——the grandson of a mother's sister is an *atmabandhu* 33 C. *L. J. 361*, P C

——father's sister's son's son is a heritable *Bandhu* 47 A. 173 1925 All. 17.

——father's half sister's son is preferred to mother's sister's son. 51 C. 1153 : 47 C. L. J. 265 : 32 C. W. N. 548 : 108 I. C. 246 : 1928 P C. Cal. 289.

——father's sister's son's daughter's son is a heritable *Bandhu* of the propositus. 49 M. 652 ; 51 M. L J. 16 : *1926 Mad.* 841 *1926 M. W. N. 540*

——a maternal uncle is preferred to a son of the paternal aunt's grandson. 44 M. 753 : 1921 M. W. N. 669 : 2 Pat L. T. 707 P. C. 26 C. W. N. 159 : 24 *Bom. L R.* 649 ; 30 M. L. T. 193 P. C

——father's sister's son is preferred to maternal uncle 94 I C 817 . 1925 Bom. 451.

... not entitled to succeed to ... I. C. 1013. ... ir to the maternal ... Bom. L R. 1003

1925 Bom. 451 F. B.

——in Berar father's sister is a preferential heir over a father's sister's son. 89 I. C. 345.

... father's son's son ... 163 . 19 A. L.

... son is ... ed to a sister's

... *sister's son* is preferred ... 23 Bom. L. R 213 ... brother's son are entitled ... 1. 789.

——the great-grandson of a sister is not an heir under the Hindu Law. 2 Bom. L. R. 842

——in Bombay Presidency daughter's daughter takes as *bhinna gotra sapinda*. 1925 Nag. 98.

Samanodaka.

——according to Mitakshara, a person who is proved to be only 6 degrees removed from the common ancestor and who is therefore a ... is preferable to the son of the deceased's sisters. 31 C. ... 10 Bom. L R 103 : 4 M. L.

... *Samanodakas* those only ... *Sakulyas* or allied by the ... *materna* are excluded from ... 1927 Cal. 11 97 I. C 343

(16D) Succession under the Mitakshara Law—*contd.*

——though every person is competent to present libation of water to every other the law of succession has given a limited signification to the term *Samanodaka*. 54 C. 171 : 44 C L. J 470 : 1927 Cal. 11 : 97 I. C 845.

Absence of heir

——in case of absence of heir the property goes to the religious preceptor and afterwards to *sisyas* and then to a fellow student These rules are now obsolete and unenforcible by reason of absence of judicial decisions. 44 M. 70 : 41 M. L. J. 109 . 1921 M. W. N. 481 : 63 I C. 659.

——*chela of Mahunt* is preferred to *guru*. L. R. 3 A. 583

(16 E) Succession under the Dayabhaga Law.

——the doctrine of funeral cakes is the key to the whole Hindu Law of inheritance. 2 B. L. R. 28 . 10 W. R 76. F. B., 5 B L R. 15 . 13 W. R 49, F. B., 15 B. L. R 35, 8 C 460, 15 C. 780, 26 C 285.

——spiritual benefit is not always the guiding principle of inheritance under the Bengal School propinquity has been accepted as a principle of succession. 35 C. 721 12 C. W N. 511, 4 C W. N. 743.

[illegible] Dayabhaga pro- [illegible] who can confer [illegible] heir according to [illegible] spiritual benefit the grandson of a daughter is not entitled to inherit on the ground of his propinquity to the original owner. 42 C. L J. 221 . 90 I C. 499, 30 C. W. N. 357 1926 Cal. 460

——under the Dayabhaga on the death of a joint owner his share does not pass to the survivor but to his own heir 109 I. C 642 · 1928 P. C. 248.

——succession of female is exception and is not based on spiritual benefit. 22 W R. 393

——the reason for inheritance by a re-united coparcener is not spiritual benefit, but a quasi contractual relation and affection for *each other*. *33 C. 721 ; 12 C W N, 511.*

——offer of oblation to the deceased or to his ancestors, in [illegible] ticipates, is the principle upon [illegible] in applying this, regard must [illegible] but to their propinquity. 8 C. [illegible]

——*sapinda* includes both agnates and cognates related by the common oblation 6 C. 256 : 7 C L. R. 145, F. B.

——those who offer *pindas* to the paternal ancestor, are preferred to those who offer *pindas* to maternal ancestors. 15 B L. R. 49, F. B , 26 C. 285.

——*sapindas* exclude *sakulyas* and *sakulyas* exclude *samanodakas*. 9 C. 563 : 12 C. L. R. 204 F. B., 15 C. 780 5 B L. R. 15 : 13 W. R. 49.

(16E) Succession under the Dayabhaga Law—*contd.*

——a maternal great-great grandfather's daughter's son's son is not an heir under the Dayabhaga as he is not a *Sakulya* but a *Samanodaka* only. Among the *Samanodakas* those only are en titled to inheritance who are also *Sakulyas* or allied by the same family with the deceased. Thus *ex parte materna* are excluded from inheritance. 54 C. 171 : 44 C. L. J. 470 : 1927 Cal. 11 : 97 I C 843.

——one who is never joint cannot afterwards be said to be re united 35 C 721 : 12 C. W. N. 511.

——persons when re-united form the joint family. 19 C. 934.

——the *sapinda* relationship exists between the daughter's son and the *son's son* of two first cousins. 17 C. 518.

——a brother of the whole blood succeeds in preference to one of the half-blood. 1. C. 27 : 24 W. R. 234 F. B

——a brother's daughter's son, though a cognate being a sapinda, is a preferable heir to the great-great-great grand-father's great-great-great-grand-son, who is only a *sakulya*. 9 C. 563 12 C L. R 204 F. B.

——a brother's daughter's son, is not a preferential heir to the great grand-son of the paternal grand father of the deceased. 15 C. 780.

——father's brother's grand-son is preferable to brother's daughter's son. 4 C. 413.

——father's brother's daughter is preferred to the mother's son 26 C. 285.

——father's brother's daughter's son, though his position in the line of heir may be after the agnatic *sapinda* descendants of the great-grand-father, comes before the *sapinda* relations in the maternal line. 26 C. 285.

——father's father's brother's *son* inherits in preference to ather's brother's daughter's son. 11 C. 393 : 23 W. R 117. Fd.

——father's maternal grand-fathers great grandson is not an heir. 16 C. L. J. 14.

——father's brother's daughter's son is preferential heir to the great-grandson of the great-grand father. 17 C. W. N. 493 : 13 W R 49, F. B , 9 C. 563.

——paternal great-grand-father's son's daughter's son is prefer ential heir to mother's brother even if the latter is specifically men tioned in the Dayabhaga while the former is not, the reason being that the giver of funeral cakes to paternal ancestors is preferent to one who offers that to maternal ancestors 13 C. W. N. 477. 13 C. W. N. 1181, 13 W. R. 49, F, B., 26 C 285. 16 C L J 342 : 17 C. W N. 492.

——great-great-grandson of the grand-father inherits in prefe rence to the brother's daughter's son. 4 C. 413 : 15 B. L. R. 35 : 23 W. R 117 *Fbl.*

——sons of sisters of whole or half blood succeed equally accord ing to the Bengal School. 11 C. 60.

——a sister's son is preferential heir to a step brother 53 I. C. 827

(16E) Succession under the Dayabhaga Law—*contd.*

——sister's son is an heir unless there is custom to the contrary. 35 C. L. J. 34

——a wife's sister cannot be an heir unless there is custom, 35 C. L. J 34

——step-mother cannot succeed to step-son as gotraja-sapinda 37 M 286.

——a sonless widowed daughter is not an heir 19 C W. N 472.

——when two daughters inherit and one dies, the other takes by survivorship and not by inheritance. 18 C W. N. 60.

——in default of both father and mother maiden's property goes to the *parent's sapindas*. 38 M 45.

——a childless widowed daughter cannot inherit 43 A 450 : 19 A. L. J. 272 : 60 I. C 777

——daughter's daughter's son is not heir. 105 I C 841 : 1927 Cal 970.

——in a caste in which widow re-marriage is allowed by custom a childless widowed daughter of child-bearing age does not succeed along with the married daughter having son 48 C 300 25 C. W. N. 29.

(17) Widows (including other limited owners)

What is widow s estate

[illegible] is neither a fee nor an estate [illegible] 777 P. C.

[illegible] vhether the widow succeeds to [illegible] or survivorship she does not take a mere life estate in the property. The whole estate is for the time being vested in her absolutely for some purposes though in some respects for only a qualified interest Her estate is an anomalous one, but it is clear that until the termination of it, it is impossible to say who will succeed as heir to her husband 5 C. 776 P. C.

——it is possible to create a widow's estate by will or by grant, and it may even be acquired by prescription 48 M. 1 : 1925 Mad 497

——when a widow alienates 'her right and interest,' she does not alienate only her life-interest. 20 C W N. 734 P. C., 19 C W. N. 110, P. C., *contra*. 13 C. W. N 353, 7 C. W. N. 619 (court sale).

——where widow of a deceased co-parcener is in possession of part of the family property and a co-parcener as managing member [illegible] v, a son born to [illegible] C. L. J. 189 : 32 [illegible] R. 182 : 107. I. C. [illegible] 20.

Status of widows,

——though a Hindu widow has for some purposes only a qualified or partial estate in her deceased husband's property, yet she represents an absolute interest therein for other purposes 10 C. 985 : 1 I. A. 66 P. C., 52 C. 1018.

(17) Widows (including other limited owners)—*contd.*

due by him. 69 I. C. 602.

——a widow's right of residence cannot be recognised against a purchaser from her husband. 43 B. 337: 22 Bom. L. R 1379 5 9 I. C 583.

——a reasonable expense of *sradha* ceremony of the widow should be paid by all reversioners. 19 C. W. N. 1181.

——absolute estate to a woman does not mean life-estate. 21 I. C. 20.

——where a person by will made a gift of his property to wife and subsequently acquired certain other property, there was an absolute gift of all property. 18 C. W. N. 140, 12 C. W. N. 412, *Dist.*

——the widow and her personal properties are liable for tortious act. 18 C. W N. 542, 27 C. 951: 4 C. W. N. 631, P. C. *Fol.*

Hindu widow converted to Mahamedanism.

——a Hindu widow converted to Mahamedanism is not divested of the former husband's property. 35 A. 466

Effect of re-marriage.

——widow loses her interest in former husband's property by re-marriage, both under general and special laws 21 C W. N. 906, 23 Bom. L R 553: 19 C. 289, 1 M. 226, 22 C. 589 but see, 35 A. 466., and it has been held in 11 A. 330 that a widow belonging to the sweeper caste among whom the Hindu Widow's Remarriage Act does not apply, does not forfeit her right to her husband's property by remarriage

——whether the Hindu Remarriage Act applies or not a re-married Hindu lady succeeds to the property left by her son by her first husband. 26 C. W. N. 25: 39 C. L J. 88, 11 W. R. 82 *fol.* 29 B. 91.

Status of other women.

——under the Law of Mitakshara the estate of the daughter is a limited and restricted interest only and the limitation and restriction must be taken to be of the same description as is applicable to the case of a Hindu widow. 6 C. L. J. 493, 4 C. 744: 6 I. A. 15. 6 C. L. R. 465 P. C. ; so also the estate of the mother. 9 C 715 P.C.

——a daughter as heiress of father takes a restricted interest like that of widow. 39 C. L. J. 194, P. C., 43 C. L. J. 562: 97 I. C. 149: 1926 Cal. 1046 she cannot alienate the property without legal necessity. 43 C. L. J. 562: 97 I. C. 149: 1926 *Cal.* 1046.

——one of two daughters who succeeded to the estate of their ... 'ties allotted to her ... executed a deed of ... and even while she ... to impeach alienation ... it entitled to do so

(17) Widows (including other limited owners)—*contd.*

during the lifetime of the surviving daughter. 48 M. 933 · 1925 Mad. 1267 : 49 M. L. J 266 : 1925 M. W. N. 643.

——a daughter, inheritting her father's estates being a limited owner is not entitled to alienate the property absolutely without there being legal necessity therefor. 90 I. C. 559 : 1925 Pat. 820.

Guardian of the widow

——when a Hindu husband is dead his kin is the guardian of his childless widow . when the husband's family becomes extinct heirs of her father are entitled to be her guardian 34 C. L. J. 529 ·

Nature of the power of the widow.

——the power of widow is similar to the guardian of an infant. 19 C. W. N 313, 2 C. L. J 487. P. C.

——a Hindu widow obtaining Letters of Administration of the estate of the last male owner is in the same position as any other administrator and a sale effected by her with the sanction of the court cannot be questioned on any ground not available against any other administrator Hence it cannot be assailed on the ground of want of legal necessity. 90 I C. 229 (O)

Right of the widow to alienate property

See Notes under "Reversioner" and Legal necessity

Power of widow to charge the property.

——a woman with a limited interest could not, by acts *ex post facto*, charge upon the estate which she represents, obligations not originally binding upon it 35 C. 420 . 25 I A. 48 . 12 C. W. N. 393 : 7 C. L. J. 335 . 10 Bom L R 230 P. C

——when a mortgage by widow is set aside the mortgagee in possession making any improvements must be re-imbursed. 47 B 696

[illegible]

Cal 412.

Relinquishment of property by widow in favour of reversioner.

——the doctrine of acceleration by surrender, though it finds [illegible]

[illegible]

her life-estate absolutely to whole property so that it may at once vest in the heir 19 C 236 · 19 I A. 30 P. C., 29 A. 71 : 3 A. L. J. 755 . 22 C. 354, 19 M. 336, 21 M. 128 P. C , 30 M. 145, 23 C. W. N. 777 P. C.

——an alienation to be valid as a surrender must be of the widow's whole life estate so as to vest the inheritance at once in the allenee. 23 C. W N. 777 p 798 P. C.

——(1) the surrender must be total and not partial. (2) It must be a *bonafide* surrender not a device to divide the estate with the

(17) Widows (including other limited owners)—*contd.*

reversioner. *41 C. L. J.* 433 **P. C.**, 41 C L J. 341 : 1925 Cal 743, 23 C W. N. 777 **P C**, 25 C. W. N. 194 : 18 A. L. J. 1069 39 M L T. 161, 28 M. L. T. 154 : 57 I. C. 325 **P. C**, 41 M. L. J. 208, 43 C. 100, 478, 431, *1923* M. W. N. 679, 90 I. C. 732 : 6 P. L. T. 731, 19 C 236 19. I. A. 30 P. C, 23 C. W. N. 777 **P. C.** (12 C. W N 74 · 30 A. 1 P. C) *distinguished and explained*

——what is such a device and what is not, discussed. 41 C L J 433 **P. C.**

——there can be no partial relinquishment by widow, 29 C. L J. 24, 40 C. 721 : 17 C. L. J. 499 : *17 C. W. N.* 701 **F B.**, 24 C W. N 274 **P. C**, *43 M.* 523, 34 B. 165, and relinquishment may be by any *process* having that effect. 24 C W. N. 274 **P. C.**, 29 C L J. 533, C. 466, 42 M. 25

——the fact that the document is insufficiently stamped immateiral because what has to be looked into is the intention the executant. 46 C. L J. 149 : 1927 Cal 806 : 105 I. C. 22, 46 I, 259 *Ref.*

——a surrender to be valid it must be an effacement which oper the estate to the heirs of the husband at that date. 96 I. C. 453 1926 M. W. N. 958 : 1926 Mad. 609.

——a deed of release of the whole immovable property retaining the movables is not valid surrender. 75 I C. 625 : 1933 Cal. 49 *41 C. L. J. 433* **P. C.**

t with the reversioner fo d Rs 150 every month k. s invalid it being merely a W. N. 1011 : *97 I C.* 236

1926 Cal. 1211.

——a surrender can only be in favour of nearest reversioner *69 I. C. 573.*

——a widow's motive in cases of this kind is immaterial, so a surrender cannot be called into question on the ground of improper motive. 31 M. 946.

——when a Hindu widow made a gift of a portion of the prop[illegible] ... subsequently surrendered her [illegible] ... wer's right [illegible] ... would arise [illegible] ... rence whether [illegible] ... 1013, but in 30 [illegible] ... the surrender itself wa[illegible] ... the point I. C. 580 [illegible] ... s to 43 M 933, 41 M. 75[illegible] ... 754 : 1927 All 258 : 25 A[illegible] ... ld that after making a [illegible] ... widow cannot make a le[illegible]

——where a reversioner obtains the estate of a widow through *surrender* he cannot question any previous alienation by the widow during her life time, the reason being that an alienee for consideration

(17) Widows (including other limited owners)—*contd.*

from the widow is reasonably entitled to calculate that the alienation to him must hold good at least for her life 100 I C. 639 : 1927 Mad 530 : 39 M. L. T 440.

——where the alienations were made by the widow and the daughter who succeeded the widow after she surrendered to the next reversioner, the reversioner could not sue the alienee so long as the daughter, was alive, *above case.*

[illegible] manage- [illegible] favour of [illegible] in consi- [illegible] surrender [illegible] n contra- [illegible] I. A. 11, [illegible] C

——the surrender is not invalid because it is made to the nearest reversioner and a stranger, for the law will treat the transaction as one made by the reversioner and an alienation by him to the stranger. 89 I. C 770 (c).

——a gift by widow of the whole estate with the consent of the nearest reversioner who happens to be insolvent is not a valid surrender in favour of reversioner. 45 A 260

——when the surrender in favour of the reversioner is fictitious the life interest of the widow can be sold in execution of a decree. 4 U. P. L R. 21 : 65 I C 724

——by the surrender a widow walks out of its estate and cannot maintain a rent suit. 2 Pat. L. T. 606 : 63 I. C. 448, 12 L.W. 105 : 59 I. C. 445 P C

——a relinquishment becomes operative when widow gives up possession of the property. 2 Pat 607 : 4 Pat L. T. 345 73 I. C. 335.

Suit by or against widow when binds the reversioner.

See notes under " Reversioner."

Effect of compromise of suit by widow.

——a compromise by which the widow makes over the property [illegible]

37 C. L. J. 356 : 25 Bom. L. R. 634 : 44 M. L J. 751 : 3 Pat. L. T. 749 P. C.

——a *bonafide* compromise by a widow does not stand on the same footing as an alienation 1921 M. W. N. 342 : 62 I C. 752.

——a compromise entered into by a revesioner during the life time of the widow will not bind the actual reversioners. 86 I. C. 893 : 1925 All. 440.

See other cases at " p 243."

Relinquishment in favour of female reversioner

——the window can surrender to a female revesioner. 11 A. 253 - 32 A. 582.

(17) Widows (including other limited owners)—*contd*

[illegible]

582) *fol.*

——*surrender of whole estate in favour of daughter is valid and it cannot be questioned by the next reversioner.* 47 B 315 (46 I. A. 72 **P. C.** 47 I. A. 233 **P. C.** *Ref.* or a person who *is adopted by the* widow after the surrender. 47 B. 678 : (47 I A. 233 P. C., 44 B 255.)

——*but there cannot be acceleration of the right of a male reversioner by means of transaction between two or more joint female heirs without the consent or knowledge of the reversioner.* 1921 M. W. N. 29 : 39 M. L. T. 567, 28 M. L. T. 272 : 60 I. C. 135

——*when a widow on the occasion of her daughter's marriage makes a gift of her whole property it amounts to acceleration of the daughter's estate and the cause of action for her next reversioner begins from that date even if she dies after the daughter* 21 A L J 796 · L R 4 A. 505.

——*agreement between two daughter's under which each gave up the right to succeed to the properties of the other by survivorship is valid* 95 I C. 648· 1926 *Pat.* 392, (11 M. I. A 487 P C., 2 I A 113 **P C.**) *Ref*

Effect of surrender in favour of reversioner.

——*if a widow alienates her interest to the then reversioner, he can hold the property against the person who is the reversioner when the widow dies.* 12 C. W. N. 49, (22 W. R 393, 10 C 1102). *Fol.*

Effect of reservation of some right in case of surrender.

——acceleration of reversionery right is a pious act and the widow is entitled to maintenance. *1917 Pat.* 94.

——a gift by a widow *in favour of next reversioner which opera-* [illegible] *ontaining a provision for* [illegible] 73 I. C. 930, (46 I A [illegible] 1024 : 1925 Mad 1111 : [illegible]

[illegible]

——*the receipt of maintenance by a widow in lieu of her estates* amounts to a complete relinquishment. *12 L. W.* 105 : 59 I. C. 415. **P. C.**, *contra* 19 C 236, 31 M, 446.

——*reservation of right in a small portion of the estate in lieu of maintenance does not invalidate the surrender.* 43 M L J. 36. 1922 M W. N. 259 : 67 I. C. 397

——*a Hindu widow surrendered all her husband's immovable* properties to the nearest reversioner *She retained one house for* residence and some movables *as regards which it was doubtful if* she inherited the same from him *There was also an agreement to* pay her annually cash and grain *for her maintenance, held that the* surrender was quite valid. 85 I. C. 804 : *1925 Cal.* 1091.

(17) Widows (including other limited owners)—*contd.*

——but where two co widows who were wards of Court under Bengal Court of Wards Act (1879) and whose property was in Court's, possession, surrendered their interest in their husband's estate without the sanction of Court of Wards to the nearest reversioners who [illegible] allowance to the widows for [illegible] is void under Hindu Law [illegible] the Bengal Court of Wards [illegible], P. C. 2 P. C.

Gift by Hindu widow.

——in every case in which an alienation by way of gift of religious or charitable purposes is made by a Hindu widow, holding an estate with the limited interest of such widow, the Court is bound to take into consideration the proportion borne by the property gifted away to the total estate in the hands of such widow. 47 A. 563 : 88 I. C. 193 · 1926 All. 945

——reversioner's right in case of gift by Hindu widow and subsequent surrender to reversioner 1926 Cal 121

——a gift by a widow in favour of next reversioner is not valid if it does not amount to a surrender. 41 C L. J. 341 : 87 I. C. 930 : 1925 Cal 743

[illegible]

——a gift by a widow to sister's son cannot be validated by the consent of next reversioner 34 A 129, 207 32 A. 176, but the consenting reversioner cannot impeach a gift. 23 Bom. L.R. 1040 : 46 B, 292.

——the validity of a gift made by a Hindu widow to the family priest must be tested with reference to its quantity *i.e*, what proportion it bears to the whole estate 47 A. 563 : 1925 All. 495 : 88 I. C 193.

Effect of contract between life-tenant and the heir expectant

——a contract between the life-tenant and the then expectant heirs giving the life-tenant absolute interest is not binding on the persons who become heirs when succession opens out 6 C W. N. 169 P. C.

Alienation by widow is not void but voidable at the option of reversioner only.

—— [illegible] able at the option of the reversi[illegible] 930 : 1925 Cal 743, 88 I. C 898 : [illegible] 329, 31 C. 695, 14 P. R 1902 : 1[illegible]

[illegible] in excess of her powers is [illegible] the reversioner who may [illegible] from exercising their right [illegible] or by acts which treat it

(17) Widows (including other limited owners)—contd.

as valid or binding. 32 C. W. N. 88 : 46 C. L. J. 267 : 105 I. C. 701 1927 P. C. 227 P. C.

——an alienation by a Hindu widow without legal necessity not void but voidable and is binding against third person unless made void by reversioner 88 I. C 898 : 1925 Cal. 1053, 12 C. W. N. 393 35 C. 420 35 I A 48, 7 C. L J. 335, 10 Bom. L. R 239 18 M L. J 100 P. C.

——alienation by limited owner is voidable and not void and the alienee is not liable to mesne profits until alienation is set aside 42 A 109 18 A. L J 41, 59 I C. 368. It is valid so long it is not set aside by any reversioner. 22 Bom. L. R 1155 : 59 I. C. 490 18 C. W. N 940, (11 C W N. 424, 25 C. 1), Fol.

——none but the reversioner can question the sale, gift or mortgage by a widow and unless the reversioner elects to treat it as a nullity it subsists as against every one else. 3 Pat. L. T 797 68 I. C 394

——none but the reversioner can question it : it is never void but holds good unless made void by the reversioner, 18 C. W. N. 940, (11 C. W N 424, 25 C. 1). Fol, 22 Bom. L. R. 1155 : 59 I. C 490

——a transferee from a reversioner can also object to the alienation. 90 I. C 74.

Properties acquired by widow.

——where a widow acquired some property through the exercise of the right of preemption it was her separate property. 43 A. 375: 19 A. L J. 129 ; 61 I. C, 3 F. B.

——presumtion as to acquisition by Hindu widow with the profits of her husband's property is that it is her own property 25 M. 351, (20 I A. 12 P. C., 10 C, 324) *Ref.*

For other cases, see, "*Accumulation*"

Adverse possession by or against widow.

——the general proposition that a Hindu widow in possession of any property by adverse possession takes it as her separate stridhan property requires some limitation if the property is acquired by a Hindu widow claiming as the widow of her deceased husband The property in the latter case becomes, an accretion to her late husband's estates and on her death would pass not to her heirs but to the heirs of her deceased husband, 87 I. C. 473 : 3 Pat L. R. 251 · 1925 Pat 523 · 6 Pat. L. T. 206. 7 Pat. 163 : 9 Pat L. T. 510 1928 Pat. 220 : 107 I. C. 151.

——when a minor widow claims and retains possession under a family arrangement her possession is not adverse 45 A. I 75 I. C. 14, 29 C, 664, *Fol.*

——adverse possession against the widow is effective against the reversioners also 30 C. W. N. 313 : 1926 M. W. N. 11 : 91 I. C 85: 1926 P. C. 249 P. C.

——possession against widow when binding against the reversioner. 1923 All. 448.

For other cases see pp "48—51"

(17) Widows (including other limited owners)—*contd.*

Rights of co-widows

——it is well settled that where there are two co-widows they succeed as joint tenants with rights of survivorship. They are entitled to partition and each can enjoy her share as she pleases but

prejudice the rights of the surviving co-widow. 33 C W. N 39 , 48 C L. J. 405 · 111 I C. 485 55 I. A. 399 : 1928 P. C 251 P. C

Legal necessity.

Meaning of the word "necessity."

——future necessity is not recognised 3 Lah L J. 484 46 P. R. 1912, 31 M. 153 Dist

What are legal necessities.

——the test of legal necessity is whether the alienation is, under the circumstances of the case proper and legitimate : *actual danger to be avoided* is not the test 20 C W N 210

——the spiritual benefit of the deceased husband, and not that of the widow determines the binding character of the alienation. 22 C 506 . 43 A 463 19 C L. J 312 . 62 I C 433 : 43 A. 515 : 19 A L. J 499 44 A. 503 **P. C.**

——family debts not incurred by the widow, debts incurred by her for marriage ceremonies and for the expenses of litigation, are legal necessities 31 C 33 . 8 C. W N 408

——a Hindu widow is under a duty to marry her daughter and is competent to make a gift of a reasonable part of the property to son-in-law 45 A. 297

——a sale by a Hindu widow, of her husband's property for defraying the marriage of her daughter binds the reversioner. A Hindu widow is not obliged to spend any money in her hands unless it had come out of the estate She is entitled to employ the money of the estate for the purpose of defraying the marriage expenses of her daughter. 41 C. L J. 209 1925 Cal 689 87 I. C 43, 47 C. L. J. 189 : 30 Bom L. R. 267 32 C W. N 538 : 107 I C. 20, 26 A. L. J. 553 : 1928 M W N 933 . 1928 P. C 20 **P C**

——proof of occasion for borrowing being daughter's marriage is not sufficient, evidence of shortage of finance must be given, 1923 Pat 332.

——a Hindu widow on the occasion of the daughter's marriage executed a gift deed in favour of the daughter and her husband giving them a twelve-annas share in the estate, held the daughter's marriage was a primary duty and the provisions in the Hindu Law,

Legal necessity—*contd.*

texts fixing ⅓ as what can be spent are simply directory and not imperative, indicating what should be considered reasonable. 91 I C. 186. (C) 1926 Cal 486.

——the gift by a widow of a reasonable portion of landed property to the son-in-law on the occasion of daughter's marriage is supported by the texts as a part of religious ceremony and as being conducive to the spiritual benefit of her husband and cannot be impeached by the reversioners. 1926 Pat 582 : 5 Pat 646.

——marriage of daughter's daughter is not legal necessity 20 C W N. 734, P. C, 19 C W. N. 110 P. C

——marriage of nearest reversioner is legal necessity until contrary is proved. 1926 M. W. N. 706 : 1926 Mad 1078, 20 C. W N 734 *Dist*.

——there is no distinction between gifts made at the nuptial fire or in the bridal procession and gifts made at the time of *dwiragaman* ceremony, the latter may be regarded as dowery deferred Such gift to a daughter by widow, to a reasonable amount, is within her power 13 C W. N. 994 1 I. C. 945 : 37 C. 1.

——the expenses incurred by a Hindu widow in performing pilgrimage or in the betrothal of daughter, constitute legal necessity 36 B 88, 41 A 503 P. C.

——the expenditure for pilgrimage should the small fraction of the whole property and it must be for the spiritual benefit of the deceased husband or father Propriety of general pilgrimage discussed 30 Bom, L. R, 685 : 111 I. C. 626 1928 Bom. 238.

——giving feast to Brahman after return from Gaya is legal necessity 18 C. W. N 1303, 35 A. 255, *not fol*

——the mere fact that money is borrowed for payment of rent and applied for that is not sufficient to prove legal necessity, a decree for rent is personal debt of the widow. 19 C. W. N. 313, 24 C. L J. 487, *contra*. 1929 Pat. 216.

——alienation of husband's property for payment of a debt which the widow incurred during husband's life-time and applied for his benefit is not for legal necessity. 15 C. W. N 466 : 33 A 342 : 13 Bom. L. R. 384, P. C

——specific debts must be recited in the deed of alienation. 46 B. 753

——the existence of the antecedent debts due to third parties constituted valid security 1923 Lab. 502.

——a widow cannot alienate the property of her son for repaying the debts of her husband although the son had a pious obligation to repay this. 43 A. 604 . 36 I. C. 279

——a prudent sale of trade or business is legal. 42 A. 109, 59 I C. 162.

——payment of Govt, Revenue is legal necessity, 36 C. 653, 10 C. 823, F. B. 74 I. C. 839,

——alienation by the widow for the payment in satisfaction of a decree against a widow for contribution for arrears of revenue by a co-sharer is binding on the reversioners. 31 C. W. N. 25 · 43 C L J. 545 24 A L J 615 : 28 Bom. L. R. 931 : 1926 P. C. 56.

Legal necessity—*contd.*

——arrears of rent due from a widow on account of the lease which she has taken up for her personal benefit is her personal debt. *47 A. 563 ; 1925 All. 495.*

——debt contracted to protect property by conducting litigation is legal necessity, the lender is not to see whether the litigation arose for the personal debt of the widow 19 C. W. N. 80.

——the preservation of the estate and the cost of litigation for that purpose are legal necessities. 13 C. W N. 1117 : 31 A 497 · 10 C. L. J. 343 · 11 Bom. L. R 911 P. C, 43 C L. J. 562 · 97 I. C 149 : 1926 Cal 1046.

——widow may pay up the interest on husband's debt by alienation 24 I C 534

——repairs of house, *sradha* and marriage, are legal necessities. 10 C. 823, F. B

——Hindu Law recognises two sets of religious acts (1) actual essential ...es which ...liss of the ...operty if necess... portion of the pr... ...part of the proper... 44 A. 503 : 27 C. ...

——payment of debt left by husband and the performance of his obsequial ceremonies are legal necessities. 86 I. C. 196 1925 B 38.

——payment of roadcess is not legal necessity, it being widow's personal debt. 36 C 753

——when a decree was obtained personally againt a limited owner, though the debt was contracted on behalf of the estate and the bond did not charge the property, held, the female heir represented the entire estate in respect of her own as well as the reversionary interest and for that very reason the creditor is bound ...

therefore the case is governed by the principles laid down in 2 A. 275 P. C., 1925 Cal. 401 : 82 I. C. 1001.

——the right of an usufructuary mortgagee vesting in a widow is movable property and can be sold in execution of a decree against her, irrespective of any question of legal necessity. 24 Bom. L. R. 729.

Legal necessity—*contd.*

——a permanent lease by widow in consideration of the lessee looking after her in her old age is binding against the reversioner as being for legal necessity. 94 I. C. 321 : 1926 Cal 854, bu

5 C. 892 : 107 I C

fair market rent
ot alone be suffi
: 35 C L J. 115
95 : 3 Pat L T

311 P C.

——a family settlement come to by the widow cannot bind the reversioner 13 C. W. N 147 . 2 I. C. 549.

Proof of legal necessity.

——the burden of proof of legal necessity is on the purchaser, recitals in deed of legal necessity is not proof of its existence 18 C W. N. 649 P C, 23 C. W. N. 1025.

——in case of mortgage of the property by the widow for meet

is on the

recital in
777 P C.

——but when it is a very old transaction so that independent evidence is not available, a recital consistent with the probabilities

37 C L
lightly set aside
M L. J 224 : 1925 Mad 673,
L 126 : 66 I. C. 564, 44 C.
25 : 24 C L. J. 437 : 42 C W

876, P. C., But this latter case has been distinguished in 23 C W N. 64 on the ground that though the document was excuted 40 years back yet evidence was available as to the pecuniary condition of the widow and that the alienation was made to a person who managed the estate of the widow (21 C. W. N 729 : 40 M. 709 41 I. C. 147 P. C , 33 C. 842, 41 C. 739 : 18 C. W. N. 673 P. C., 20 C. W. N. 210), *considered.*

——where legal necessity was recited in a deed of 40 years old and it was not impeached by the then reversioner, presumption was in favour of the existence of legal necessity. 27 C. W. N. 433.

——actual proof of the necessity is not essential. It is only necessary that a representation should have been made to the purchaser that such necessity existed, and that he should have acted

on 21 C W. N. 225.

du widow must prove
that legal necessity existed or that he made proper and bonafide
tisfied himself
or is not bound
excess of the

Legal Necessity—*contd.*

——in case of debt, legal necessity must be shown not only for the loan but also for the exceptionally high rate of interest. 24 I. C. 85, 19 C W. N. 370, P. C

——if the plea of legal necessity is first raised and then abandoned in the trial court it cannot be raised again in the appellate court, 1928 All. 596, F. B.

The widow is not bound to transfer for the exact amount legally necessary.

——when the alienation is partially invalid for want of legal [illegible] 13 C W N 544 9 C. [illegible] *Fol Contra.* it may be [illegible] 421, 24 Bom L. R 493 [illegible] A. 48, P. C, *Ref* 62 [illegible] proportion should be [illegible] 324.

——where the sale proceeds were Rs 5300 and a sum of Rs 4588 was spent for legal necessity the sale was valid. 31 M L T 149 1922 M W N 804 P C.

——where out of the sale proceeds of Rs 19000 Rs 17378 were for legal necessity the sale could not be challenged 32 C. W. N 117 · 46 C. L. J 291 105 I. C 257 : 1927 P C 244 : 29 Bom L. R, 1385 : 53 M. L. J. 300 P. C, (54 I A 79 P C., 54 I A. 211 P C.) *Rel.* on

——where a Hindu widow *bonafide* executed a permanent lease upon taking a *selami* of Rs 125 in order to pay off a debt of her husband amounting to Rs 100, the reversioner should not be allowed to recover possession upon payment of the actual debt The P. C., ruling reported in, 11 C W. N 474 29 A 331 34 I. A 72 : 5 C L J 344, did not intend to lay down the rule that the widow is in every case bound to sell property for the exact amount of debt. 14 C W N. 895.

——where there is pressure on the estate, question of prudent management does not arise, 23 C 766 *Ref*, it is more so where the lender acted *bona fide*. 30 C L. J. 56 19 C. W N 80 *Ref.*, where the transaction was in the main for legal necessity it cannot be impeached on the ground that a smaller sum would remove the pressure 37 C. L. J 319, 27 C. W. N. 365 P. C

(18) Wills.

Testamentary capacity

——testamentary capacity is a relative thing having reference to the particular will. 50 C. 100 35 C L. J. 569

——mental power of the testator, burden of proof. 20 C L J 501, 7 Bom. L R. 92, 175, 21 C 279.

——testamentary capacity,-proof,-nature of disposition. 49 C 132

——having sense and consciousness does not sufficiently prove testamentary capacity. 72 I C 88.

——a minor cannot make a will 38 M. 166

(18) **Wills**—*contd.*

——a raiyat cannot make testamentary disposition of non-transferable occupancy holding, 18 C. W. N. 1290, 1294, 12 C W N. 1086 8 C. L. J. 261, *Diss.*

——a member of an undivided family cannot make a bequest of ancestral property as his interest in such property ceases on his death. 95 I C 181 1926 Bom. 463, 28 Bom. L. R. 532

——a co-parcener of a Hindu joint family cannot dispose of his undivided share by will even with the consent of his sons 50 B 395, 96 I. C 421 . 1926 Bom 378 · 28 Bom. L. R. 695.

——as *coparcener's power of alienation* is founded on his right to partition and as that right dies with him and the title of his co-sharers by survivorship vests in others at the moment of his death there remaining nothing upon which the will can operate, a will by a member of a joint Hindu family of the *Mitakshara School* is not a valid devise But in the present case as it was done with the consent of the co-parceners it was held to be a family arrangement and so valid. 48 A 313 : 28 Bom. L. R. 910 : 43 C. L J. 513 . 31 C W N 101 . 1926 M. W. N. 529 . 95 I. C. 566 P. C.

——but if a member of an undivided family wants to get himself divided he can do so by simply *making* the statement in a will, "I want to get myself divided and want to execute this will" 927 Mad. 1066 104 I. C. 650.

——but it has been held by the Allahabad H C that unless the *will of the head of the family is accepted by* the members of the family there cannot be a partition of the property by will. 49 A. 763 . 102 I. C. 66 : 1927 All. 454 : 25 A. L. J. 413.

——a Hindu widow cannot by a will confer any title on the legatee even to eject a trespasser. 8 Pat. L. T. 437 : 6 Pat. 788 1927 Pat 262 . 103 I. C. 482, 79 I. C. 1011 *Rel. on.* 55 C. 918 · 1928 Cal. 194

Rule against perpetuity.

——in a case in which the rule of *Tagore Case* applies a gift which cannot be made directly, cannot be made indirectly by conferring power on executor. 24 I. A. 93 *fol.* But there may be exception to the general rule. There may be exceptional cases in which Hindu Law sanctions departure from the *rule that the donee* must be in existence. Under Hindu Law the founder of a religious trust or institution may lay down a general rule of succession to the management and may confer a power on the wife to appoint a successor to the shebaitship and the appointment by the wife of a person as shebait who was not in existence at the date of the death of the testator will not be invalid. A trusteeship with power to appoint a successor is recognised by Hindu Law. 50 C 425 75 I C 435

——the rule of law as to invalidity of gift to an unborn person was applicable to the office of shebaitship. 40 C. L. J. 64, 29 C. 714, 22 C L. J 404 . 20 C. W. N 314, 36 C. L J. 478 *Ref.*

——before the Hindu Wills Act bequest would not be bad for remoteness or as offending against law of perpetuity. 23 C W N. 826.

(18) Wills—*contd.*

——a clause to the effect that division of the estate will not be made till the testator's sons come of age and earn their livelihood

Bequest to trust

——when a testator creates a trust it must be for a definite and lawful object 65 I. C. 820, 23 B. 725, 31 B. 583, 31 C. 895, 37 M. L. J. 489 *Rel*

Bequest to females.

——when a bequest is made to wife with full proprietory right she takes an absolute estate 26 C W N. 425 35 C. L. J. 427: 42 M. L J. 492 3 Pat L. T 133, 20 A L J 362 P C., 26 C W. N. 129: 35 C L. J 315 46 B 153 30 M. L. T 149 P C

——when a testator after providing for a life estate of his ... on her death to his son ... will pass to the person ... th of the tenant for life ... at the date of his death 64 I. C. 237 (c).

——a bequest of immoveable property to wife in the absence of words giving absolute estate with power of alienation confers only a limited estate 1923 Cal 575

——life-estate to widow with remainder to another upon condition to be fulfilled is valid, if the ultimate gift is invalid for uncertainly yet the intermediate gift is valid, a bequest in favour of the husband of a son's daughter unmarried at the date of the will but married in the testator's lifetime is valid 17 C W N 39

——if words are used conferring ownership upon the wife, the wife enjoys the rights of ownership unless the circumstances of the context were sufficient to show that ownership was not intended 26 C W N 129 P. C, 86 I C. 196 1925 Bom. 38

——the view that under the Hindu Law, in the case of immoveable property given or devised by a husband to his wife, the wife has no power to alienate unless the power of alienation is conferred upon her in express terms, is not sound 86 I. C 196 1925 Bom. 38

——Hindu widow's estate differs materially from a life-state. In India a tenant for life must behave as if he were substantially a trustee for the remainderman. The tenant for life cannot create a charge so as to bind the remainderman unless it was proved beyond a shadow that the charge was to save the property from grave injury, 2 Pat L T. 728.

——a widow who acquired a life estate under a will and became an executrix might sell property as executrix 23 Bom. L. R. 858, 17 Bom. L. R 705, 40 B 69, 16 Bom L. R 796 P. C.

(18) Wills—contd

——an intention to leave the wife in the same position as if he had died intestate cannot be implied in a case where the testator has made a will in which he has deliberately made no express provision with respect to her. 45 M. L. J. 249 · 25 Bom L R. 631 · 72 I. C 242 P. C.

——it is a valid disposition of property where the testator directed the residue of his estate after payment of certain legacies to be delivered over to his wife after she attained the age of 20 years. 44 M. L. J. 23 . 70 I C 321, 42 M 283, 44 M. 447, 30 A 84 Ref.

——devise to wife and gift over to son, son predeceasing mother she does not acquire absolute right. 25 Bom. L R. 189 ; 71 I C [illegible]

——a life estate known to the English Law can be granted by deed or will in India. 2 Pat L. T. 729

——in the absence of legislative provision a tenant for life must behave as if he were substantially a trustee for the remainderman *above case*

——Hindu widow s estate differs materially from a life estate *above case*

——a Hindu female [illegible] presumed to take only [illegible] presumed to pass an absolute [illegible] refers to full ownership and [illegible] W. N. 120 · 47 M L J. 733 [illegible] Mad 254.

——where the will of a Hindu gave property to his son's widow as "malik ' and gave her power to mortgage at times of real necessity and she was allowed to do whatever she liked with income and produce, held the intention was clearly to give her not an absolute estate The word "malik ' is not a term of act and does not necessarily define the quality of the estate taken 90 I. C. 757.

Absolute and limited interest, creation of.

——where the earlier part of the will created an absolute estate to the daughter considering the other parts it was held to create limited estate. 26 C W. N. 893.

——in all cases of gifts by will whether to male or female unless the inte[illegible] st was intended to [illegible] titled to the whole [illegible] be construed in the [illegible] 20 C. W N 463

——when absolute interest is given the court will not cut it down by subsequent words in the will unless they clearly restrict it. a gift over on failure to dispose of any part bequeathed is void 20 C W N 463

——construction—absolute or limited interest—gift over—period of distribution 21 C W N. 854, 24 C. 646 : 1 C. W. N 574, [illegible] construction by reference to another. 23 C. 563, P. C.

——in the absence of words of restriction donee takes an absolute estate 44 A. 397.

(18) Wills—*contd.*

——in the absence of satisfactory evidence regarding the disposition in a Hindu will, a court can presume that the testamentary disposition of a Hindu was in accordance with the ordinary notions of Hindu Law,—that a daughter would take a limited estate and her son an absolute estate 1925 M W N. 232 88 I. C. 249 : 1925 Mad 1005.

——if the husband's devise in terms confers upon the widow an absolute estate, the widow does not take the limited widow's estates. 25 C. W. N 527 (10 B. L. R. 267, 17 C L. J 461) *Ref*

——where the will provided that the legatee would be entitled to transfer the property to a stranger if the testator's heirs and co-sharers refused to purchase it for adequate consideration it was held that the restraint did not cut down an absolute estate, it only gave the heirs and the co-sharers a right of pre-emption 28 C W N 527.

——malik denotes an absolute owner 25 C W. N 527. *But see cases under "meaning"*

——where by a bequest to grandson with direction to perform the worship of some family idols out of the income, without any gift of any property to idols and without any provision made for worship after his death an heritable shebaitship is created the properties are conferred on the grand-son subject to the maintenance of the worship the trust being a private one, scheme under S. 92 C. P. C. is not proper 49 C 459 · 36 C. L J 57 43 M L. J. 116 : 24 Bom. L R 937 P. C

——where a widow conveyed the whole property and all title [illegible] would include the right and title [illegible] restriction was imposed by the [illegible] 69, 16 Bom L R 796 P C,

Widow testator can direct accumulation.

——it is not incompetent for a widow-testator to direct accumulation. 11 C W N 65, 1 C W N 345 24 C 589, on appeal 2 C. W N 389 : 25 C. 662, 4 C. 443

Revocation of will

——s 57 of the Succession Act read with s 3 of the Hindu Wills Act means that a Hindu will cannot be revoked except in a manner mentioned in s. 57 subject to s 3 of the H. W Act. 35 C. L. J. 488.

——revocation of the will does not necessarily amount to revocation of codicil 35 C L. J 488

——a will last seen in the possession of the testator but not forthcoming will be presumed to have been revoked. 31 C 885 8 C. W N. 821

——an alternative inconsistent disposition which is not valid or effectual in itself does not revoke an earlier disposition of the same property. 20 C. W. N. 234, P. C

(18) Wills—contd.

——when the testator wrote the word 'cancelled' on the will and signed it and tore it partially, it was revocation. 20 C. W. N. 304 : 23 C L J. 314.

——to constitute revocation actual destruction or writing is not necessary 7 C W. N. 1 · 25 M. 678 : 29 I. A 156 12 M L. J 229. P C.

C W N 221 P. C

Execution of the will,—formalities,—witnesses,—proof.

——a will is one of the most solemn documents known to law. Where no formalities are prescribed by law proof of the testator's signature is all that is needed. Mere resemblance in signature is of no value where witnesses are available but are not forthcoming to prove the will 27 C. W N 485 : 21 A. L. J. 402 : 31 M. L. T 277 44 A. 495 P C, 27 C W. N. 797 P. C.

——the fact of the signature being shaky but not uncharacteristic is in favour of genuineness. 27 C. W. N. 414 : 31 M. L T 307 17 L W 1

——when the Sub-Registrar and the identifier put their signatures after the execution of the will but in the presence of the testator, the requirements of law are satisfied. 1 Pat L. R 267

——every presumption will be made in favour of due execution ... pudiate their signatures the ... have given false evidence ... L J. 632. P C, 27 C. 521

... 4 C W N 501, P C.

——witness need not be of superior position. 20 C W. N 617. P C

——all attesting witnesses need not prove the same fact; guiding the hand of executant in fixing mark is sufficient execution 19 C W N. 1295.

... at the same ... N. 1297 ... witnesses

...

For other cases of "Proof of a will" see, cases under ss 61 to 72 of the Evi Act"

——will must be proved by the person setting it up as the will of the testator. 24 C W. N. 674. P. C.

——probabilities disproving a will. 27 C. W N. 797 : 41 M. L J. 699 P C

——... of son-in-law whose will ... h was produced ... gainst her own ... 466 P. C. ... M. L. J. 23

(18) Wills—*contd.*

Construction of will.

——rules of construction developed by the English Courts are highly artificial and are inapplicable to India Intention must be determined from the words used 31 M. L T 213 27 C. W. N. 199: 49 C. 1005 · 37 C L J 420 . 25 Bom L R 625 P C.

——regard must be had to the intention of the testator 31 C. 89, 21 C 488

——calling a document a will does not make it so—the particular document was held to be in the nature of a transaction *inter vivos*, 25 C W. N 511 P. C

central idea
will 26 C.
C. 274, 8 C.

——the words of one will should not be construed by the construction of more of less similar words in a different will, which was adopted by a court in another case 26 C. W N 425 · 35 C. L. J. 427 42 M L. J 492: 20 A L J. 362: 24 Bom. L R. 576: 1 Pat. 305 3 Pat. L T. 133 P C.

——in India the meaning of every word in a will must always depend upon the setting in which it is placed, the subject to which it relates and the locality of the testator which may give the true meaning. *above case*

——"*malik*" means possessed of full proprietory right unless otherwise restricted *above case*

——the word "*malik*" is not a term of art and does not necessarily define the quality of the estate taken 90 I C 757

——where the bequest was made by a will to an adopted son
et aside the bequest
not strain to adopt
ion of the testator.

——*santan* means issue generally. 21 C W N 854.

——legacy on a *condition precedent* does not take effect when the condition by reason of subsequent events becomes impossible of performance 26 C W N. 378, 48 C. 1100.

——an alternative ulterior disposition, not valid and effectual
osition. 23 C L. J 366 P C.
failure of the prior bequest,
occurred in the manner

——gift to class—inability of some to take—donce must be in existence 20 C L J. 348, P. C., 13 C. L. J. 183, 434

——there is no objection to some power being given by a will to two Hindu brothers provided they together have the entire ownership of the whole coparcenary property as such document may be looked upon as embodying a mutual bargain 45 A 245

——in a case for setting aside a will as false the first thing is to be seen whether the plff. has any title to raise the question, and where the plff. admits that the deceased had an intention to make a

(18) *Wills—contd.*

will it raises a presumption of the genuineness of the will 17 L. W. 1. 1922 P. C. 315.

——*when the property is bequeathed to two or more persons they take jointly.* 62 I. C. 814.

——the current of auth ... to the effect that in the case of ... here ... is ... pre- ... *of the office of trustee as trustees are ordinarily to be treated as joint-tenants* 90 I. C 839 1926 Mad. 51 : 59 M. L. J. 341.

——*where a Hindu who was divided from his eldest son gave a legacy to him out of his self-acquired property, held that the intention ... and not his family When ... that self-acquisition, ... ers in preference to ... rised by a father in favour of his son, there is a presumption that the son takes it as property inherited by the father so as to give their sons a right by birth But where a divided son gives a sum of money without any words qualifying his right this presumption does not apply.* 83 I. C. 127 1925 Mad. 370.

——*entries in kindred roll and names of heirs made about a soldier by the military authorities are not tantamount to the soldier's will.* 47 B. 552.

For other cases, see "Absolute and limited interest, creation of"

Probate

——*unprobated will may go in evidence otherwise than to prove the title of the legatee.* 20 C. W. N. 122 : 20 C. L. J. 149 : 13 C W N. 1136 : 4 C. 508 : 14 M. 454 : 33 M. 91, *and a natural heir can sue without proving will.* 18 C. W. N. 1136.

——*probate is only to be taken when proceedings have to be taken in courts of justice.* 23 Bom. L. R. 514 : 45 B. 1186

——*a probate case cannot be compromised and withdrawn* 1917 Pat 192 . 20 C. W. N 986.

——*when probate is asked for six months after, it should not be refused.* 1917 Pat. 85, (18 C W. N. 521 : 19 C. L. J 165 : 20 C W N 617, P. C 20 C. W. N. 192, 194, 195), *Fol.*

——the petitioner applying for revocation of probate must explain delay 19 C W. N 388 ... of revocation does not ... 19 C W. N 1108 ... ing a will cannot be qu... 38 : 23 C L. J 621 ... court cannot question the validity of a probated will but ... 9 C. L. J. 37. ... 20 years and in various pro... as having died intestate, the ... lished 1923 M. W. N 647. 18 I ...

... under a will, see "Executor"

HINDU WIDOWS REMARRIAGE ACT.

S. 1.

——a Hindu widow can inherit from her son by former marriage although her remarriage took place before her son's death. 26 C. W. N. 925, (11 W R. 82, 29 B. 91), *Ref.*, 1 Pat L R. 390 4 P. L. T. 650 : 74 I. C 815, 70 I C 479

——Act XV of 1856 does not apply where the widow is permitted to remarry by custom. 20 O. C 297.

——widow loses her interest in former husband's property by remarriage, both under general and special law. 21 C. W N 906, 23 Bom. L. R. 533 but see 35 A. 466

S 2.

——when a Hindu widow becomes Mahomedan and remarries she loses her rights to her former husband's property because by [illegible] body of her deceased [illegible] erring spiritual benefit. 7 I C 550 (41 M 1078) [illegible] 8 C. L. J 542, 1 M. 226,

——where a Hindu woman becomes a widow and afterwards embraces Mahamedanism and marries a Mahamedan, and where afterwards, her Hindu sister devises property to her by will, the [illegible] [illegible]d. Similarly, when [illegible] nbraced Islam after [illegible] ie latter sister can [illegible] 87 I C 621 1925 Mad 861

——s 2 applies not only to widow who could not remarry before the Act but also to those who were not so precluded from remarrying either by law or custom In all cases the widow forfeits the estate inherited by her from her late husband 50 C. 727: 27 C. W. N 669, 75 I C 11, 65 I C 117, *contra*, below

——where a Hindu widow remarries according to custom she is not attracted by the consequence of sec 2, 24 O. C. 11 61 I C. 303, 25 M. 425, 22 C. 589, 22 B 531, 40 I C 783, 46 I C. 884, 19 C. 289, 41 M 107, 29 B. 91, 32 A. 489, 109 I C 791 1928 Oudh 338

——a Hindu widow of the Jat community, among whom re-marriage has existed even before 1856, does not forfeit her rights in her former husband's estate by virtue of S. 2 49 A. 203 100 I. C. 734 : 1927 All. 523, 31A 161 *Ref.*

——a remarried Hindu widow is not entitled to inherit as a gotraja sapinda to the relation of her first husband 45 B. 1247 · 23 Bom. L. R. 553.

HOLDING OVER, see, '*B. T Act, Holding over.*'
HOMESTEAD, see, *B. T Act, "Homestead."*
HOROSCOPE, see, '*Admissibility.*'
HORTICULTURE, see, '*B. T. Act, Horticulture*'

HYPOTHECATION.

——Although no provision has been made either in the Act or the Contract Act with regard to the hypothecation of moveable property, it does not follow that transactions are invalid. The hypothecation confers a good on the hypothecatee although not accompanied by possession C W. N 14, (5 W. R 189, 10 A. 20). Ref (23 C. 592, 25 M. 406), D

——a mortgage of moveable property is valid and a deed giving the deft. power to redeem mortgaged chattel, is valid C W N. 167 n

——an hypothecation bond executed prior to the passing of the T P. Act though not expressly containing a power of sale is simple mortgage within S. 58 T. P. Act. 9 M. L. T. 309 : 9 I. C. 163

IDENTIFICATION.

——a witness's evidence of identification given in court should only be accepted if he identified the same persons whom he had previously picked out in the identification parade in jail 82 Ind C 280 25 Cr L. J 1272 1925 Lah. 137.

——evidence of identification of persons previously unknown after a number of months, that certain persons took part in an attack is unreliable, unless there was a regular identification parade in which the witnesses picked out those persons, especially where it is not stated that such persons bear any distinguishing marks by which they can be recognised. 1924 Lah. 722.

——a note of test identification recorded by a M. cannot be used as evidence against accused persons, where the M. who recorded the note has not been called as a witness. 81 I C. 45. 25 Cr L J 557

——witness picking out a... that such ... proof

——

house ...

C and ...

1914 in somewhat similar ... in the house of another prostitute was not admissible either under s 9 or 11 Evi Act, to prove that and B were the same persons as C. and D. 47 C. 671. 31 C. L. J. 4... 24 C. W. N. 501 : 21 Cr L. J. 849, F B.

——to bring outsiders to stand with accused in identification parade is unusual but not illegal 47 A. 39. 1925 All 223

IDOL, see, '*Hindu Law, Endowment*'

INCOME-TAX ACT (VII OF 1918)

Applicability.

——on points specifically dealt with in the Act it should be interpreted without reference to previous state of Law, 52 Cal. 1 1925 Cal 34 83 I C. 273

——the Act applies to proceedings stated thereunder but continued under the Income-Tax Act of 1922. 1925 Nag. 65

——when the source of income is non-existent in the year of assessment but had been in existence in the previous year 31 C 630 31 C W N 557; 1927 Cal. 553. 103 I. C. 609.

S. 2.

eaning

icome.

agri-
cultural income but paid for recognition of transfer is not such and is assessable. *above case*, but it has been subsequently held by the F. B. that *Nazar* or *selami* paid by a tenant to a *landlord* for the recognition of transfer of a non-transferable holding is rent or revenue with the meaning of s 2 (1) (a), and is agricultural
53 C 34 29 C W. N.
F B.
rom outside and not
f a Mutual Benefit
verdue subscriptions

——mere constitution of the patnership between some members of a joint family does not preclude the assessment in cases where the partnership is carried on for the benefit of the family. 46 M. 673 : 45 M L J. 150

——the process of preparing and manufacturing tea fit to be taken to market is in its entirety a combination of agriculture and manufacture The profit accruing from agriculture process are exempt and the profits accruing from manufacture is liable to assessment. 48 C 161 32 C L. J 421 61 I. C 107.

——[illegible] "[illegible]" [illegible]udes among other things any
manufacture is an income
under ss. 3 and 5 40 C. L J.

S. 3.

——interest accruing due but not realised is not assessable 44 M. 65 . 39 M. L J 649 F. B.

——compound interest not realised or countercredited is not taxable 1922 M W N. 480 31 M L T 255 69 I C. 405

——the term profits in this sec. means chargeable income and must be computed from the gross income after allowance under sub-sec. (2). 46 B 567

——what constitute the receipt of income in British India 3 Lah. 349 F. B 43 M 75 *Dist* 46 M 706 . 44 M 773

——the same sum of money cannot be received as income twice over, once outside British India and once inside it. 46 M. 706, 45 B. 286.

——the income of the Limited Service Club of Simla is not liable to assessment except in respect of its house property. 2 Lah. 109 : 61 I. C 886

——the word "accrues" in s 3 (1) means growing or growing up, by way of addition or increase or as an accession or advantage. The word 'arises ' means "comes into existence or notice or presents itself" 40 C. L. J. 110.

S. 3—*contd*

——whether the non-resident is a British subject or a foreigner he is liable to pay income tax in British India. 44 M. 773.

——profits by money-lenders out of exchange fluctuations are assessable 45 M. L. J. 707 : 33 M. L. T. 119.

——partnership temple, liability to tax. 47 A 69 : 1925 A. 115 84 I. C 207.

S 5.

——income divided from the rents and royalties of collieries does not

——the word income implies the *idea of receipt*, actual or constructive. 40 C. L. J. 110.

S. 8.

——profits *made*, received and retained by a Resident in France having an agent *in* British India are not liable to incometax in *British* India. *46 M. 360 : 44* M. L. J. 290.

——business premises such as shops, offices, godowns &c are not "*house* property" as used in this sec. 1 Bur L. J. 46 67 I. C. 711

——allowance on account of the annual value of business premises, owner and *occupier* of a firm is not liable to assessment. *43 A. 139.*

S. 9.

——in a Banking concern no *deduction should be allowed* for depreciation on war bonds and *securities* arrived at by computing the market rates with valuation in the books of the bank. *46 B. 557*

——Bengal Nagpur Railway Company assessment *on* business profits, *deduction* of guaranteed interest. 49 C *815* 27 C W N. 34

——the amount paid by a *joint* company to the underwriters on an issue of new shares increasing the capital of the company is not exempted from assessment. 45 B. 1306.

——when a firm carries on business in partnership with another firm, the losses *in* the second concern can be deducted for the purposes of assessment *from* the profits of the first firm. 45 M L J 711 33 M. L. T. 122.

——money spent in engaging accountants and lawyers for representing the case before the income-tax authorities should not be deducted. *above case.*

S. 10.

——the question whether there has been an advance of capital by particular partners or *bona fide* borrowing of money by the firm in which the money-lender happens to be partner must be treated as one of fact in each case. 21 A. L. J. 703.

S. 19.

——an adjustment can be made during a financial year in which the Collector's certificate of Registration under s. 12 (a) is in force in respect of the income of a firm for a previous year when the firm was not registered. 43 M L. J. 434 68 I C. 655 : 1923 Mad. 34.

S. 26.

——sec 26 only relates to a mistake in the demand of any assessment and cannot enable the discontented assessee who has paid the amount demanded from him, to reopen the question of the assessment. The section provides for the ratification of mistakes *caused by the demand not corresponding to the assessment and* does not provide for an appeal to the commissioner from the order of the Collector under s 26. 27 Bom. L R. 400 89 I C. 595 : 1925 Bom. 257.

Ss. 31, 33, 34

——s 34 merely defines who may be included as an agent under s. 31 and the agent under the sec must be in receipt of the income under the latter sec. 49 C. 721 26 C W N. 745 37 C L J 257

income cannot branch 66 I C

——it is only in cases where there has been an appeal from an assessment by an income-tax officer under s 31 or 32 of the Income-tax Act that the assessee can apply to the commissioner for a reference to the H C. 4 Pat. 224 : 1925 Pat. 352 86 I C. 170 : 1925 P. H C. C 17.

Ss 33. 43 (2) (c).

——in calculating total profits of a person not resident in British India the assessee is not entitled to deduct the income-tax and excess profits duties payable in England or income-tax payable at stations outside British India 44 M. 489 40 M. L J 560 F. B. 41 M. L. J. 191.

——s 33 (1) is not a charging section at all but a machinery ... any taxation upon any income ... to tax 46 M. 360 44 M. L. J.

... for an agent being the assessee in the place of his non-resident principal 46 M. 360.

——under the Indian Law in the case of foreign residents, any ... connection in British India, ... the English Law the income ... ny trade within the United ... I. C 273

S. 36.

——an Income-tax Collector in Bombay can recover arrears of tax by distraining and selling moveables of the defaulter. No

S. 36—*contd*

warrant is necessary, the form prescribed in the Act is only f guidance 83 I. C. 899. 26 Cr. L. J. 195.

S. 39.

——assessment by Collector, jurisdiction of civil court Pat L T 125.

S. 46.

——s 46 does not require personal service *only* excluding other forms of services under Or. 5 of the C. P. C. 68 I. C. 823

——arrears of Income-tax can be realised like an arrear of land revenue under s 46. In the absence of the Commissioner's order the Collector cannot issue a distress warrant for realisation of income tax 4 Pat L.T 171. 1 Pat. L R. 68.

S. 51

——at the hearing of reference the objector who questions the assessment has the right to begin and the right to reply. 45 C 161 32 C L. J. 421 43 A. 139.

——where the Board of Revenue makes a reference under s. 51 it cannot object that the H C. is not competent to hear the reference 14 L W. 413 F B the procedure applicable to appeals is applicable to such reference and the assessee is entitled to engage vakils and counsels 45 C. 766 25 C. W. N. 80. 32 C. L J 433

——application to the Chief Revenue Authority to refer questions to the H. C. must be made by the assessee in the course of assessment and before the case is disposed of by the Chief Revenue Authority. 23 Bom L. R. 1267: 46 B 707.

——the H C is competent to consider the grounds on which the Chief Revenue Authority was satisfied that a reference was unnecessary 45 B. 881.

——the power given to the Chief Revenue Authority to state a case for the opinion of the court under s. 51 of the Act involves a duty to exercise it when in the course of an assessment an important question of law arises for decision. 39 C. L. J 302. 25 Bom L. R 920 47 B. 742 45 M. L. J. 592: 21 A. L J 689 P. C.

——a decision under s 51 to be appealable must be either a final judgment or final decree or order which means adjudicates on its merits A decision of the H C under s. 51 is merely advisory and not final and the appeal is incompetent. 45 M. L. J. 295: 49 C L J 16 · 25 Bom L R 908: 47 B. 724 P. C. 1924 M. 63 overruled

——an application for the refund of Income-tax already paid having been dismissed the applicant cannot refer the question of refund of assessment to the H C. and this order of dismissal was not made in the course of an assessment. 27 Bom. L R 409. 1925 Bom 257 89 I. C. 595

S. 64.

——under s 64 (1) the Income-tax Officer of the area in which the principal place of business is situated has the duty of assessing

S. 64—*contd.*

the whole of the income derived from the principal place of business as well as the various branches 47 A 631 : 23 A. L J. 379 : 88 I. C. 216

S. 66.

——this sec does not give a right of appeal to the H. C. by an assessee who is dissatisfied with the decision of the commissioner. 86 I. C. 27 23 A L. J. 40 : 1925 All. 298.

——in an application to the H C to reduce the amount of costs in an Income tax-reference, held that under s 66 (6) costs are in the discretion of the court. 87 I. C. 797 1925 All 40‹

INCOME-TAX ACT, IX OF 1922.

Application.

——income-tax has always been regarded as a typical example of a direct tax There is great distinction between a tax on gross income and a tax on income which for taxation purposes means gains and profits 1928 P C. 282 : 111 I C 216 **P C.**

——avoiding taxation by means not forbidden by law is not unlawful. 50 A. 495 107 I C 683 1928 All. 81 **F B.**

S. 2.

——when the assessment comes to be made the officer in charge will have to determine simply whether the firm with whose return or with whose accounts he is dealing, is or is not a registered firm within the definition 21 A L J 703 75 I. C. 339.

——the negotiation of the sale of a large mill is "business" 47 A. 372 · 23 A. L J 65 . 86 I C 189 · 1925 All 469

——an application to have a firm registered under rule 2 must be made on or before the date when a return is due under s 22 (2) of the Act. 27 Bom L R. 223 · 86 I C 851 1925 Bom 247.

——where a limited company instead of distributing its profits as divided among the share-holders passed a notification to the effect that the undivided profits should be distributed to the shareholders in the form of fully paid bonus shares and the shareholders had no option to take the profits in any other form, held that such a transaction did not result in any income, profits *or gains to the shareholders so as to make them liable for super-tax.* 2 Rang. 211 82 I C 665

——supertax being calculated on the income of the previous year, the fact that the assessee became entitled to a larger share in a firm at the time of assessment does not enable the tax being calculated on such increased share. 26 Bom. L R 366 81 I C 489 · 48 B 504.

——a receipt of a casual and non recurring nature arising from business or the exercise of a profession, vocation or occupation does not come within exception. 47 A 372 . 86 I. C 189

——profits arising from the transactions of adventurous kind are not of a casual or non-recurring nature. 47 A. 372 : 86 I C. 119.

S. 36—*contd.*

warrant is necessary, the *form prescribed in the Act* is only for guidance. *83 I. C. 899 : 26 Cr. L. J. 195.*

S. 39

——assessment by Collector, *jurisdiction of civil court.* 3 *Pat. L. T. 125.*

S. 46

——*s 46 does not require personal service only excluding other forms of services under Or. 5 of the C. P. C. 68 I C 623*

——arrears of Income-tax can be *realised like an arrear of land* revenue under s. 46 In the absence of the Commissioner's order the Collector cannot issue a distress warrant for *realisation of income* tax 4 Pat L. T 171 : 1 Pat. L R. 68.

S. 51.

——at the hearing of reference the objector who questions the assessment has the right to begin and the right to reply. 45 C 161 : 32 C L J. 421 : 43 A. 139.

——where the Board of Revenue makes a reference under s 51 ... eferes
it cann... ppl ca
14 ... kils
to ...
ccu ...

——application to the Chief Revenue Authority to refer questio... to the H C. must be made by the assessee in the course of ass... ment and before the case is disposed of by the Chief Revenu... Authority. 23 Bom L. R. 1267 : 46 B 07.

——the H. C is competent to consider the grounds on wh... the Chief Revenue Authority was satisfied that a reference w... unnecessary 45 B 881

——the power given to the Chief Revenue Authority to state case for the opinion of the court under s. 51 of the Act involves duty to exercise it when in the course of an assessment an impor... tant question of law arises for decision. 39 C L. J 303 : 25 Bom L. R 920 47 B. 742 . 45 M. L. J. 592 : 21 A. L. J 639 P C.

——... must be either ... ns adjudicatus ... rely advisory ... J 295 : 34 C L

... L. R. 908 : 47 B. 724 P. C. 1924 M. 63 overruled

... of Income-tax already ... cannot refer the question ... this order of dismissal was ... assessment. 27 Bom. L. R. 439 : 133

Bom. 257 : 89 I C. 595

S. 64.

——under s 64 (1) the Income-tax Officer of the area in which the principal place of business is situated has the duty of assessing

S. 4—*contd.*

or half a dozen times in a year. Profits arising from such a transaction are not of a casual or non-recurring nature. 47 A. 372 · 23 A. L. J. 65 : 1925 All. 469 : 86 I. C. 189

——the phrase receipts "arising from business" as used in s. 4 (3) (vii) is not confined to receipts arising from a business carried on continuously during the year. Even if they are from a single adventure in business they would be liable to be taxed 87 I. C. 706 27 Bom L R 478 1925 Bom. 318

——no assessment is valid when the source of income is non-existent in the year of assessment but had been in existence in the provious year 54 C 633 31 C W N 557. 1927 Cal 553 103 I. C. 609

Ss. 6, 10 and 24.

——a person who carries on two different trades, one individually and the other as a member of an unregistered firm, is entitled to set-off the loss incurred by him in respect of the partnership trade against the profits made by him in his individual capacity Though the practice is to assess firms as such each partner in a firm is an assessee in respect of the profits and gains of the business which he carries on in partnership There is no distinction between registered and unregistered firms 47 M. 660 34 M L T. 332 46 M. L. J. 68

——income from Jalkar included in the assets at the parmanent settlement is not assessable, 53 C 524 30 C. W. N 524 44 C L. J. 427 : 1926 Cal 819, but it has been held by the F B that income derived from jalkar not taken into consideration at the time of fixing the *Jama* at the permanent settlement is liable to assessment 52 C. 863 31 C W N. 765 45 C L J 323 1927 Cal. 432 102 102 I. C. 845 F B.

S. 7

——s 7 (1) is wider than the corresponding provision in English Act, and includes fees, commissions, perquisites or profits received in lieu of or in addition to salary or wages, 6 Pat L. T 47 3 Pat L. R. 85 4 Pat 210 1925 Pat 281.

S. 8.

——the amended Act is not retrospective 1927 P C 242 8 Pat L. T. 791 25 A L J 964 53 M. L J 819 32 C. W N 237 47 C L. J. 1 · 106 I C. 156 30 Bom L R. 60 · 9 Lah 284. P C

S. 9.

——where certain bunglows of a Rajah were kept ready for occupation, they cannot escape assessment though in fact it so happened in any one year that they were not lived in by the Rajah or his guests or officers 22 L. W 822 : 49 M 22

——if a man owns a house ready for his own occupation, ready for him to live in when he chooses to do so, he is assessable under s 9 sub-sec 1 (7) though he may not live in it one day in a year 49 M. 22 : 91 I C. 940 . 50 M. L. J. 63 1926 Mad. 287.

S. 9—*contd.*

——a loss incurred by a firm by standing surety for another firm is not loss incurred forming ... I C 243.

... actual

paid is ... property

income ... 31 C. W. N. 557 : 1927 Cal. 353 : 103 I. C. 609

——the house-tax is not a part of the rent of the annual income accruing from the house property to the landlord and cannot come within the meaning of the expression "annual value" 1929 Lah. 573

SS. 9 and 10

——where the objects of a company include the object of owning and ... from the property ... 10, 35

S. 10.

——the word "any" in s. 10 means "each and every." 47 M 660 77 I. C 772 : 46 M. L. J. 68.

——an assessee who had been allowed deduction of a certain amount for obsolescence of machinery in calculating his profits for the year 1921—1922 is entitled, in making his return for the year 1922—1923 on the basis of his income profits and gains for the year ending 30th June 1921 to deduct this allowance for obsolescence under s. 10 (2) (7). 48 B. 389 ; 26 Bom. L. R 312 : 80 I. C 282

—— *Railway Company allowed to lay out roads by the District Board without roadcess under a grant,*—profits paid to the Board are to be deducted. 32 C. W. N 737 : 1928 Cal 579 : 113 I. C. 33

——cesses paid by a colliery company are local rates in respect of such part of the 'premises" as is used for the purposes of the ... -sec 2 of sec 10 and ... nt of cesses paid The ... Popularly "premises" ... house and premises ... Colliery is premises.

... 29 C. W. N. 925.

——money embezzled by a clerk of the assessee is a deduction in computing the income or profits of the business, so also the boarding expense of servants and their transit charges are items of deductions. 6 Pat. L. T 166 : 86 I. C. 777 : 4 Pat 385 : 1925 Pat 408.

... the circumstances ... rring nature but ... object is income ... 237

——profits arising from wagering contracts entered into in the course of business are liable to income-tax. 47 A 363 : 23 A. L. J. 63 86 I C 95

——payments made in certain properties of the profits of ... of the business cannot

S. 10—*contd*

be treated as expenses incurred solely for the purpose of earning such profits or gains within the meaning of Cl. (IX) of sub-sec. (2) of s. 10, 27 Bom. L. R 219. 86 I. C. 848. 49 B. 362.

[illegible]ed under cl. (2) (iii) is only
[illegible]wed for the purpose of the
[illegible] 109 I C. 369 54 M. L J.

——amounts paid by a Bank as contribution to the employee's provident fund is not "expenditure incurred solely for the purpose of earning profits" 1926 Mad. 1048: 98 I. C 1: 1926 M W. N. 740 F. B

——where the borrowed capital of a banking business is used for a separate branch of the business and on failure of the branch business loss is incurred, interest paid on the borrowed money during the year of assessment following the year of loss can be lawfully claimed to be deducted 52 M. 296 112 I C 697. 1928 Mad 1229. 55 M. L. J. 600 28 L W 616 F. B

——but the interest on borrowed capital to be deductible must be interest paid during the year of account either in cash or by adjustment on the mercantile basis of accounting 55 M. L J. 850 F. B.

——interest paid on the loan advanced by a partner to the partnership business is a deductible item of expenditure. 51 M. 787: 110 I C 889 1928 M W. N 474 1928 Mad 923. F B.

——money paid to a rival contractor to induce him not to compete for the contract is in the nature of capital expenditure and not expenditure incurred solely for the purpose of earning profits. 110 I. C 629 1928 M W. N 328 1928 Mad 902 55 M L. J. 66 F. B,

——tax on companies levied under s 92 of the Madras District Municipalities Act can be deducted as a business allowance under s 10 sub-sec. (2) Cl (9), in calculating the profits of company for purposes of income tax 47 M 667 81 I C 451

——the word "absolute" in s 10 (2) must be taken to include cases of unfitness from whatever cause. 1925 Mad 157 · 20 L W. 859: 85 I C. 478

——where a rice mill factory was leased out and the owner was to bear the loss due to wear and tear, held as the property depreciated there should be a deduction. 97 I. C. 850: 1926 Mad 1032: 1926 M W N. 805 F B

——where a company is purchased as going concern by another firm the latter company is entitled to claim deduction for depreciation in respect of machinery, etc. 115 I C 814 1929 Mad 453: 29 L. W. 476 F B.

[illegible]ical rates in respect
[illegible]e purposes of the
[illegible] of s. 10. and they
[illegible] cesses paid. The
[illegible] defined. Popularly

S 10—*contd*

"premises" usually means a building; the expression "house and premises" shows that premises are not the houses only. 29 C. W. N. 923 · 89 I C 789 : 53 Cal. 76.

——where the partners were found to be mere employees, payment of profits to them as working partners cannot be deducted from the assessible income. 1927 M. W. N 869 1927 Mad 1043 106 I C. 308 54 M L. J 219.

——where shareholders were paid amount under compromise the same should be treated as income for that year and not as profits for previous years and the assessee will be liable to super-tax 55 C 987 · 32 C W N. 574 · 1928 Cal. 729 : 112 I C 718

S 11

——profession tax is a contribution to the Municipality from the income of the assessee and stands in the same footing as income-tax, it is not license tax. 49 M. 296; 1926 M W. N 473. 1926 Mad 368 92 I C. 943 · 50 M. L. J 176 F B

S 12

——in the case of income derived from a royalty of collieries cesses paid under the Jharia Water supply Act or Mining Settlement Act. do not form permissive deduction as they are in no sense expenses incurred for the making of the income 4 Pat. 732 91 I C 476 1926 Pat 109.

——*Nimak Sair* is an income which fall within the expression "income received from other sources" and is liable to assessment 100 I. C. 897 1927 Pat 133 , 8 Pat. L T. 359.

S. 13.

——the Income-tax officer is the sole arbiter on the question of deducing the income profits and gains and the assessee cannot question the method. 94 I C. 128 ; 1926 Lah. 446, but the Income-tax officer should be governed in his procedure by judicial considerations and should pass his assessment on legal and not mere hearsay evidence. 94 I C 156 1926 Lah 233, and wholly arbitrary assessment without laying down any basis for it is not justifiable. 7 Lah 201 1926 Lab. 161 : 94 I C. 614.

——proviso to this section applies only when no method of accounting has been regularly employed or when the method employed is such that in the opinion of the Income-tax Officer the income, profits and gains cannot be deduced therefrom 94 I C 150 : 1926 Lah 201 27 Punj L. R. 325.

——where the Income-tax Officer accepts the method of accounting adopted by the assessee in certain transaction equitable estoppel necessarily arose 108 I. C. 805 : 1928 Nag 102 . 24 N. L. R. 76.

S. 14

——income personally derived by an assessee as a member of a joint family is not taxable under s. 14 of the Act 2 P. L. R 1?? Cr 5 Pat. L. T. 609 : 88 I. C. 1014 : 1924 Pat 641

S 14—*contd.*

——the whole object of s. 14 (1) of the Income-tax Act is to exempt from taxation in the hands of an individual that which has already been taxed in the hands of the joint family as such. 5 Pat. 20 : 93 I. C 999 : 1926 Pat. 256 . 7 Pat. L T. 391

S. 18.

——deduction from salaries must be made at the rate applicable to the estimated income for the year of assessment. 1 Rang. 335 : 1924 Rang 30. 83 I C. 20.

——the deduction of income-tax from salaries under s 18 at the time of the payment of the salary must be made at the rate applicable to the estimated income for the year of assessment. 83 I C 20

S. 22.

——where an assessee in a verified return under this sec. declared that he had no income from a particular source, if the authorities disbelieve it, the onus is on them to prove the income. 50 C 905

——where a person voluntarily files a return of his income for the previous year in the prescribed form whether it is a valid return is a question of law and it is necessary to state the case to the H C., 1929 Lah 246

——*if the commissioner is not satisfied with the statement of* the assessee, he has ample power to call upon him to produce his books or other documents relating to the collections and to enforce attendance of the witnesses to give evidence upon a question about which he has any doubt 2 P. L R 242 6 - at L T 355 : 1925. P 313

——the Income-tax officer can call for the accounts or documents under s 22 (4) after the issue of notice and before the filing of the return and s 23 (2), 23 (3) and 37 give him ample powers to call for any documents he requires, but the failure to comply with any of those notices does not authorise the Income-tax officer to make a summary assessment to the best of his judgment under cl (4) of s 23, 1927 Pat. 390 ; 8 Pat. L. T 686 but it has been held by the Punjab H. C. that sub-clause (4) is very wide and gives the Income-tax officer very wide powers 101 I C. 321 1927 Lah 5.

——an Income-tax officer can serve the proprietors of a firm with notice under s. 22 (4) to produce their accounts but he cannot enforce the production thereof He can only act under s 23 (4). 27 Punj. L R 298 . 95 I. C. 308 : 1926 Lah. 326.

——an assessment by rule of thumb without issuing notice under s 23 cl (2) to the assessee is illegal. 94 I C 614 : 7 Lah 201 . 1926 Lah 161 8 L. L J 106.

S. 22—*contd.*

was issued 1928 Pat 529 : 9 Pat. L. T. 653 7 Pat 852 . 114 I. C. 211, F. B.

——even after [illegible] officer can issue a [illegible] sumarry assessment. F. B. 8 Pat. L. T. 686 [illegible] 524 1928 Lah 219 which [illegible] 1927 Lah 5, [illegible] when enquiry under s 23 [illegible] Lah, 219, contra 52 M [illegible] 3, 1928 Pat 529 F B. 50 A 589, 49 M. 831 F. B.

S. 23.

——an assessee whose return is disbelieved and who is summarily taxed without being given notice under s. 23 (2), can apply to the H C. to have a case stated under s. 66 (2) as the question raised challenges the very foundation of the assessment 29 C. W. N. 23 1925 Cal 173

——in the case of an unregistered firm a notice under s 23 (2) can be served on any member of the firm as provided for in s 63 (2) of the Act. It is not necessary that notice should be served only on the member of the firm who made the return The word "person" clearly includes a firm 22 L. W. 206 : 49 M. L. J. 124 . 48 M. 6[illegible] 90 I. C 549 · 1925 Mad. 1048.

——when an Income-tax officer is not satisfied with a return made under s. 22, he has under s. 23 (2) to serve on the assessee a notice to produce evidence on a specified date (per Greaves J) such notice need not specify the points on which evidence is required (per Mukerji J) s 23 is mandatory and it would only be [illegible] the notice specifies the points on which evidence is required 29 C W. N. 591 . 88 I. C 404 . 1925 Cal. 890

——it is not illegal to issue a combined notice under ss. 22 (4) and 23 (2). 32 C W. N 710 · 1928 Cal 587 . 56 C. 39 114 I. C 9[illegible] F. B., 50 A 589 · 108 I C. 234 : 1928 All. 283 : 26 A. L J 3[illegible]

——the first thing to be done before a person can complain of any departure from the principle that the assessment is to be d[illegible] [illegible] evidence which [illegible] not do so the [illegible] ent to the test [illegible] ires is that the [illegible] should produce [illegible] ort of his case [illegible] If the assessee does so the mere fact that the Income-tax officer does not accept that evidence as conclusive of the matter does not bring the case within the provisions of s 23 sub s (4) 6 P. L. T 555 : 89 I. C 675 : 1925 Pat 694.

——sub-sec. 4 of s. 22 prevents the Income-tax Officer from calling upon an assessee to produce books of account going back for a period of more than three years prior to the accounting

S. 23—*contd.*

period, but there is no such limitation upon the power to call for documents. 50 A. 589 108 I. C. 234 . 1928 All. 283.

——if evidence is adduced by the assessee in support of his return, it should be accepted unless it is rebutted by other admissible evidence and not by any mere hearsay. When accounts are put in they should be accepted as the basis of the assessment. 94 I C. 614 1926 Lah 161 · 7 Lah 201 8 C L J. 106.

——an assessee filing a statement of his income in which he grossly understates his income may file it in appeal prefered by him. 49 M 831 . 24 L W 771.

——the Assistant Commissioner must satisfy himself that the action of the Income-tax officer under s. 23 (4) was in order. 101 I C. 321 : 1927 Lah 5

S. 24

——under this sec the share of loss in a registered firm has been permitted to be not against the partner's other incomes, but the same privilege has not been entered to the share of loss in an unregistered firm L R 3 A 535

S 25

——where a company which was carrying on a business went into voluntary liquidation, the liquidators transferred the business [illegible] ...his was [illegible] ...ttract [illegible] ' Bom.

S. 26.

——a new company is not liable to pay super tax in respect of a year for which its predecessor was not liable for supertax. 47 A 715 23 A L. J 685 88 I. C 239 1925 All 535 *but see below*

——where an unregistered Association is converted into a limited company [illegible] ous year is the [illegible] Company. 52 B. [illegible] 642 : 26 A L J 4[illegible]

——where a registered firm succeeds to the business of an undivided Hindu family the assessment should be made on the firm constituted at the time of making the assessment 49 A. 611 : 102 I. C 189 1927, All. 397.

——a family business may continue after the disruption of the family 1929 Lah. 461.

——the words "from the date of receipt of any demand" do not mean from the date of receipt of any notice of demand under s. 20. 55 C 565 32 C. W. N 287 1928 Cal 837.

S. 27.

——it would be for the income-tax officer to decide whether on the particular facts of the case sufficient cause has been show[illegible]

S. 27—*contd*

by the assessee for *not* appearing in time and as to whether his failure to appear *and produce* his accounts in time is justified by sufficient cause. *1924 Mad. 680 ; 1924 M. W. N. 785 : 84 I. C. 331.*

S 29.

——under s 29, no period, within which a notice demanding income-tax is to be issued, is prescribed and therefore *prima facie* a notice issued, about 14 months after the expiration of the year of assessment would necessarily be too late. 1925 P. H. C. C. 311 : 1925 Pat. 581 . 5 Pat 13 : 7 Pat. L T. 269.

——suit for declaration that assessment is illegal, as being *ultra vires* 92 I C. 351 · 1926 Bom. 50.

——period within which notice demanding income-tax should be issued. 5 Pat 13

——whether the Income-tax officer legally assessed under s. 23 is a question of law and therefore no appeal lies to the Assistant Commissioner 100 I C. 774 . 1927 Lah. 288.

——the word "ordinarily" means that there is nothing to prevent the authorities from entertaining an appeal preferred after 30 days. 31 C W N 630 . 1927 Cal. 518 . 103 I. C. 130.

S 31.

——power of appeal is limited to the subject-matter of assessment, 6 Pat L. T 166 . 86 I C 777 : 4 Pat. 385 ; 86 I. C. 777 ; 1925 Pat. 408

——application may be made in respect of order under ss 31 and 32 when there is a question of law involved. 4 Bur. L. J. 102.

S. 32.

——it is only in cases where there has been an appeal from an assessment by an income-tax officer under s. 31 or 32 that the assessee can apply to the Commissioner for a reference to the H. C. It does not apply to cases where the assessment was accepted without appeal. 4 Pat. 224 : 1925 P. H. C. C. 17 : 86 I. C. 178.

S 33

——no application lies to the Commissioner of Income-tax to state a case to the H. C. in respect of any order passed under the provisions of s. 33. Application may be made in respect of orders under ss. 31 and 32 when there is a question of law involved 4 Bur. L J 102

... his decision under s. 33 and
issues ... give a sufficient and reason-
able ... e heard. 7 Pat L. R. 130:
5 Pat ... 1924 Pat. 644.

——the Commissioner's powers under this sec. are subject to limitation imposed by s. 35 100 I. C. 675 : 1927 Lah. 249 : 9 Lah L J 352 8 Lah. 354.

——for the purpose of re-assessment proceedings s. 33 is subject to s. 34 1927 M. W. N. 611 : 108 I. C 73 : 1928 Mad. 257 : 54 M L. J 298 F. B.

S. 33—*contd*

——the H. C. has power to order the Commissioner to state a case embodying any point of law arising under s 33, 49 M. 725 : 1926 Mad 1051 : 24 L. W. 664 F B

——but the H. C cannot compel the commissioner to state a case. 30 C W. N 831 96 I C 702 1926 Cal 998

S. 34.

——assessments to supertax for 1921-1922 on the income of 1921-1922 could be made in 1922-1923 under the heading of adjustment in cases in which *during provisional assessment proceedings, it was* found that the assessee's income was below the taxable amount for ... "imately found in ... as amended by ... o be assessed to ... ad 485.

——"escaped assessment" covers not only a case where the Income-tax officer omitted to consider the question at all but also a case where he on consideration came to the conclusion *ex-hypothesis* and eroneous conclusion that the property in question was not assessable 22 L. W 822 49 M 22 ; 81 I C. 940 50 M L. J. 63

——"escaped assessment" covers also a case when an income has ... not really ... Lah. 354 ... irted under ... under s 28 ... vice within year of a proper notice on the assessee to assess is a condition ... 7 M. W N 611 F B ... ess after the expiration of ... C 675 1927 Lah 248, 8

S. 35.

... of returns of 5 concerns ... is, later on, it transpired ... applicant who was thus ... inst enhancement The applicant thereupon claimed assessment collectively on those 5 and one more which was in great loss, held his application was rightly refused 4 Pat. 224 86 I C. 170 : 1925 Pat 352.

——rectification of a mistake which has the effect of enhancing the assessment cannot be made after the lapse of one year from the demand of the assessee, no matter that the assessee moved the Commissioner during that period. 101 I. C. 139 9 Lah L. J. 373. 8 Lah 357 : 1927 Lah. 421 · 28 Punj. L. R. 212.

S. 37.

——this sec being penal should be construed strictly. 31 C. W. N. 996 : 46 C. L. J. 550 : 1927 Cal. 727 : 104 I. C. 903 : 55 C. 423.

S. 39.

——*s. 39 does not prohibit a suit for declaration* that an assessment is *ultra vires.* 27 Bom. L. R. 1507 : 92 I C. 351 1925 *Bom. 50.*

S. 42, 43.

——Foreign Company carrying *on* business through Indian Company,—*profits* earned *in Indian business* if assessable to income-tax and supertax. 113 I *C.* 602 : 52 B. 726 · 1928 Bom 465 · 30 Bom L. R 1190, 52 *B. 702 : 1928 Bom.* 448 : 30 Bom L. R 1172 · 113 I C. 593.

S. 50.

——*the words* "tax *was recovered*" mean "tax was recovered by the government" and not "tax was refunded to the assessee" 51 M 920 39 *M* L. T. 481 : 1927 M. W. N. 837 : 1927 *Mad.* 1039 . 106 I C 127, F. B

S. 52

——the Income Tax *Act* [illegible] al jurisdiction and [illegible] ment. Where the [illegible] *levied* an asses [illegible] under the Act he [illegible] exercises only a jurisdiction under the Act and a suit will not lie in a civil court challenging his order. even if there are errors in calculation. 78 I. C 940 : *1925 (S) 130.*

S. 55.

[illegible] Tax Act of 1922 *from* which [illegible] ome of individuals [illegible] upertax has been [illegible] 470 : 78 I. C 751.

——*assessee* controlling and *receiving* income from family companies is liable to supertax 51 B. 372 : 102 I. C 49 1927 *Bom 371.*

S. 56.

——there is no provision for the assessment of Income tax on the estate of a deceased person. 31 C. W. N. 630 : 1927 *Cal* 519 : 101 *I. C.* 120.

S. 63

——in the case of an *unregistered* firm a notice under s 23 (2) need not be served only on the *member* of the firm who made the return but under s 63 (2) of the *Act it* can be *served* on any member of the firm and such service is good service. 49 M 642 · *90 I. C* 549 : 49 M L J. 124.

S. 64

——under s. 64 (1) the Income *Tax Officer* of the area in which the principal place of business is situated has the duty of assessing

S. 64—contd.

the whole of the income derived from the principal place of business as well as the various branches. 23 A. L. J. 379 . L. R. 6 A. 325

——ordinarily the principal place of business of a firm or company is at the place, where the persons directing the firm or company do their business 49 A. 616 ; 100 I C. 756 ; 1927 All. 299.

S. 66.

——clause (1) of the sec. refers to the reference of a question of law either by the Commissioner on his own motion or on reference from any subordinate Income-tax authority and not at the instance of an assessee. 105 I. C 167 : 1927 Lah 513. (49 M. 925 **Sp. B**, 5 Pat. 595 **F. B.**, 4 Pat 224) *Rel on* 3 Pat. 664 *Doubted.*

[illegible] assessee to refer any [illegible] not any question [illegible] able one so if no [illegible] within the time [illegible] and the Commissioner [illegible] case raising that point [illegible] **F. B** [illegible] supposed mistake which has the effect of enhancing the assessment without issuing notice to the assessee and the Assistant Commissioner's refusal to cancel such enhancement gives rise to a question of law. 1929 Lab. 326

——an application for Reference made under s 66 (2) more than one month after the order giving rise to the application should not be entertained and a reference made on such application is without jurisdiction 6 Lah 373 , 90 I C 1018 26 Punj L R. 796

——s 66 (2) is express and any official or court cannot extend the time 50 M 335 1927 M W N 171 1927 Mad 545 , 100 I C. 291, 98 I C 299 1926 Bom 566 28 Bom L R 1096

——in cases under sub-sec. (3) it is the duty of the Commissioner to find all the relevant facts 55 C 953 1928 Cal 836 · 111 I. C. 828

——sub sec (3) covers only the case of a refusal on the ground of any question of law arising and not to refusal on any other ground 30 Bom L R 1114 1928 Bom 434

——when a Judge directs a Commissioner of Income Tax to state a case for the opinion of the H C the question should be so framed as to leave it to the court which afterwards have the reference to decide the matter on the facts stated by the Commissioner of Income-tax who makes the reference 49 M L J. 425 48 M. 836 1925 Mad 1242

——where the Commissioner makes an order in review under s 33 assessee cannot require the commissioner to state a case to the H. C. under s 66 98 I C 299 1926 Bom. 566 : 28 Bom L. R 1096

——opening price of the balance of stock for the next year should be estimated at the price shown at the end of the previous year 49 M L. J 425.

S. 39.

——s. 39 *does* not prohibit a suit for declaration that an assessment *is ultra vires.* 27 Bom. L. R. 1507 : 92 I. C. 351 : 1925 Bom. 50.

S. 42, 43.

——*Foreign* Company carrying on business through Indian Company,—*profits* earned in Indian business if assessable to *income-tax* and supertax. 113 I. C. 602 : 52 B. 726 : 1928 Bom 465 : 30 *Bom.* L. R. 1190, 52 B. 702 : 1928 Bom. 448 : 30 Bom L R 1172 : 113 I C. 593.

S. 50.

——the words "tax was recovered" mean "tax was recovered by the government" and not "tax was refunded to the assessee" 50 *M.* 930 : 39 M L. T. 481 : 1927 M. W. N 837 : 1927 Mad 1039 : 1?? I C. 127, F. B.

S. 52

——the Income Tax Act creates a special jurisdiction and provides special remedy against order of assessment Where the Collector professes to tax income only and has not levied an assessment on any of the classes of *income excepted* under the Act he exercises only a jurisdiction under the *Act and* a suit will not lie in a civil court challenging *his order,* *even if* there are errors in calculation. 78 I. C. 940 : *1925 (S) 130*

S. 55.

——there is nothing in the Income Tax Act of 1922 from which it can be inferred that in computing the taxable income of individuals for purposes of supertax, dividends *upon* which supertax has been paid by a company, should be *deducted.* 3 Pat. 470 : 78 I. C 733, 5 *Pat.* L. T. 489.

——assessee controlling and receiving income from family companies is liable to supertax 51 B. 372 : 102 I C. 49 : 1927 Bom. 371.

S. 56.

——there is no provision for the assessment of *Income-tax* on the *estate* of a deceased person. 31 C. W. N. 630 : 1927 Cal 518, 103 I. C 120.

S. 63.

——*in the* case of an unregistered firm a notice under s 23 (2) need not be served only *on the member of* the firm who made the return but under s. *63 (2) of the Act it* can be served on any member *of the* firm and such service is good service 48 M 6?? 90 I. C 549 : 49 M. L. J. 124.

S. 64.

——under s. 64 (1) the Income Tax Officer of the area in which the principal place of business is situated has the duty of assessing

S. 64—*contd.*

the whole of the income derived from the principal place of business as well as the various branches 23 A. L. J. 379 : L. R. 6 A. 325

——ordinarily the principal place of business of a firm or company is at the place, where the persons directing the firm or company do their business 49 A. 616 100 I. C 756 · 1927 All 299.

S. 66.

——clause (1) of the sec. refers to the reference of a question of law either by the Commissioner on his own motion or on reference *from any subordinate Income-tax authority and not at the instance* of an assessee. 105 I. C. 167 : 1927 Lah 513, (49 M. 925 **Sp. B**, 5 Pat 595 **F. B**, 4 Pat 224) *Rel on.* 3 Pat 664 *Doubted.*

[illegible]

should not be entertained and a reference made on such application is without jurisdiction 6 Lah 373 ; 90 I C. 1018 · 26 Punj L R 796

——s 66 (2) [illegible]
the time 50 M
291, 98 I C 299

——in cases under sub-sec (3) it is the duty of the Commissioner to find all the relevant facts 55 C 953 1928 Cal 836 111 I C. 828

——sub sec. (3) covers only the case of a refusal on the ground of any question of law arising and not to refusal on any other ground 30 Bom L R. 1114 1928 Bom 434

——when a Judge directs a Commissioner of Income Tax to state a case for the opinion of the H C the question should be so framed as to leave it to the court which afterwards have the reference to decide the matter on the facts stated by the Commissioner of Income-tax who makes the reference 49 M L J. 425 48 M. 836 1925 Mad 1242

——where the Commissioner makes an order in review under s 33 assessee cannot require the commissioner to state a case to the H C under s. 66. 98 I. C 299 · 1926 Bom. 566 28 Bom. L. R 1096

——opening price of the balance of stock for the next year should be estimated at the price shown at the end of the previous year 49 M. L. J 425.

S. 66—*contd.*

——the question whether an assessee is a member of a joint family sharing in the firm or whether he is separate is a pure question of fact, s. 66 of the new Act does not give a right of appeal ... the decision of ... ference to the ... open to the ... as a division of the family 1927 M. W. N. 591 F. B.

——the legal effect of division of a joint Hindu family is a question of law 103 I C 522 : 1927 Lab. 616

——by s. 66 (6) of the Act costs are at the discretion of the court. L. R 6 A 218.

——non-compliance with s 23 (2) though not raised in proceedings under s 66 (3) before Commissioner was held to be question of law under s 66 (2). 1925 Cal. 173 : 85 I. C. 520

——whether the Income-tax officer proceeded legally to assess the assessee under 23 (4) is a question of law under this sec. 100 I C. 774 1927 Lah. 288.

——while it is quite proper for the Income-Tax Commissioner in making a reference to express his opinion on the questions involved, it is his first duty to state clearly and fully the material facts admitted or proved in evidence before him. 5 Pat L. T 497. 82 I C. 653 . 4 Pat 73 . 1924 Pat. 679, 104 I. C. 841.

——whether reasonable opportunity was given under s 33 and whether personal income can be jointly assessed with family income are questions of law necessitating a reference to the H C. 84 I C 792 1925 Pat. 155.

——the Oudh Chief Court is a High Court within the meaning of s 66, 92 I. C 257.

... should state the questions of ... the H. C and the ... the question of law ... ed to the H. C. 92

——when the members of a joint family are separated and separately ... and deposits are necessary. 50 M. ... 5 ; 1927 M. W N 171 335 . I ... for the purposes of the Act. 91 I C. 980.

——where the Commissioner or the Board of Inland Revenue decides the question of assessee's principal place of business under s 64 it is final and cannot be interfered with by the H. C unless there ... total failure to apply the plain provision of sec 64. ... J. 225

... Commissioner is bound ... improper process or by ... 100 I. C. 897 . 6 Pat. ... 7 : 32 C. W N 413, 1928

S. 66—*contd.*

mandamus under
application and
I C. 128 · 1926

the Income-Tax
provided 4 Pat.

ly when assessee
is competent to apply to the commissioner under s. 66 (2), 27 Punj. L. R. 411 . 96 I C 382 1926 Lah 400

——in appeal to Privy Council certificate of the H C. is required,—when certificate can be granted 28 Punj 443 100 I C. 97 : 1927 Lah 181 8 Lah 269 , 8 Pat. L T 791 25 A L. J 964 : 1927 P C 242 · 53 M L J. 819 · 32 C W N 237 47 C L J. 1 106 I. C. 156 : 30 Bom. L R 60 1928 M. W N 95 P C

S. 67

——this sec. is not *ultra vires* by virtue of s 32 of the Government of India Act. 5 Rang. 825 1928 Rang 70 109 I. C. 180.

INDIAN EXTRADITION ACT

——Extradition under any condition is an invasion of the common law right and where there is a treaty followed by a Statute recognising the treaty, the procedure is to be in accordance with the treaty and statute and no further condition can be imposed by the courts 30 C L J 24

——the East Indian possessions of France are not a foreign state. *above case.*

Ss 3-4.

——this Act provides for bail to be furnished by person accused of certain crimes and the matter is one which must be regulated by the provision of the Cr P C , so the H. C has the fullest discretion in the matter 15 C W N 736 12 Cr L J 358 10 Ind C 958 2 Cr. C. L 327

n Act is not subject to
W N 737 38 C. 547 .
227 16 M. L J. 128
375 . 12 C. L. J. 503 :

——the jurisdiction of the H. C to give directions in the nature

under it, *above case*

Ss. 3-A—*contd.*

——where a warrant under s. 4 of this Act had been issued by a M. when the fugitive was outside the local limits of the jurisdiction of the M. the warrant was at its inception without jurisdiction. *above case.*

——a person against whom extradition proceedings are taken must under the Act be given a reasonable opportunity of adducing evidence. *above case.*

——s 3 gives the Govt. authority to empower any M. to enquire into a case who has jurisdiction to inquire into a crime of like nature and the fugitive need not be within the local jurisdiction. *above case.*

Ss. 7-8.

——there is no provision in this Act making inquiry by a competent British Court in Brititish India, into the truth of the accusation whether in the presence of the accused or otherwise, a condition [illegible] warrant of the Political [illegible] J. 439, 41 C. 400 [illegible] of [illegible] fs. with a view to [illegible] e and they should.

——where a warrant is issued by a Political Agent under s 7 its execution by the D M. in accordance with the Act is an executive [illegible] H. C. [illegible] interfere in revision with such executive [illegible] otherwise than by way of [illegible] untouched by this decision

——an order of a Magistrate under s. 7 is a judicial one and its propriety can be gone into by the H. C under s. 439, 491 or 561 A of the Cr. P. C., 53 B. 149 : 1929 Bom. 81 . 31 Bom. L. R 62.

——where a warrant is sent by political Agent of a Native [illegible] of the duty of the M to [illegible] or not, the responsibility [illegible] L. J. 755 [illegible] 275 : 27 Cr [illegible]

[illegible] the jurisdiction of the [illegible] issued under Chap [illegible] der of a M under a [illegible] M. has acted in his [illegible] to revision by the [illegible] 36. Cr. Ref.

[illegible] it has no power to interfere in respect of warrant issued by a Political Agent of a Native State under s 7 of the Act, on the grounds either that there is no prima facie case against the petitioner or that the [illegible] originally moved, do not [illegible] said sec. 26 P. W. R.

Ss. 7-8—*contd.*

——the M cannot hold a person to bail to appear before a tribunal in a State to which the Act applies. The M. can bind over the prisoner to appear before himself, and then when the prisoner [illegible]

——the M. cannot release the prisoner, who has been arrested on a warrant issued by the Political Agent, on bail and direct him to appear before the Political Agent on a certain date in the absence of endorsement authorising the M. to pass such order. 12 C. W. N. 602: 7 C. L. J. 171: 7 Cr L. J 198

——the M. in British India to whom a warrant has been addressed under s. 7 of this Act, has the power to admit an arrested person to bail apart from the provisions of ss. 8 and 8A *above case.*

——the offence of chea [illegible] British India is concerned [illegible] withstanding its omission fr [illegible] between the British India G[illegible]

——a warrant of extradition signed by an officer who has not [illegible] C 175: 25 Cr L. J 687

[illegible]tant British Envoy is not

S. 10.

[illegible] India powers [illegible] information [illegible] to have been [illegible] His Majesty [illegible]ing a Foreign State, and to order warrant to issue for the arrest of such accused persons. 8 Bom L R 507 4 Cr. L. J 49

——where the police arrests a person without warrant either under s 54 g of the Cr P. C. or s 32 g of the Bombay City Police Act 1902 and the person so arrested is detained by a M under s. 22 of the Extradition Act it is open to the M. to release the arrested person on bail under s 10 (4), 26 Bom L R 984.

S. 14

——the H C has no power to order the transfer of an inquiry pending before a M under provisions of s 14 of the Extradition Act, XXI of 1879 as the competency of the M to hold an inquiry under the sec depends on the authorization of the Executive Govt. 15 C. W. N 735 · 2 Cr. L. J. 426.

S. 15

——this sec. ousts the jurisdiction of the H C to inquire into the propriety of the warrant. 7 Bom L R. 463: 2 Cr L. J. 439.

S 18.

——s 18 only provides that the Act shall not work against the will of either party so as unduly to impose any liability on a party. It does not prevent their co-operation in a friend's a ... according to the committee of nations. 91 I C 69 : 27 Cr. L J ... 1926 Sind. 126.

INCUMBRANCE

——adverse possession for 12 years is an incumbrance ... 244, 20 C. L. J. ... 25 C. W. N. ...

——transfer of a portion of a non-transferable occupancy holding is not an incumbrance. 30 C. L. J. 4, 43 C 558 ; 22 C L. J. ... C. W. N. 229 : 11 C. L. J. 16, 19 C. W. N. 176 n, 2 Pat. L. J. 45 ...

——a mortgage is an incumbrance within s 16 B T. Act and ... mortgage security is not extinguished till the sale has taken place in execution of the mortgage decree and the proceeds have been distributed in satisfaction of the sums due to the mortgagee ... C. L. J. 156.

not an incumbrance within s ...

——the mortgage of a portion of a non-transferable occupancy holding is an incumbrance and it is necessary to have it annulled under s 167 B. T. Act. 22 C. W. N. 662.

——incumbrance under secs. 159, 161 of the B. T. Act, ... the right acquired by trespasser by adverse possession and that can be avoided only under sec. 167. 14 C. L. J. 136, 17 C. W. N. ... 16 C. L. J. 539.

... does not make all ... 14 C W. N. ...

... creation of putni it cannot be called an incumbrance which ...

Incumbrance—*contd.*

annulled by the purchaser of putni at a sale for arrears of rent 19 C. W. N. 18

——a fictitious or collusive rent sale cannot avoid the incumbrance, i e, the interest of the under-tenure holder 19 C. W N. 270

——when a property is sold for arrears of rent, it is sold free from any arrears due before sale. 24 C L. J. 34

——when dur-putnidar is ejected under sec 167, B T Act the *se-putnidar is necessarily ejected, the extinction of the superior* right carries with it the extinction of the inferior right if it be not a protected tenure under sec 160 B T. Act 17 C W. N. 1064

——an auction purchaser for 16 as rent is entitled to annul an incumbrance although the service of sale proclamation was not under sec. 167 B T Act 18 C W N 64 n, 1917 Pat. 143

——*boroj* or betel plantation may be protected interest 18 C W. N. 39

——a se-putni created by a dur.putnidar in pursuance of the lease granted to him, is a protectd interest. 21 C W N. 829

——a putnidar who has got his putni registered cannot annul an incumbrance under the putni after purchasing the proprietory right at revenue sale 18 C. W. N 672

——adverse possession against sub-tenant is an incumbrence to be avoided under sec 161 B. T Act, by the purchaser of superior tenancy in execution of a decree for arrears of rent 21 C W N 155 But there is no provision in Ch XIV. of the B. T Act, for the sale of the lands held by an under raiyat nor for annulment of incumbrance created by an under-raiyat 16 C L J 539 16 C. W. N 831

——the interest of an under-raiyat is an incumbrance within the meaning of sec 161, B. T Act, which a stranger purchasing raiyati holding at a sale for arrears of rent is bound to annul under sec. 167, 19 C. W. N 1077; 43 C 178, but where such purchaser is the landlord himself, he need not annul the under-raiyati right 28 C 205, 17 C W. N. 860, 19 C. W N 412 18 C. L J. 252, 22 C. W. N 67 n, but where the landlord purchases the raiyati interest at private sale, he cannot treat an under-raiyat, holding under oral lease from the [illegible] 13 C. W N 913, (31 C 932, 34 . 205) *Dist.*

s. 100 T P Act is not an . 22 C W. N 131

——an intermediate interest created between a proprietory right and a *mokurari* is an incumbrance within the meaning of the Revenue Sale Law 1 Pat. 38.

——*Quære*—whether the purchaser of a *putni* is bound to annul incumbrances created not by the *putnidar* but by the *dur-putnidar* 23 C. W. N. 201.

——the purchaser of a holding under the Municipal Act for arrears of rent takes it subject to incumbrance 21 C. W. N. 425

——notice of annulment of incumbrance may be served as summons upon the deft. 18 C W. N. 259 P. C.

INJUNCTION.

General.

——an injunction is a discretionary relief and cannot obtained by a plff. out of possession when he does not ask for possession against the deft. ... 549, ... 5 I (... deter ... what the rights of the parties are and where does the balance of convenience lie. 16 C. L. J. 47 : 18 C. W. N. 176.

——it is well settled that a man who seeks the aid of the court by an injunction must show that the act complained of is in fact ... which if carried into effect ... mere prospect or ... act complained of ... 837.

——in granting a temporary injunction the court acts in aid of a legal right so that the property may be preserved *status quo*. 18 C. W. N 92.

——where in a suit for declaratian, perpetual injunction is not asked for, the court should not allow temporary injunction 18 C. W. N. 92.

——the mere fact of sole occupation by one co sharer does not necessarily constitute an ouster of the other co sharer, nor does it entitle the latter to a decree for joint possession 18 C. W. N. 3... ... interfere and preserve property ... for such purposes ... your of the plff. ... C. L. J. 427

——the distinction between a case in which a temporary injunction may be granted, and a case in which receiver may be appointed, is that in the former case, it would be sufficient if it be shown that the plff in a suit has a fair question to raise as to the existence of the right, while in the latter case, a good *prima facie* title has to be made out. 22 C. 549, 15 C 818.

——the court has no power to issue a temporary injunction to restrain the deft. from executing a decree *lawfully* obtained by him. 23 L. W. 85.

——in granting or withholding an injunction, a court should exercise a judicial discretion, and should weigh the amount of substantial mischief done or threatened to the plff and compare it with that which, if injunction granted, would inflict upon the deft. 14 C 189

——the granting of an injunction is a judicial act in the ... ting an injunct... ... cting without reason ... damage done to the ... of the plff. leads ...

General—*contd.*

[illegible]

appl. 14 C. 189, *apprd.*

——a court has no jurisdiction to grant a temporary injunction restraining [illegible] of the lanc [illegible] be interfere [illegible] sion of a br [illegible] the court granting the [illegible] on and not by separate [illegible] to disobedience of an order issued under clauses (1) and (2) of that rule but has a more general application and applies equally to disobedience to all injunction issued under s. 94 of the Code. 50 M. L. J. 401

——injunction-order though subsequently withdrawn must be obeyed so long as it exists. 20 C. W. N. 457, P. C

——in granting an *interim* injunction the court should see on which side, in the event of obtaining a successful result, will be the balance of inconvenience if the injunction do not issue, bearing in mind the importance of retaining immoveable property in *status quo*, 23 C. W N 677.

——in granting a mandatory injunction the Court should see the balance of convenience in favour of each party 108 I C 171.

——in a suit for mandatory injunction special injunry or substantial damage should be proved 109 I C 568 1929 Lah. 73.

——in the absence of fraud, collusion or fear of irreparable loss, no injunction will be granted to plff who is out of possession. 1925 Lah 167.

——order granting injunction must contain the finding as to the *prima facie* possession of property and whether the property is in danger of waste or damage. 1925 Mad 896 · 21 L. W 698

——on an application for a temporary injunction to restrain a sale in execution of a decree, pending a suit, the application must show a *prima facie* case. 1925 Pat. 337

——the court has no power to issue a temporary injunction against a person who is not a party to the suit 27 Punj L. R. 11

Cases in which Injunction was allowed.

——when a raiyat surrendered some portion of the holding in favour of co-sharer landlord who acquired it for the purpose of erecting structures thereon and to hold market on that site, the other co-sharer landlords were entitled to obtain an injuction to restrain the defts. from altering the character of the land. 24 C L. J. 85, 34 C 718 : 34 I A. 133 : 6 C. L J. 19 P. C. *Dist.*

——because a co-owner is, with the tacit or express consent of his co-sharer, in sole occupation of a portion of joint property, he

Cases in which injunction was allowed—*contd*

is not entitled to change the nature of that possession or to use the property in a different mode 19 C L. J. 47

——where substantial portion of the building has been erected by the deft. (co-sharer) after he had become aware of the inst... of the suit and of the application for temporary injunction, the court ... injunct... ted ... dore

...troversy between ... should be ... ore the pl...

a co-sharer, in a partition suit was granted an injunction as the building was being erected by the other side on a plot which was to fall to the allotment of the piff)

——when a decree passed by a Revenue Court comes for execution in the civil Court, proceeding in it may be stayed by injunction when a suit has been brought for declaration that the decree was obtained by fraud. 18 C. W. N. 92.

——injunction was granted restraining the deft from granting lease to prevent embarrassment 17 C. L J 427.

——where the act of the deft amounts to an ouster of the pl... from his possession of joint property, pecuniary compensation ... being an adequate relief, an injuction would be the proper remedy 29 C 500, 19 B. 269.

——as every owner of land is under an obligation not to allow the branches of his trees to overhang and the roots of his trees to penetrate his neighbour's land to the detriment of the latter, the court can grant mandatory injunction for the removal of such nuisance, 31 C 94: 8 C. W. N. 710, 19 B. 420 but a perpetual injunction restraining the deft from planting trees, the roots of which are likely to penetrate the foundation of the plaintiff's building and wall, is unworkable. 31 C. 944, 24 C. 260. *Ref.*

——where one co-sharer was erecting a *Kacha* building ... common land which was in excess of his share which would ... him on partition, perpetual injunction was granted 12 A 436, F B 9 A. 661. *overruled*.

——actual damage is not necessary to grant injunction 3... 527, 18 A. 115, 12 A. 36 F B

——courts in India can under Or. 39. r. 2. C. P. C issue temporary injunction in mandatory form 41 M 208, (41 C. 436, 16 Bom L. R. 566) *Ref.* 38 B. 381, not *fol.*

... for a temporary injun... ... in support of his alleged ... f an injunction with ... ng to establish an easement against him. 24 Bom. L. R. 305 : ... 356.

Cases in which injunction was allowed—*contd*

——though it is possible for the plff to open another window on the opposite wall or one of the other walls which would be a neighbourly act, he is not legally bound to do so and is entitled to enjoy

25 L. W 154.

——where the plff had been allowing the deft to discharge water on a vacant site of the plff. for some years but the deft.

4 Pat. L J 48

Cases in which injunction was disallowed.

——when a co-owner seeks a decree for injunction perpetual or mandatory, to prevent change in condition or to restore it to original condition, the court is bound to decide the question on equitable ground 11 C. L J 189, (in this case *Jagadharti bhiti* and *Chundi Mandap* were in *ijmali*, *Chundi Mandap* fell down and was being rebuilt by the deft)

——where the plff. sued for declaration that a certain order of the Revenue Court was without jurisdiction, but did not ask for perpetual injunction, he could not ask for temporary injunction during the pendency of the suit 18 C. W N. 92.

——when each co-sharer was in occupation of some land as *Khamar* and one co-sharer sued the other for possession and

it did not allege that

substantial injury, no

18 C. W N 328

against trespasser in

——when one co-owner erects a wall, the court should not order the demolition of the wall when there is no evidence to show that injury has been done and that resonable steps were taken in time. 30 C. 901

——when one co-sharer is in exclusive possession and deals with it in a particular way and in the ordinary course, remedy of others, is to sue for partition. 28 C 223.

——the fact that a portion of a land on which a tank has been excavated by the deft was fit for cultivation, does not constitute substantial injury to grant injunction. 14 C. 236.

——in a suit by one co-sharer for the removal of permanent building erected by another on land jointly held, the court will order its removal only in proof of injury to the plff., and of the

Cases in which injunction was allowed—*contd*

is not entitled to change the nature of that possession or to use the property in a different mode. 19 C L J. 47

——where substantial portion of the building has been erected ... of the [illegible] be ... [illegible] junction ... cted ... n down

——where there is a substantial question in controversy between the *parties*, pending its determination the *status quo* should be maintained to the necessary *extent*. 19 C. W. N 412 (here the plff. a *co-sharer*, in a partition suit was granted an injunction as a building was being erected by the other side on a plot which was to fall to the allotment of the plff.)

——when a decree passed by a Revenue Court comes for execution in the civil Court, proceeding in it may be stayed by injunction when a suit has been brought for declaration that the decree was obtained by fraud. 18 C. W. N. 92

——injunction was granted restraining the deft. from granting lease to prevent embarrassment 17 C L J 457.

——where the act of the deft. amounts to an ouster of the plff. from his possession of joint property, pecuniary compensation not being an adequate relief, an injuction would be the proper remedy. 29 C. 500, 19 B. 269.

——as every owner of land is under an obligation not to allow the branches of his trees to overhang and the roots of his trees to penetrate his neighbour's land to the detriment of the latter the court can grant mandatory injunction for the removal of such nuisance. 31 C. 94; 8 C. W. N 710, 19 B. 420 but a perpetual injunction restraining the deft. from planting trees, the roots of which are likely to penetrate the foundation of the plaintiff's building and wall, is unworkable. 31 C. 944, 24 C. 250. *Ref.*

... erecting a Kacha building ... share which would ... was granted 12 A. 436, F B ...

——actual damage is not necessary to grant injunction ... 527, 18 A. 115, 12 A. 36 F B.

——courts in India can under Or. 39, r. 2 C P. C issue temporary injunction in mandatory form. 41 M. 208, (41 C 436, 16 Bom L R 566) *Ref.* 38 B. 381, not *fol.*

... for a temporary injunction ... in support of his alleged ... an injunction ... to establish an easement ... 56.

Limitation.

——there is no period of limitation prescribed by the L. Act for a suit for permanent injunction against the deft 31 C. W. N. 82.

INSOLVENCY ACT, *See* "**Provincial Insolvency Act**"

INSTALMENT AND WAIVER OF RIGHT OF THE CREDITOR.

Instalment.

——parties cannot by contract change the law of limitation 17 C. W. N 518, but see 39 M. 109 F B

——a rent-decree cannot be made to be payable by instalment. 11 C. W. N. 857, 7 C. W. N 518.

——if a rent decree is passed to be payable by instalment limitation runs from the date of decree and not of default 17 C. W. N. 518

——where the defence is frivolous no instalment should be allowed. 71 I. C. 303

——the fact that the deft's estate has been brought under the management of the Court of Wards is not a ground for allowing instalment, 1923 Lah 256 73 I C 800.

——in case of instalment bonds with the stipulation of whole debt becoming due on the default of one instalment limitation runs from the breach of that instalment unless there has been a waiver by the acceptance of the overdue instalment 13 C. W. N. 1004 : 9 C L. J. 226, 36 C. 394

——when option is given to the creditor in a bond or to D Hr in a decree to take step on the first default, limitation runs from the first default 24 C 281 . 1 C W. N. 229.

——when there is stipulation of the whole amount becoming due on default of any instalment a suit for unpaid instalment only bars a subsequent suit for the remaining instalment 25 Bom L R 203 1923 Bom 201 . 72 I C 290, 20 Bom. L R. 773, 37 A. 400, 430 671, 39 M 981

Waiver of right of creditor.

——mere abstinence on the part of the creditor from bringing a suit for the recovery of the whole amount on the failure of payment of the specified instalment, does not amount to waiver. 13 C. W. N. 1004 36 C. 394 9 C L J. 226, 19 M L. J. 372 ; 32 M 284 ; 5 M. L. T. 351, *Ref.* 13 C. W. N. 1010 4 I C. 17, 31 C. 297, 85 I. C. 784.

——the mere fact of the decree holder not conferring the right given to him to realise the whole amount which falls due on default of one instalment does not in itself amount to a waiver for all time to come. 85 I. C 784 (c)

——such a waiver can be effected not only by acceptance of a subsequent instalment but also in variety of other ways and it may be inferred from various circumstances But it must always depend on some definite act or forbearance on the creditor's part 13 C. W. N. 1010 ; 4 I. C. 17, 31 C. 297 *Ref.*

Waiver of right of creditor—contd.

——when a debt is payable by instalment without interest but with *interest on default* to pay any instalment and the creditor accepts the dues of an instalment after default without contest *he waives his right to interest if he takes that in discharge of any specified instalment* not in reduction of the debt generally 43 A. 38

——acceptance of part of an overdue instalment does not amount to waiver, as there is still something due and there is still *a default.* Similarly the acceptance of interest alone does not amount to waiver. 31 C. 83; 8 C. W. N. 66, (5 C 97, 15 C 502) Dist. I. B. 125, 17 B. 555, 20 B. 109, 27 B. 1, 2 A 857, 12 M. 161, Ref

——acceptance of overdue instalment amounts to waiver 27 B 1 F. B., 13 C W N. 1010 : 4 I. C. 17.

——*waiver* is conset to dispense with or forego something to which a person is entitled 19 C. W. N. 1172.

——in the case of instalment-decree default in payment of one instalment can be waived and time begins to run from the date of actual default. 86 I. C 1051 : 1925 Cal. 1012.

INTEREST.

Application of usurious Loans Act.

——in a transaction subsequent to 1918 the deft can avail himself of the Usurious Loans Act, and in transactions before that he must bring the case under s 16 (a) or (b) of the Contract Act 45 A. 506

When there is no stipulation or provision for the payment of interest.

——it is open to the court to allow damages in lieu of interest. 17 C. L. J. 399 : 15 C L J. 684, *fol*, 5 C. W. N. 356.

[illegible] provisions of the Interest Act [illegible]y of equitable relief in a proper [illegible] conscience require it 42 M. L.

——where there is no special agreement in a promissory note a statutory interest of 6 p c. is reasonable under s. 80 of the Negotiable Instrument Act. 18 C. W. N. 1216.

——where no interest is stipulated in a mortgage bond no interest is payable. 40 C 514, 11 C L. J. 186.

——where a decree does not provide for interest execut[illegible] court has no power to award interest. The remedy of the decree holder lies in bringing a suit for damages for detention of the decretal amount 53 C. 42; 94 I C. 997 : 1926 Cal. 505

Burden of proof of stipulation to pay interest.

——the burden is on the plff. to prove a stipulation to pay compound interest. 1927 M. W. N. 73 ; 31 C. W. N. 566. 45 C L J 318 29 Bom. L. R. 791 : 100 I. C. 668 : 1927 P. C. 50.

Payment before stipulated time

——if the mortgagee makes demand of the money before the stipulated time of payment and the mortgagor complies, the mortgagee is not entitled to interest. 19 C W. N 387.

Creditor preventing the debtor to make payment

——when the creditor prevents the debtor to make payment he is not entitled to interest. 20 C W N. 689

When the money is left with the creditor

——interest is payable on the debt although the money borrowed is left in deposit with the lender 69 I C. 205 1923 Nag. 85.

Advancement by partner

——when a partner advances money to the firm, he is entitled to interest. 23 C. L J. 148.

Interest or dower money

——under the Mahamedan Law a widow is entitled to interest on dower money, 25 C W N. 866 P. C., 38 C 475, 33 A 182, [illegible] 25 C. L. J 517 21 C W N 1

——interest at 6 p c p. a was allowed. 25 C W. N. 866 P. C.

Suit for account

——in a suit for account no interest should be allowed [illegible] there was *stipulation* 68 I C 678

Suit for contribution

——when several Jt Drs. make payment from time to time under a decree, only the defaulters will be liable for the [illegible] of interest upon the decretal amount in a suit for contribution. 31 C 597 31 I A. 94 8 C W N. 625 P C

Suit by co-owner.

——when one of several co owners has appropriated the [illegible]

Interest on costs of the suit.

——no interest on the costs could be charged when such interest was not allowed by the order of the Privy Council, 32 C. 494 · 9 C W N 372 1 C. L. J. 118, 23 C 357, 3 C. [illegible]

Liability of tenant to pay interest

——stipulation by tenant to pay interest at [illegible] p. c. per annum cannot be given effect to 23 C W N 291

——when a tenant holds over he is not to pay interest more than 12 p c per annum as provided in s. 67 B. T. Act, 2 C W. N. 525, 28 C 227

——under s. 169, B. T Act, the D Hr. landlord is en[illegible] to interest on arrears of rent paid to him from the balance [illegible] proceeds. 22 C. W. N 323.

Liability of tenant to pay interest—*contd.*

——interest to be paid by the tenant at the rate of Rs 150 p c. p. a. was held to be exhorbitant. 34 C. L J. 369.

When stipulation to pay interest is vitiated by undue influence or fraud. *(Ss. 16 and 17 of the Contract Act)*

What amounts to dominate the will of the debtor.

——the relation between a debtor and creditor is not one in which the former is to be taken as being situated in such a position that his will is bound to be dominated by the latter. 29 C. W. N. 1029: 90 I. C. 463.

——urgent need of money on the part of the borrower, does not of itself place the lender in a position to dominate his will within the meaning of sec. 16, Contract Act, 19 C W N 775 21 C L. J. 79: 42 C 652, 34 C. 150: 11 C. W. N. 249: 5 C L J. 106: 34 I. A. 9: 4 A. L. J. 109: 9 Bom. L. R 304: 17 M L J 43: 2 M L. T. 75 **P. C.**, 32 B. 37: 9 Bom. L R 1164, 31 C 233 7 C. W. N. 876.

——a mortgagee is entitled to contractual rate of interest where it is not shown that he dominated the will of the borrower or there was any undue influence or coercion: the fact that the interest runs up to a large sum is not sufficient ground for holding that the lender had dominated the will of the borrower. 23 C. W. N. 92 n.

When the transaction is harsh or unconscionable.

——in money-lending transaction the mere fact that the sum ultimately claimed exceeds enormously the amount originally advanced is no ground for holding the transaction unconscionable. 29 C. L. J. 165, **P. C.**

——renewal of loan with capitalised interest at intervals may at first sight appear oppressive, and yet there would be nothing harsh or unconscionable. 23 C. W. N. 233, **P. C.**

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——only exhorbitant rate of interest is no ground of interference by the court unless there is unfair dealing. 31 C. 233: 7 C. W. N. 876.

——mere delay in suing cannot be construed unconscionable, though interest is increased thereby. 31 C. 233: 7 C. W. N. 876, 52 I. C. 708, 9 A. 228, *Diss.*

When stipulation to pay interest is vitiated by undue influence or fraud—*contd.*

——it is difficult for a court of justice to give relief on the ground of simple hardship in the absence of any evidence to show that the money-lender had unduly taken advantage of his position even when the transaction appeared to be undoubtedly improvident, (in this case contract of compound interest at 25 p c was given effect to, the principal sum was Rs 550 and the decree was for Rs. 14301-7-9) 23 C W. N 130, P C.

——interest to be paid by a tenant at the rate of Rs. 150 p. c. p. a was held to be exhorbitant. 34 C L. J. 369.

Proof of undue influence or fraud

——undue influence or fraud must be precisely pleaded 2 Pat. L. T. 141: 5 Pat L. J 744: 1921 Pat. 107

——in the absence of fraud or undue influence the holder of an instrument is entitled to recover interest at the rate stipulated in the instrument, though the rate may be 25 p c p m 59 I C. 277 (C), undue influence (or fraud must be pleaded 2 Pat L. T 111, 59 I C 277, 5 P. L J 744: 1921 Pat 107, 60 I. C 282

——in the absence of proof that any undue advantage was taken by the landlord of his position as such, the rate of interest mentioned in the contract cannot be interfered with 48 C 93, 57 I. C 1004, 41 C L. J. 453 · 1925 Cal 722, 90 I. C 727

——in the absence of evidence that any undue advantage was taken by the landlord of his position the contracted rate of interest cannot be interfered with. 1921 Pat 107 : 61 I C 282

——in the absence of fraud or undue influence the stipulated rate of interest is recoverable. 59 I. C 277 (C).

——in the absence of undue advantage the mere fact that the rate of interest in a mortgage bond is excessive or hard is not sufficient to disallow the pliff interest at the rate of contract. 60 I. C 693 (C) 60 I. C. 733 (C)

——in the absence of anything to prove undue influence or that there was an unconscionable bargain. the mere high rate of interest is not to be treated either as penal or unconscionable, 30 C. W. N. 83 . 1925 Cal. 1193.

When the interest is penal

——a penalty under s 74 Contract Act will only follow a breach of a contract or an obligation Where there is no obligation at all there is no question of a penalty. 1925 P H C. C 353.

——the doctrine of penalties is not applicable to stip contained in decrees 1925 P H. C C 353

——when the stipulation to pay an increased rate of i retrospective running from the date of the bond, it is penal, 150 . 11 C W. N. 249 · 34 I A. 9 5 C. L J. 106 ; 9 Bom. 304 : 17 M L. J. 48 P. C , 29 C. 43. *contra*. 26 C. 300 N. 175

——stipulation to take less than specified rate of int ment be punctually made, is penal. 22 C. W. N. 226

When the interest is penal—*contd.*

——a stipulation charging enhanced interest from the date of the bond on failure of payment on the fixed date is penal and cannot be enforced 89 I. C. 896.

——where the interest is payable after default at an exorbitant rate but no interest is payable until default it may be treated as penal 110 I. C. 311 : 1928 Cal. 857, 27 Punj L. R 807 : 1927 Cal 113 100 I C 269.

——stipulation for interest simple or compound at a high rate is not itself a penalty 31 C 138, (26 C 80 : 29 C 823), *Dist*

——stipulation to take interest at a reduced rate in case interest is paid punctually does not make the original rate penal. 25 C W. N. 265 · 1920 M. W. N. 631 . **P. C**, 33 C. L. J. 414 : 25 C. W. N. 776, 61 I. C. 923 (C)

——the stipulation to pay a higher amount of annuity in case of default of punctual payment is penal but the plff. is entitled to a reasonable compensation, in this case 12 p c interest was allowed 25 C W. N. 262.

——the court is competent to grant relief whenever the rate of interest appears to the court to be penal. S. 47 of the Contract Act is in its present form comprehensive enough to include the type of cases where an exorbitant rate of interest is claimed, because it covers all cases where the contract contains any stipulation by way of penalty, 19 C. W. N 775, 21 C L. J. 79 · 42 C. 452

——the fact that the rate of interest is excessive may be sufficient by itself to justify the inference that the rate was penal and unenforcible. Once stipulated rate of interest is found to be unenforcible, the plff. is in the hands of the court which will decree such rate of interest as may appear to be reasonable 20 C. W N. 408

——the court is competent to grant relief whenever the rate of interest appears to be penal, what constitutes a stipulation by way of penalty is to be determined by the circumstances of each case. (in this case interest at the rate of 75 p. c. per annum was held to be penal) 25 C L J. 24 : 21 C. W. N. 740.

——a stipulation in a *mukorari* lease to pay 75 p. c. interest on arrears of rent and damages at 300 p. c. is penal. 21 C. W. N. 108, 112, 27 C 428, 5 C. W. N. 438 *Contra.* 24 C. W, N. 152 n.

——although s 179 of the B. T. Act, is not controlled by s. 67 of the Act, yet a stipulation in *mukorari* lease to pay interest on arrears of rent at a rate which is unconscionable is penal. 21 C. W. N. 112.

When the compound interest is penal.

——compound interest at a moderate rate is not necessarily oppressive a[illegible] [illegible] rests is not oppressiv[illegible] interest and with fre[illegible] C. L. J. 403 : 7 Pa[illegible] 8 I. C 337 : 20 Bom[illegible]

When the compound interest is penal—*contd.*

——to determine whether an agreement to pay compound interest falls within s. 74 Contract Act, the question is whether the stipulation is itself penal 62 I C. 717.

——compound interest is penal only when the rate increases in default 100 I. C. 679, 1927 All 315

——compound interest is in itself perfectly legal, but compound interest at a rate exceeding the rate on the principal amount, is penal. 34 C. 150 · 11 C W N 249 5 C L J 106 · 4 A L. J. 109 9 Bom L R 304 . 17 M L J 43 P C., 42 A 230

——contract to pay compound interest from the date of default at the same rate as simple interest in a hypothecation bond is not penal. 50 M 614 . 1927 Mad. 620 103 I C 394 52 M L. J 612.

——a stipulation in a bond to pay compound interest from the default is not penal 1921 M W N. 717 41 M. L J. 470, 34 C 150 *Appl.* 37 I. C 790 *Diss*

——compound interest at short intervals may be oppressive and unconscionable but it is not so when the interval is long. 29 C L J. 165 P. C.

Rate
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——in transaction amongst traders nine p c is an ordinary rate of interest for a mortgage , compound interest no doubt increases the rate but it shall not be interfered with by the Court 30 Bom. L. R. 1455 1928 Bom. 522.

——the phrase " interest upon interest " does not necessarily mean " compound interest " 32 C W N 569 47 C. L. J 188 : 1928 M W N. 91 . 30 Bom L R. 261 107 I C. 1 26 A L. J. 488 1928 P C 35.

Period for which interest may be due

——mortgagee is not entitled to interest for the day on which the money was advanced and for the date of repayment 8 C. W. N 216.

——on a decree directing payment of mortgage money and cost of the suit with future interest up to the date fixed for payment, the D Hr is entitled to interest until realization 35 C. 221 : 12 C. W. N 369 7 C L. J 233 : 35 I. A. 28 10 Bom. L. R. 144 P C. 30 C 953, 5 C W N 137 23 A 181 · 3 Bom L. R. 51 : 28 I A. 35 P. C.

——the creditor is entitled to interest at the contract rate up to the date fixed by the decree for payment , after that he is entitled to a reasonable rate of interest and 6 p c may be fixed as reasonable. 31 C. 138, (26 C. 39, P. C., 23 A 181, P. C) *Fol.*

——in case of mortgage by conditional sale a covenant to pay *post diem* interest up to the date of redemption is to be implied. 4 Lah. 346 : 1923 Lah. 648, 66 I. C. 771, 20 A L. J 752.

Construction of mortgage deed.

——in construing a mortgage deed as to interest, attention should not be confined to a single passage but the whole deed should be taken into consideration. 2 C. W. N. 129 : 25 I A. 9 : 21 A. 171, P. C.

Discretion and power of the Court.

——in a mortgage suit the court has no option to cut down the interest from 30 p. c., 23 C. W. N. 680 (23 C. W. N. 130 P. C., 24 C. W N. 233 P. C.) *Fol.*

——the court has no power to reduce the rate of interest on a mortgage bond though extortionate unless there are circumstances vitiating the transaction. 101 I C 759 : 1927 All. 538.

——discretion of the lower court should not be lightly interfered with in appeal 2 Pat. L. T. 648.

——the court has discretion under s. 34 C. P. C. to award interest on damages from the date of suit to the date of decree but the court must state the grounds. 39 C. L J. 77.

Ceasing of interest by tender

——where a creditor unlawfully refuses to accept the tender of the full amount due, he is no longer entitled to interest from the date of such refusal, and to have this effect it is not necessary to deposit the amount in court. 90 I C. 637, (c) : 1926 Cal. 310.

——a valid tender stops interest 34 C. 305 : 5 C. L. J. 270, 35 C. 34 : 11 C W. N. 983 6 C. L. J. 273, 6 C. L. J. 383.

INTERLOCUTORY ORDERS.

——interlocutory orders means only such orders as are expressly said to be interlocutory orders in the Code, that is, those mentioned in order 39 C P. C , 40 C L. J 199.

——an order made in the course of a suit is final and cannot be retried by the Judge in the course of the same proceeding. 39 C L. J. 251, 48 C. 409 · 33 C L. J. 435 P. C , 6 A. 269 P. C. *fol.*

——the H. C will, as little as possible, interfere with interlocutory orders where alternative remedy exists. 40 C. L. J. 191, 14 C. 768, 14 C. W. N. 147, 15 C W N. 353, 43 C 926.

——a mandatory order should not be given in an interlocutory order. 24 I. C. 625, 38 B. 381.

——an interlocutory injunction should not be lightly granted. 23 C. W. N. 677 : 29 C L. J. 584, 38 C. 971 : 13 C. L. J. 394

——the interlocutory orders which can be challenged in an appeal against the final decree are of such nature as would have induced the court to alter its decision 41 C. L. J. 185.

For other cases see, "Or. 39 C P. C." and "Injunction."

Interpratation of documents, see **" Construction of documents ".**

Jurisdiction, see **" C. P. C. Jurisdiction."**

KNOWLEDGE.

——the burden lies upon the deft. who obtains a deed by misrepresentation to prove that the plff acquired full information of the true state of facts at a time too remote to allow him to maintain a suit for cancellation of a document. 34 C L J 563, 17 B. 341 *Ref. contra* 1921 M W. N. 722. 41 M. L J 474.

——tenant's possession can only commence to be adverse when landlord becomes aware of the encroachment. 31 C 397, 13 C W. N. 698, 38 C L J. 266, 50 C 487 35 C. L. J. 185, 35 C. L. J. 182, 36 C. L J. 499 **P. C**, 38 C L J. 266.

——a co-sharer cannot have adverse possession unless there is assertion of hostile title to the knowledge of the other 26 C W. N. 65, 206, 890, 35 C L J. 554 **P C**

——cause of action under s. 155, B. T. Act, runs from knowledge. 9 C. W N 246 n

against particular person in particular court, of a particular amount, is necessary 47 B. 485, 92 I C. 295

——the term knowledge in Art. 164 of the L Act means a certain and clear perception of a fact, the fact being the decree in the suit The expression "knowledge of the decree" means knowledge not of a decree but of the particular decree sought to be set aside. 13 C. L J. 221 p. 227, 11 Bom L. R 1296.

For other cases see. "s. 18 L. Act"

LAND ACQUISITION ACT (I of 1894).

Scope of the Act

——the general scheme of the Act is first, there is to be an inquiry by a Govt. officer into the question, (1) whether the proposed acquisition is needed for the construction of some work, (2) whether such work is likely to prove useful to the public. If the Govt. officers report affirmatively on both points then the Local Govt. may issue a declaration that the land is required for the purpose stated, and this being done the sequel is the ascertainment of value by the Collector, but the owner may appeal to the High Court for the determination of value. If a judicial ascertainment of value is desired by the owner, he can obtain it by requiring the matter to be referred by the Collector to the Court 32 C 605; 32 I. A. 93 · 9 C W N. 454, 1 C. L. J. 227 . 7 Bom L. R. 422 **P. C.**, 45 M L J. 339 1923 M. W N 682.

——there are two distinct forms of procedure under the Act (1) fixing the amount of compensation which is an award from which appeal lies to H. C under s. 54. (2) in case of conflicting claims money is deposited in court and parties litigate in court. Decision of such court is decree and is appealable in H C. and P. C. 33 C 1290, 10 C. W. N. 1041; 4 C. L. J. 343. 45 M. 320 · 35 C. L.

Scope of the Act—*contd.*

J. 545 : 26 C. W. N. 713 : 43 M. L. J. 78 : 24 Bom. L. R. 963 : 20 A. L J. 684 P. C.

——the Land Acquisition proceeding binds every person even if he had no notice of the proceeding, when the Collector acts *bona fide*. 30 C. 576, 1923 Cal. 513.

——the proviso to s. 31 (2) applies only where the person was under a disability or was not served with notice. 26 C. W. N. 576 7 C. 388, *Fol* 7 C. W. N. 538 *Diss.*

——this Act creates a special jurisdiction and provides special remedy, when the mode of redress is provided in the Special Act the civil court cannot question it. 26 C. W. N. 506, 31 M. L. T. 409

——this Act refers only to one notice, one proceeding and one award to be given and made regarding one holding and one ownership 33 C. L J 509.

——the L. A. Act, vests the Local Govt. with absolute discretion in the matter, irrespective of any consideration of willingness or unwillingness of the owner to part with his property. 30 C 36. 7 C. W. N 249

——the Local Govt. can acquire lands for a Company. 30 C 36 . 7 C. W. N. 249.

——but the Company or Corporation for whose benefit any land [illegible] party in a Land Acquisition

[illegible] (a) is used as an antithesis [illegible] : 54 C. 582 : 31 C. W. N. 436 : 103 I. C. 366 : 1927 P. C. 172.

——where the Govt. has no proprietary right in the land but has only a right to levy assessment the law can be notified for acquisition 91 I. C. 357 27 Bom. L. R. 1237 : 1926 Bom. 47.

——s. 5-A. of the Land Acquisition Act has no retrospective effect. 1926 Bom 369 : 96 I C. 329 : 28 Bom. L. R. 592.

Notice under s 6.—"Public purpose"

——effect of notification under s 6. (3) is only to make it conclusive that the land is required for a public purpose. 48 C. 916, 45 A. 443.

——where a second notification cancells the prior one the date to determine compensation to be awarded is the date of the second [illegible] 126. [illegible] measure [illegible] e." 99 I.

——a Municipality can use the land for any purpose authorised by the statute other than that for which it was professedly taken. 104 I. C. 129 : 1927 Cal 874, 18 C. 99 P. C. *Rel. on.*

——acquisition of lands by Govt. for the purpose of providing house sites for Panchamas is a "public purpose." 49 M 237 : 86 I C. 485 : 1925 Mad. 837 : 48 M. L. J. 204, (39 B. 279 P. C., 32 C. 605) *Dist.*

Notes under s. 67.—"Public purpose"—*contd.*

——construction of road in Municipal area is public purpose. 105 I C. 377 : 1927 Cal 968

——the language of s 6 is perfectly plain and clear barring the court from enquiring into the question of purpose. 45 A. 443, 48 C. 916.

——the declaration need not state that the acquisition is to be made out of the public revenue 99 I C 530 1927 Mad 114 , 1926 M W. N 963, 99 I C 446 1927 Mad 207 . 1926 M W N 969

——where the contract was that the land might be resumed for 'public pupose' the purchase meant to include a purpose in which the general interest of the community was concerned 19 C. W. N 303, P C.

[illegible] Government towards the [illegible] iso to s 6 (1) and the [illegible] M 308 · 99 I C 542 ;

Notice under s 9,—inviting claims.

——notice under sec 9 inviting claims for compensation must contain the material facts which would enable the land-owner to identify the land , when the Collector omits to take essential step, a waiver of the defect by the owner is to be clearly established. 11 C. W N 356 · 5 C L J 669 ; 34 C 470.

——non-service of notice under s 9 is not fatal if the party complaining has notice 1923 Cal 513, 43 M 280.

——statement of claim is necessary, production of uncertified copy of sale deed does not amount to claim of the price mentioned in the deed. 94 I. C 245 1926 Lah. 401 7 Lah. 416

——when a person is served with notice under s 9 he is bound to apply for a reference under s 18, if he is dissatisfied with the award, he cannot maintain a suit in Civil Court. 26 C. W N 506.

——claim filed on the day following the day fixed in the notice for appearance is sufficient 25 C W. N 71, 19 A L J 672 . 63 I C 862, 43 A 652

——what is sufficient reason for not preferring claim 1923 Cal 513.

——where the notification did not give the claimant the 15 days' notice as required by this sec it amounts to sufficient cause within s 23 (3) for the claimant's omission to make a claim and he escapes the application of the stringent provisions of s. 25 (2). 95 I. C 883 ; 1926 Mad 732

——the provisions in s 9 (2) that 15 days should be allowed to appear before the Collector is not repeated in cl (3), consequently it does not apply to a personal notice served there-under. 49 A. 145 . 1927 All 183 25 A L J. 144 · 98 I C 806

——at the instance of some claimants a reference was made under s 18 and it also set out the nature of the claims of a third party who claimed to be a mortgagee, held, he was entitled as of right to appear in support of his claim, as there was impliedly a

Notice under s. 9.—inviting claims—*contd*

reference under the ss 18 and 30, 29 C. W. N. 340 : 86 I. C. 789 : 1925 Cal. 630.

——a contract by a lessee that he will not claim compensation if the land is taken by the Govt is not enforcible when the land is acquired by the Corporation under the Land Acquisition Act. 40 C. L. J 301

——a court has no jurisdiction to deal with objections except those which were made by persons who were parties to the proceedings before the Collector, and which brought about the reference 12 C W N 985, 26 C. W N. 506.

Objection.

——new objection belonging to the same category may be allowed to be gone into. 40 C. L. J. 105, 12 C. L. J. 489.

——a person who does not raise any objection as to the apportionment of compensation made by the Collector, must be taken to have accepted that 34 C 451, 38 C. L. J. 265.

——where during the pendency of a proceeding before a Land Acquisition Collector, the property acquired was sold for arrears of revenue, purchaser could urge only such objections as might have been taken by the defaulting proprietor, his special right, if any, must be asserted in a separate suit. 11 C L. J. 420, 34 C. 451, 12 C. W. N. 98, 985, *Dist*

——an award made by the Collector becomes final and binding only when it is filed under s 12, 23 Bom. L. R. 1136 : 59 I. C 429, 23 Bom. L R 779 64 I C 103, 46 B. 366

——the claimant is to prove that the award is wrong 106 I C 909.

——the burden is ordinarily upon the person who contests the amount of compensation awarded by the Collector before the civil court, on the ground that it was calculated on a wrong basis, but where the award was made without taking any evidence the burden becomes very light. 24 I. C. 141, 11 C. W. N. 875, *Fol.*

——the reversioners are not precluded by s 26 from claiming a higher amount before the District Judge than was claimed by the widow before the Acquiring Officer, because the reversioner is not a representative of the widow. 45 M. 421

——the word "applicant" in s 25 is used to describe the person who puts in written application under s. 18, 45 M. 421.

Land is acquired free from incumbrance :

——when Govt. acquires land under s. 16, the land vests in them [illegible] easements. Even an easement [illegible] the time of acquisition [illegible] 658 : 7 Lah L. J. 537

——but the existence of right of way over the land does not deprive the owner of his right to get compensation. 25 Bom. L. R. 450 85 I. C 11 1924 Bom. 54.

Persons entitled to Compensation.

——under the Land Acquisition Act compensation should be apportioned between the landlord and the tenant according to the value of their respective interest. 7 C W N. 810 30 C. 801, 28 C. 146

——compensation money will be apportioned according to the value of the respective interest 30 C. 801 : 7 C. W N. 810, 17 C. W. N 1001, 36 M 395, 4 M. 367 7 C L. J. 234.

——portion of the compensation may be paid towards the cost of the proceedings by which the money came to be awarded to an administration having a limited power of alienation. 65 I. C. 209, 39 C 33 *Ref*

——it is not every person whose earnings are injuriously affected by the acquisition of land that is entitled to compensation; a yearly tenant of tank who leases the tank for the purpose of fishing, is entitled to compensation 28 C. 152 . 5 C. W N 349.

——in case of portion of the *putni* being taken by the Govt. *putnidar* is entitled to some share of the compensation. 7 C. W. N. 130

——under s 20 (c) the Secretary of State is only interested in the amount of compensation awarded and not to its distribution. 20 A L J 604 : 1922 All 438.

——when land is acquired but *putnidar's* rent is not abated, *putnidar* is entitled to whole of the compensation money, on the ground that Zemindar suffers no loss 18 C W. N. 103.

——where compensation is separately assessed for the landlord and the tenant, the landlord cannot claim the share of the tenant, his only remedy is to move the District Judge, 1917 Pat. 129.

——an occupancy raiyat whose land is acquired is entitled only to the capitalised value of the tenancy right the balance going to the landlord 55 C. 407 . 1926 Cal. 846 . 96 I. C 69

——when occupancy lands are acquired the landlord is entitled

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by the Govt. is a person interested in the land within this Act. 49 M 38.

——a sub-tenant, who was given a right to construct building on the land, whose interest is not transferable except with the sanction of his superior landlord, has an interest entitling him to be heard upon the question of adequacy of compensation. 39 C. L. J. 574, (28 C 146, 28 C. 152, 17 C. 144, 13 C. L. J. 262, 3 C. W. N. 202, 7 C. 515, 40 C. 64, 31 C. L. J. 65 ; 24 C. W. N. 184) *Ref.*

——matters to be considered in case the land and buildings thereon are owned by separate person. 54 C. 669 : 31 C. W. N. 965 :

Persons entitled to compensation—*contd*

46 C. L. J. 1 : 1927 M. W N. 461 : 102 I. C. 193 · 29 Bom. L. R. 1143 : 8 Pat. L. T. 663 1927 P. C. 135

——when the landlord does not raise any objection but the tenant gets a reference made under s 18 and he obtains some compensation for himself the landlord cannot claim the same. 38 C L J 265

——an attaching decree holder of land which is subsequently acquired is a person interested in the land within this Act. 49 M 38. 1926 Mad. 307 · 97 I. C. 496

——when certain lands dedicated to an idol are acquired a *shebait* is not entitled to the compensation money. 19 C. W N. 652 : 13 C L. J. 597, *Fol.*

——when there are rival claimants to the compensation money the onus of proving title is on the person who claims the amount as against the person who is in exclusive possession of the land at the date of acquisition 107 I. C. 347 ; 47 C. L. J. 337 : 30 Bom L R 755 : 1927 P C 262.

——tenant and sub-tenant can claim to be bound, even though he has no saleable interest in the land. 84 I. C. 4 : 1925 Cal 197.

——when the tenant accepts a fixed amount as compensation by way of agreement with the landlord he has no further interest and the landlord is entitled to the enhanced compensation 44 C. L J 1 · 1926 Cal. 1000 95 I C 459

——when provisional notice is served upon a company in occupation of certain land after the expiry of the lease without any title and the company evacuates the land it is not entitled to claim any compensation 53 C 957 . 32 C. W N. 556 : 109 I. C 315 : 1928 Cal. 761.

——*karta* of the joint Hindu family can withdraw the compensation money 1929 Cal 379, 32 C. W. N. 815 *fol.*

Principle of valuation in awarding compensation

——"market value of the land" in s. 23 (2) means the market value of all interest in the land but when the government has also some interest the expression means the claimant's interest only 1927 Bom 635 29 Bom. L. R 1450.

——intention of s 23 taken as a whole is to provide complete indemnity to a person whose land is compulsorily acquired, the sub-clause gives the head of compensation 25 C. W. N. 677

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Principle of valuation in awarding compensation—*contd.*

time and at an estimated cost, is not only in its essence a question of fact but is one upon which, almost above any other, opinions will differ, with its being possible to give irrefragable reason for any particular conclusion. Appeals in valuation cases will only be entertained on questions of principle 42 C. L. J 143 · 49 B. 700: 49 M. L. J. 233 : 23 A L J. 803 : 90 I C 48 P. C (36 C 967, 39 I A. 201, 52 I. C 133) *Fol.*

——in computing the value of the land compulsorily acquired under the Act, it is a well established rule that the correct principle to apply is to assess the market value of the land as put to its most lucrative use 50 M L. J 566.

——market-value is the price that the owner willing, and not obliged to sell, may reasonably expect from a willng customer The rent received by the landlord may be the basis of proper value of the leased-out land. 55 C. 994 : 1928 Cal 522, 32 C. W N. 421.

[illegible] its appurtenant land should [illegible] value as the two cannot be [illegible] 70 I C 82, 32 B. 325, 2 C 123, [illegible] 44 [illegible] 152 : 72 I. C 214

——where there are two *data* available one based on the market value of the land and the other on the classification of lands into agricultural and building sites, it is safer to adopt the former valuation. 24 I. C. 141.

——where property is leased for a long period with a periodically increasing rate of rent, in the absence of any direct evidence as to what a willing purchaser would pay for the interest of the landlord the apportionment can be made only in a rough and ready way. 108 I C. 253 1928 Cal 475

——market value is to be determined as a whole having regard to the sales in the vicinity. Purchase by speculator is not to be disregarded 25 Bom L. R 1182.

——prices awarded by the Collector and accepted by people are valuable evidence in ascertaining the market value. 104 I C. 129 1927 Cal 874, 36 C. 967 P. C *fol.* but the court cannot base its award exclusively on such evidence. 32. C. W N. 458 : 49 C L. J. 398 27 A. L. J. 249 114 I. C. 587 1929 P. C. 92.

——market value of the property is to be determined not according to its present disposition, but laid out on the most lucrative and advantageous way in which the owner could dispose of it, the most lucrative and advantageous way is to be determined with reference to its future utility which should not be conjectural. 11 C. L. J. 393, 612

——sale nearest in date is the best criterion of the market value. Distinction between frontage and back for a very small plot is meaningless. 84 I. C. 371 : 1925 Pat. 129

——tenancy at will has appreciable market value within the meaning of s. 23, 40 C. L. J. 303, 24 C. W. N. 184 : 31 C. L J. 63, 84 I. C. 732 . 1925 Cal. 224.

Principle of valuation in awarding compensation—*contd.*

——value previously paid for a portion of the same area affords infinitely the best material of calculation. 1922 Lah. 327.

——where a land has been recently purchased by the claimant the purchase money would be a fair test of its market value though evidence may be given to show that there has been a rise or fall in the value since the purchase. 24 Bom. L. R. 782 : 68 I. C. 521.

——owner is entitled to the value of the property in its actual condition with all its then existing advantages and with all its future possibilities excluding only any advantage due to the carrying of the scheme for which the property is acquired. 33 C. W N 458 27 A. L. J 249 : 49 C. L. J. 417 : 114 I. C. 587 : 1929 P. C 92

——special adaptability of the land is a factor which determines compensation. 49 C. 63

——prospective use and special adaptability determine the value of the land 39 M. L T. 551.

——probable use and not only the present use of the land is to be considered. 64 I C. 146

——the fact that a land is likely to be a brickfield land should be considered. 31 C W. N 382 : 1927 Cal. 298 : 101 I. C. 537.

——all potential uses to which the land can be put should be considered and the claimant should put forward a scheme showing how the site could have been developed. 27 Punj L. R. 679 : 97 I C. 775 : 1926 Lah 618

——in determining compensation potential value should be considered. 44 C L J 1 1926 Cal 1000 . 95 I. C. 459. 95 I C. 883 · 1926 Mad 732 50 M. L J 566 : 32 C. W. N. 549 : 30 Bom. L. R. 683 . 115 I. C 730 1929 P. C 112.

——the assessment of the value of the land acquired regardless of the user for which it is specially fitted cannot lead to an adequate award of compensation for the loss sustained by the owner. 25 C W N 677.

——the market value of the land not according to its present condition but laid out in the most lucrative and advantageous manner in which the owner can dispose of it. 100 I C. 190 : 1927 Cal. 357

——where land is acquired for quarrying purposes the special adaptability of the land for that purpose is an element to be considered for fixing the amount of compensation. 39 M. L. J. 623 . 13 L. W 11 : 60 I C. 187

——the mere fact that there is stone underneath does not mean that the land should be valued on a quarrying basis. 24 Bom. L R. 471 · 1922 Bom. 254 *contra*, 31 Bom. L R. 241 : 29 L. W. 597 . 1929 P. C. 49.

——in determining the amount of compensation, the scheme of improvement of land is to be considered. 24 I. C. 141 : 36 B. 1 · 28 I. A. 121, P. C , *Fol.*

——but where an owner of land claimed compensation for being obliged to keep the land vacant after the sanction of the scheme

Principle of valuation in awarding compensation—*contd.*

as he could not erect any structure for which he pulled down the old structures, his claim was not maintainable 32 C. W N. 860 : 108 I C. 251

——earnings injuriously affected by the acquisition should be considered. 106 I. C. 909

——the profit which might arise from the most advantageous disposition, is one test for determining its market value, the utility of the land is also to be considered; the homestead lands are generally of higher value than the agricultural lands. 34 C 599, 25 C W N 1002 : 34 C. L J. 188 67 I. C 25

——when the substantial portion of the land has been used for industrial and residential purposes the court can award compensation on the footing that the entire land bore that character 100 I. C. 508 · 25 A L. J 137.

——the court must ascertain the amount of rent payable to the landlord and capitalize it at so many years' purchase, the number of year's purchase depending upon the circumstances of each case, the landlord is also entitled to the chance of an enhancement of existing rent. The burden of proving the capitalized value of the chance of enhanced rent, lies on the landlord. 22 C 146

——if a *bazar* is acquired under the Act the claim of the proprietor should not be based on rental but on the parmanent rents received from the shops in the bazar and also on the loss of earnings in respect of profits from tolls received from people who come to the bazar with baskets, though such profits vary according to the number of baskets brought 39 I. C 619 (c)

——in valuing lands within Municipality, one-sixth should be deducted from the Municipal assessment on the whole area for roadcess and other costs, taxes and ground-rents should also be deducted and balance should be estimated at 20 years' purchase 11 C L J. 408, 12 C. W N. 200 n. *Fol*

——in Calcutta including its suburbs the number of years taken in capitalising upon a rack rental is 20 and not 25, 1927 Cal. 874 104 I. C. 129

——in awarding compensation for vacant land, the existence of a tenant was supposed and the amount of possible rent with the value of landlord's interest as it was taken to be the sum of compensation 31 C L J 204 ; 56 I C. 758

method of first valuing mount as compensation igher elevation and the ved for the purpose of of valuation. 28 Bom.

——"land" as defined under this Act includes "tree", so the fifteen per cent. under s 23 (2) must be awarded on the total value of both land and trees. 48 A. 498 : 1926 All. 689 : 24 A. L. J 583 : 95 I. C 150

Principle of valuation in awarding compensation—*contd*

——land acquired under the L. A. Act should not be valued as a building site and at the same time valued upon the footing of the tree remaining there at the time of acquisition. 93 I. C. 639 · 1926 M. W. N 235 ; 1926 Mad. 945 · 23 L. W. 336, 95 I. C. 577 . 23 L. W. 731 : 28 Bom L. R. 548 : 95 I C. 513 : 1926 Bom. 365.

——when land is severed, the owner is entitled to increased compensation. 28 C. 685

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——evidence of offer is admissible to prove the market value but much weight cannot be attached to mere oral offers 27 Punj. L. R. 679 97 I. C 775 1926 Lah. 618.

——where the Govt has a partial interest in the land the valuation of Govt interest is a question of considerable difficulty. 24 Bom L. R. 471 1922 Bom 251

——piecemeal acquisition under erroneous decision of superior court, *subsequent acquisition of rest. 48 C. 892.*

——when the amount of compensation has been fixed by an agreement between the Collector and the landlords the claimant cannot in appeal seek fresh computation on a new basis. 53 C 407 : 1926 Cal. 846 . 96 I C 69

Reference.

[illegible] money had been paid of the civil court to the Act. 17 C W. N. 1057

——the Land Acquisition Court acquires jurisdiction only on reference by Collector and its jurisdiction is confined to matters so referred ; it cannot consider the legality of acquisition or of the reference. 99 I C 530 · 1927 Mad 114 . 1926 M. W. N. 968.

——under s 18 reference can only be made by the Collector. 73 I C. 127.

[illegible] acts as an agent of [illegible] w on

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27 C. W N. 809.

——in a proceeding under reference under s. 18 an award of the *Acquisition Officer is an evidence ; the claimant is to show that the* award is wrong. 1926 Mad. 961 : 96 I C. 279, 27 M. L. J. 106 *Fol.* (36 M. 395, 32 C. 605) *Dist.*

[illegible] money to a wrong person does [illegible] 17 C. W. N. 1057 : 21 I. C. 111.

[illegible] does not apply unless s. 31 (2) itself has been obeyed and does not apply to a case of excess payment wrongfully made. 1926 M. W. N. 128 : 49 M. 519 : 1926 Mad. 492.

Reference—*contd*

——the Court cannot award as compensation an amouut less than the amount offered by the Collector. 28 Bom L R 576. 1926 Bom. 372 : 96 I C. 316

——where no claim is put forward by the claimant the Dt. Judge acting under s 25 (2) cannot award a sum exceeding the sum awarded by the Collector 27 Punj L R. 656 · 94 I. C 245 · 1926 Lah 401.

——the principle of Or. 1 R 10 (2) C P C does not apply to a reference proceeding, parties may be added under certain circumstances. 31 C W. N 384 1927 Cal 352 : 101 I. C. 539

Interest on compensation moneys 26

——interest is awardable only from the date the Collector takes possession of the land acquired 95 I C 883 1926 Mad. 732 : 50 M. L J 566, 106 I C. 909. Interest must be paid from such date. 111 I. C 261. 1928 Cal 287 P C.

——where the claimant does not forward any extravagant claims and the claim is allowed to a considerable extent the claimant is entitled to interest at 6 *p. c* from the date of taking possession of the land up to the date of payment. 97 I C. 933 : 1926 Mad. 1016.

Jurisdiction of Civil Court

——Collector or Deputy Collector acting under the L. A. Act, is not Court or 'Judicial Officer' 27 C. 820, 30 C 36 The Collector's action is administrative only 30 C 36, 7 C. W N 249

——decision of the Collector under L. A Act may be questioned before the civil court, but the proceeding under s 40 cannot be thus questioned 30 C 36 : 7 C. W N 249.

is more than the amount awarded by the Collector 28 Bom L. R 576 : 96 I C 316. 1926 Bom 372

——the court has no power to reduce the amount of compensation awarded by the Collector even though there is mistake in his calculation 31 M L T. 409, 70 I C 82, 22 M L J. 379 19 A. L J 871 *Ref*

——District Judge's order for payment of the compensation money to certain applicant must be carried out by the Land Acquisition Judge 20 C. W. N 975

——the court cannot order a refund of the money awarded. 3 Lah. L. J 421 · 63 I. C 1

——the order of the c [illegible]

Jurisdiction of Civil Court—contd.

——s. 32 does not vest the court with power to retain the money inspite of the directions of a competent Civil Court. 1928 *C.* 402 : 107 *I. C* 738

——duty of the Court referred to is to see whether the evidence displaces the Collector's award. 22 *C. W. N.* 659.

——if a court puts a fictitious value on the property on account of its *potentiality* for building purposes, then it is an inclusive rate and nothing can be allowed in addition for the trees 28 Bom. L. R 548.

——the general rule is that costs shall follow the event. 53 B. 178 114 I C. 397 . 30 Bom L R 1622 ; 1929 *Bom. 63.*

——in a proceeding under this Act the court can determine the title between claimant and the Govt. 23. Bom. L. R. 148 : 45 B. 227 : 64 I C. 582, 584, 64 I C 93.

——in case of acquisition of trust properties questions between the trustees and beneficiaries should be left to be debated before the Court having jurisdiction to administer the trust estate. 108 I. C 253 · 1928 *Cal.* 475

——the existence of a civil suit involving the question of ownership does not affect the jurisdiction of the Dt. Judge to decide the question referred to him 94 I. C. 249 1926 Lah 442 . 8 Lah. L. J. 416 . 27 Punj L. R 532.

——s. 52 does not apply to proceedings commenced by an owner of property to restrain the Calcutta Corporation and Improvement Trust from taking further steps in pending Land Acquisition proceeding. 48 C. 916.

Appeal.

[illegible] Divisional Court reject- [illegible] bat the application to the [illegible] 9 Lah. 244 : 1927 Lab. *Ref.*

——under s. 54, there is no appeal against an order of the District Judge allowing a Hindu widow to withdraw the compensation money deposited by the Collector under s. 31. 19 C W. N. 1290.

——s. 54 does not affect the right of appeal from the judgment of single Judge of the H. C. to Division Bench 3 Lah. 420 ; 69 I *C.* 428

——s 54 contemplates an appeal from final award or part of a final award and until the decision of the question of apportionment their is no final award. 94 I. C. 249 : 1926 Lah. 442 · 8 Lab. L. J. 416 : 27 Punj L. R. 532.

[illegible] part of it ; no appeal lies [illegible] for restoration of previ[illegible] I. C. 312 : 1927 Cal. 533 : [illegible]

——when reference is made by the Land Acquisition Officer under s 30 of the Act to the Subordinate Judge's Court the decision of the latter is not an award under this Act and is not appealable

Appeal—*contd.*

under. s. 54 of this Act but is a decree within the meaning of s 2 (2) of the C. P. C and appeal lies to the Dt Judge or to the H. C. according to valuation 52 M 142 · 1929 M. 351 : 29 L. W. 343, 1929 M. W. N. 62 115 I C 345 : 1929 Mad. 223, 45 M. 320 P. C. *Ref.*

[illegible] the *L. A* [illegible] -sec. (2) [illegible] P. C , 29

[illegible] ents of Indian Courts in matters involving valuation of property unless there is something to show that the judgment cannot be supported as it [illegible]

——no appeal lies to the Privy Council when there is no error of law or miscarriage of justice. 30 C W N 386 . 1926 M W. N. 278 : 1925 P. C 211.

——in cases relating to the acquisition of land the whole matter, both of fact and law, is a proper subject of appeal in India, for their local knowledge and experience enable the Judges to form useful judgments upon the whole case So the Privy Council will not review the decree of an Indian Appellate Court merely upon question of value unless there appears to be error in law or miscarriage of justice 42 C. L J 143 23 A L J 803 . 49 B 760 49 M. L J 233. 90 I. C 48 : 30 C W N. 386 1926 M. W N 278 P. C.

——the Privy Council is bound by the term of ss 23 and 24 of this Act dealing with the consideration that are to be taken into account in determining the value of the land 32 C W N 549 . 115 I C 730 30 Bom L R 683 1929 M W N 376 1929 P C. 112

——where a number of separate references under the Land Acquisition Act are heard together and disposed of by one judgment, and where distinct appeals are filed from this judgment, it is absolutely essential that a copy of the award should accompany each memorandum of appeal, and the Appellate Court has no power to dispense with such a copy 6 Lah. 218 26 Punj L R. 356 : 1925 Lah. 438, 104 I C 281

LANDLORD AND TENANT (General).

(1) Abandonment and surrender.
(2) Abatement of rent.
(3) Accretion.
(4) Application of the B. T. Act and T. P. Act.
(5) Bona-fide payment of rent.
(6) Bona-fide tenant.
(7) Co-sharer landlord.
(8) Creation of tenancy.

Landlord and Tenant (General)—*contd.*

(9) **Denial of landlord's title, forfeiture.**
(10) **Easement right of tenant.**
(11) **Ejectment**
(12) **Enhancement or increase of rent.**
(13) **Estoppel between landlord and tenant.**
(14) **Eviction by title paramount.**
(15) **Exparte rent decree, evidentiary value of.**
(16) **Holding over.**
(17) **Improvement.**
(18) **Intermediate right, creation of.**
(19) **Labourers or tenants.**
(20) **Lease**
(21) **Mutation of name.**
(22) **Non-payment of rent, effect of.**
(23) **Permanent tenancy.**
(24) **Price of paddy.**
(25) **Relationship of landlord and tenant.**
(26) **Rent receipt**
(27) **Rent sale.**
(28) **Rent suit and rent decree.**
(29) **Res-judicata between landlord and tenant.**
(30) **Status of tenant and incidents of tenancy.**
(31) **Suspension of rent.**
(32) **Waiver on the part of landlord.**

(1) Abandonment and surrender.

——no writing is necessary in this country for surrendering a tenancy but when the original lease is registered, the surrender of a portion with an abatement of rent can be made only by registered instrument and oral evidence of surrender is not admissible. 63 I. C. 483 (c)

——termination of a tenancy may be proved by oral evidence although the tenancy has been created by registered document 64 I C. 883 (c).

——oral surrender is valid even if the tenancy is created by registered lease. 59 I C 788

——a tenant, even after having created an incumbrance, can surrender his holding 4 Pat. 838 6 P L T. 500 · 88 I. C. 1032 ; 1925 Pat 741

——a surrender of occupancy holding by the tenant after the transfer of a share of the holding is invalid in so far as it professes to effect the interest of the transferee. 85 I. C. 757 ; 1925 Cal 1238

[illegible] holding need not prove [illegible] The abandonment of [illegible] fact that the entire [illegible] to the purchaser. 3[illegible]

[illegible] C. W N 251.

——in case of relinquishment by tenant before the expiry of [illegible] the landlord even

(1) Abandonment and surrender—*contd.*

if the latter has accepted the surrender. 38 C. L. J. 177, 1923 Cal 63, 35 C. L. J. 175 : 49 C. 345.

——a landlord who under an agreement takes possession of a [illegible] has been abandoned

[illegible] proves the abadon-

——when the usufructuary mortgagee of a non-transferable occupancy holding is dispossessed by landlord the martgagee is entitled to possession in view of the finding that there was no abandonment of the holding by the tenant, 49 C 899

For other cases see, "*B. T. Act ss. 86 and 87*"

(2) Abatement of rent, see, *B T. Act ss. 38 and 52.*

(3) Accretion

——when the tenant encroaches upon the adjoining waste land of his landlord the latter is entitled to eject him within 12 years from the date of knowledge or to sue for additional rent. 34 C. L. J. 481, 2 C. L J. 125 *fol.*

——where subsequent to the creation of a tenure, there have been accretions to the lands actually leased and these accretions [illegible]

favour that the possession is only under a claim of a limited right. Art 142 and Art 144 are not in conflict 40 C L J 160, 8 C. L. J. 557, 17 C. L J 277, 17 C W N 386 P C

——if a tenant has encroached upon any land and made it part of his tenancy, he is bound to give up those lands to his landlord at the determination of the tenancy 42 C L J 276 87 I C. 630, 1925 Cal 1114

For other cases see "*accretion.*"

(4) Application of B T Act and T. P. Act. See B T. Act, "*Application of the B. T Act*"

(5) Bona-fide payment of rent.

——*bona-fide* payment of rent to the assignor without notice of assignment is good. 17 C. L J 372

——payment of rent to co sharer is not sufficient discharge from liability to others 25 C 322.

——in cases when provision in the occupation of a tenant are assigned, it is incumbent on the assignee to make enquiries of the tenant as to the extent of his rights and interest. Any representation made by the tenant would preclude him thereafter from resiling from it. But if the assignee makes no enquiries at all, the assignment will be subject to the tenant's rights 91 I C. 113.

(6) Bona-fide tenant, see "*B. T. Act s. 3 (18) Tenant.*"

(7) Co-sharer Landlord.

——one co-sharer landlord purchasing a nontransferable occupancy holding can be ejected by others; plff. being himself in possession in *occupancy right* of other nontransferable lands obtained from original raiyat is no defence. 1925 Cal. 538.

——in a suit by a co-sharer landlord who under an arrangement between himself his co-sharer and the tenants is entitled to collect his share of the rent separately, the tenants are entitled to apply for abatement of rent 41 C L J. 330 : 88 I. C. 654 : 1925 Cal. 783.

——where a plff in a suit for declaration of title and for recovery of possession establishes his title, but the deft sets up tenancy from a co-sharer of the plff's, vendor, the latter should establish satisfactorily a valid tenancy Even if such tenancy is established plff would be entitled to declaration of title and the deft. would be liable to pay rent 87 I C 642 (c)

——a permanent lease granted by co-owners without the concurrence of one of them is not binding upon that person and consequently if the property comprised in the permanent lease is allotted to him in the partition, he takes the property without being subject to the lease. 43 C L J. 333, 1926 Cal 714 F. B

For other cases see. "*Co-sharer.*"

(8) Creation of tenancy.

——a tenancy is created in India not only by contract but also by occupation of land when it is agricultural. 25 C. 324.

——a mere demand for rent is not sufficient to create relationship of [illegible] of tenancy. 11 C W [illegible]

—— [illegible] n case of licer[illegible] ured a right t[illegible] ttending the[illegible] g and not te[illegible] F. B., 17 C. [illegible]

——when the lessee is put into possession under an agreement of a tenancy for a term, though no legal document is executed the lessee cannot terminate the tenancy before the expiry of the term by notice of relinquishment not accepted by the lessor. 35 C. L. J. 175

——tenancy can be proved without proving the lease even if there be any. 41 C. 347, 8 C. W. N. 424, 89 I. C. 180 · 1925 Cal 1225, 1 C W N. 248, 6 C W. N. 916, and even if the lease is inadmissible in evidence. 6 C W. N. 916

——tenancy may be presumed from long possession 23 C. W N. 76 n.

——raiyat by conduct—consent of both parties not necessary. 17 C L. J 431 : 17 C. W. N. 348.

——there is no such thing as tenancy by sufferance in India. 69 I. C. 504 (C)

(8) Creation of tenancy—*contd.*

——payment of rent by one co-owner to another does not create relationship of landlord and tenant. 32 C. L. J. 81.

——a tenancy can be c
of relation of landlord and
gathered from conduct or
6 Pat. L T. 12 : 84 I. C.

——unknown origin of tenancy or ambiguity in terms makes evidence of circumstances and conduct of parties admissible. 1925 Cal. 340.

——when a tenancy interest is sold in execution of a decree against the lessee, a tenancy is created in the name of the purchaser in the terms of the original demise and the covenants therein will be binding on him 90 I. C 832 (C)

——the grant of *marfatdari* receipt year after year shows the
361 : 1925 Pat. 499.
efore the B. T. Act., that
valid and sec. 178 will not
W N. 533

——deft. was permitted to enter upon land subject to an agreement to be afterwards arrived at as to rent. No agreement was arrived at—deft is not a raiyat and is subject to eviction at the mere will of the plff. though doubtlessly he is entitled to a reasonable time to remove his effects 23 C. W. N 48 n

For other cases, see " B. T Act, s 3 (18) Tenant ".

(9) Denial of landlord's title.—forfeiture, see, ' Forfeiture and " T P. Act s 111 cl (g)."

(10) Easement right of tenant.

——a tenant cannot acquire by prescription an easement right over other lands of his landlord or over the land of another tenant of the same landlord, but he can have a way of necessity over the land of his landlord 1 C W N 151, 29 C. 363, 17 C 826, 14 A. 185, 6 C. L. J. 218

——a tenant cannot acquire by prescription an easement against his landlord. 74 I. C 703, 1924 P. C. 65 · 19 L. W 259 P. C

——a tenant cannot acquire a right by prescription against his landlord 6 C. L. J 218.

——in India unlike in England a tenant with permanent right can acquire an easemet by prescription against tenant having the same right. 70 I. C. 173 (c), 19 C. W. N 1211 *fol*

——although a tenant cannot acquire a prescriptive right of easement he may claim a right of easement based on immemorial
e he pleases to his tenant.
his field from landlord's
user from time immemo-
161 29 C 363, 38 M L. J.

——the user of the easement right before the commencement of the lease is not affected by the lease, unless it is shown that the

(10) Easement right of tenant—*contd.*

landlord up-to the time of granting the lease was ignorant of the claim of such right 50 C 356 : 36 C. L. J. 161 : 1923 C. 8.

——user of the land by the tenants for performing *Ramlilas* and conducting kalipans and tying cattle from time immemorial is a customary right and not a right of easement. 4 Pat. L. T. 223.

——where the origin of the tenant's possession is permissive he cannot acquire by prescription a title adverse to the landlord 71 I. C 812 (C)

——a tenant having permissive possession over a path does not acquire right 20 C. W. N. 1159, 19 C W. N. 1211 p 1214.

——a tenant may have a right of pasturage on his landlord's waste lands by immemorial user. 31 C 503 : 8 C. W. N. 425, P. C.

(11) Ejectment.

——the condition in a lease that the lessor would not eject the lessee is binding on the lessor. 42 C. L. J 78 : 90 I. C 104

——a landlord cannot sue for khas possession during the continuance of tenancy, but can sue for declaration of his title. 1925 Cal. 155.

——in an ejectment suit every tenant and sub-tenant should be made parties But a decree obtained against head lessee is binding against all sub-lessees 50 C. 410.

——after cessation of tenancy the possession of the tenant is wrongful and landlord can forcibly eject him but without undue force 3 Pat L R 27 Cr 1925 Pat. 17.

——where there is condition of forfeiture on the insolvency of the lessee or his assignees and lessee mortgages the lease-hold and the mortgagee purchases it in execution of his mortgage decree and then the lessee is declared an insolvent, the lessor cannot claim back possession of the property on the ground of forfeiture. 41 C L. J. 371 - 88 I C. 808 1925 Cal. 750

——a suit for ejectment from a portion of the holding transferred is not maintainable as the tenant still holds the remainder 33 C L J. 516, 518 33 C L. J. 533 *Dist.*

——when notice to quit is addressed to all joint tenants but is served upon some only it is sufficient. 33 C. W N. 559

For other cases, see, "ejectment"

(12) Enhancement or increase of rent see, "*B T Act*" *ss 30 and 52.*"

(13) Estoppel between landlord and tenant.

——a tenant can prove subsequent ceasing of landlord's interest and s, 116 Evi. Act will be no bar. 35 C. L. J. 146

——a landlord is bound by the statement in a sale proclamation as to the rate of rent of a tenancy and if the sale proclamation is not forthcoming the sale certificate may be accepted as secondary evidence 62 I. C. 60 (C).

——for raising an equitable estoppel against the landlord the tenant must show that in spending money in erecting *pucca* building

(13) Estoppel between landlord and tenant—*contd.*

he acted under an honest belief that he had a permanent right and the landlord knowing this allowed him to construct the building. 27 C. 570 : 4 C. W. N. 210 · 21 A 696, P. C *Ref*

For other case, see "*Evi Act. ss 116 and 117.*"

——tenant cannot deny title of his lessor without first surrendering possession, 24 C L. J. 103, 20 C. W N 1335, 28 M 526, 34 B 329, even after the termination of the tenancy 32 C. W N 867 : 1928 Cal. 546, 56 C 15 49 C L. J. 1 114 I C 409 ; 1929 Cal 546

——tenant must give up occupation of the land before denial of landlord's title. 24 C L J. 453, 19 C. W N 1207 P. C.

ets him in

7 C.

20 C. W

N. 1 3, 5 C. 662,

10 C. W N 747

——a covenant by the tenant not to transfer the land without the consent of the landlord is an incident which binds the transferee of the lessee. 37 C L J. 538

——lessee cannot question the status described in the kabulyat when the kabulyat is found to be void 24 C L J 541 20 C W N 1140 But admission of tenant of khamar right of landlord in a kabulyat is nothing 17 C. W N 466, 7 C W N 400, 13 C W. N 661, 13 C W N. 913 9 C. L J, 15, 1 C L J 506.

——a landlord who does not recognize the purchaser of a putni cannot sue him for rent of subsequent period 10 C L. J 538 : 3 I. C. 346, 5 C L J 95 : 11 C. W N. 284 · 34 C. 257, 6 C. L J. 601, 13 C W N. 1197.

——a lessee is estopped from denying lessor's title even if he was not put into possession by lessor, in the absence of proof of his ignorance of lessor's title or that his execution was procured by fraud, misrepresentation or coercion. 40 M 561.

——grantor is estopped to show that the recitals in the document as to his status, are incorrect and he had no authority to create the lease. 13 C L J 649, 656.

——a lessor granting a permanent lease cannot repudiate his own status, 22 C. W. N. 179, 20 C W. N 1340, he is estopped from denying the recitals in the lease as to his status 13 C L J. 649, 656, 48 C 783 32 C L J 296 · 25 C W. N 4 F. B., 32 C L J 296 But see 23 C W N. 435, 437

——a lessee taking under-tenure lease from tenure-holder who is subsequently found to be occupancy raiyat, cannot deny landlord's title under the lease 24 C L. J. 411.

he is

title

the

auction purchaser. 17 C. W. N 248n

——when landlord puts the raiyati holding to auction-sale he cannot eject purchaser saying that tenancy was under-raiyati. 17 C L. J 652.

(13) Estoppel between landlord and tenant—*contd.*

——Bengal Tenancy Act is not a complete Code even in respect of the law of landlord and tenant, much less as regards contract and *equity*. *24 C L. J. 542, 35 C. 34 : 21 C W. N. 983 : 6 C. L. J 273, F.*

——granting of permanent lease to under-raiyat, notice under s. 49 (b) served, under-raiyat cannot rely on subsisting tenancy. 23 C. W. N 435, (17 C. W. N. 59, 468, 18 C. W. N. 140) *F. 13 C. L. J. 549, Dis* 23 C W. N. 487.

See other cases under "Evidence Act ss 115—117."

(14) Eviction by title paramount.

——eviction by title paramount means eviction by a title superior to the title of both the lessor and lessee against which neither is entitled to make a defence. 26 C. W. N. 143, 33 C. W. N. 106, 49 C L J. 252; 1929 Cal 272.

——eviction by title paramount is a good defence in rent suit if the party evicting has good title. 33 C L. J. 159.

——there is implied undertaking on the part of the landlord to protect the tenant from disturbance by stranger claiming paramount title. If the tenant is so disturbed and attorn to such person it will be equivalent to an eviction and fresh taking 35 C. L. J. 146

See other cases under *"B T. Act s. 3 (18) Tenant."*

(15) Exparte rent decree, evidentiary value of.

——an *ex-parte* rent decree against the heirs of a tenant is evidence to prove subsistence of tenancy negativing the plea of abandonment. 1923 Cal. 270

——an *ex-parte* decree for rent against the executor under a will is binding on a legatee, unless the latter shows the estate was not properly represented in that suit or that the decree was obtained by fraud or there was a change of circumstances subsequent to the decree making it ineffectual. The onus of proving any such invalidating circumstance is on the legatee. 91 I. C. 416 (C).

For other cases " see Exparte decree"

(16) Holding over, see "*B. T. Act s. 61*" and "*T. P. Act s. 116*"

(17) Improvement, see *B. T. Act. s. 78.*

(18) Intermediate right, creation of, see "*B. T. Act s. 3 (18) Tenant.*"

(19) Labourers or tenants.

——a suit for damages is not rent suit. 19 C. W. N 204n.

——one cultivating as a labourer is not tenant and a suit against him is not a rent suit. 20 C. W. N. 1110, 14 C. W. N. 623, 23 C. W. N. 614.

——*bhagchasis, burgadars, botoidars, adhiars*, are not labourers or hired servants, they may or may not have interest in the lands. 21 C W. N. 595

——in the case of a lease of *bagat* land when there is no indication that the lessee is to be treated as a raiyati or that the

(19) Labourers or tenants—*contd.*

the lessee possession

a tenant.

(20) Lease. see "*T. P. Act s 106*".

(21) Mutation of name

——where there is registered kabulyat mutation of name is not necessary 17 C. W. N. 96 n

For other case, see, "*Recognition*" and "*Land Registration Act.*"

(22) Non-payment of rent, effect of.

——omission to pay rent on the part of the tenant or refusal to receive rent on the part of the landlord, does not cause a cessation of tenancy 35 C L J 309, 32 C. W. N. 720

——mere non-payment of rent for any year does not determine the relationship 6 C L J. 72, 7 C L J. 202, 7 W. R 400, 24 W. R 386, 4 C 314, 16 C W N 202, 17 C W N. 627

——under sec 6 of Act VIII of 1869 non-payment of rent taken with submergence of land is sufficient to indicate an extinguishment of the right of occupancy 6 C L J 149, 4 C. 894, F. 13 M. I A. 467 *R contra* 41 C. 683 18 C. W N. 369 **P. C.**, 18 A 290

——but mere non-payment of rent or discontinuance of the payment of rent does not create adverse possession 1924 Cal 168, 40 C 173 · 17 C W N 137, 16 C L J 202 : 16 I C. 365, 27 C W N. 925. 36 C L J 499 24 C L J 453

——mere non-payment of rent for 12 years does not create rent free title The claimant must assert his right to the knowledge of the landlord 52 C 576 29 C W, N. 323 : 86 I C. 781 · 1925 Cal 651

——but long possession without payment of rent in open defiance of a landlord's claim raises a strong presumption against him. 29 C W N 833, 86 I. C, 835 1925 Cal. 635

(23) Permanent Tenancy.

——where a deed purports to grant a tenancy at fixed rate of rent in perpetuity, a clause prohibiting all rights of alienation is inoperative in the absence of a clause for re-entry 91 I C. 649 (C).

——a tenancy may be permanent without payment of premium. 35 C L J 90.

——where a tenure has been in existence for over 80 years at a uniform rate of rent, the presumption of a permanent tenure arises. The onus of proving the existence of a permanent tenure is on the person who sets it up 90 I. C. 781.

——long possession and uniform payment of rent are not by themselves sufficient to justify a finding that a tenancy was permanent from its inception. 33 C. W. N. 734 1929 P C. 156 : 57 M. L. J. 1 P. C, 33 C. W. N. 211 : 1929 Cal 37, 37 C. L. J. 478 : 1923

(23) Permanent Tenancy—*contd.*

Cal. 682 : 75 I. C 105, *contra*. 1923 M. 54 : 71 I. C. 330 : 73 I. C 2 (C).

——the presence of permanent structure is not necessary to establish that the tenancy in its inception was of a permanent character. 73 I. C. 2 (C), 56 C. 275

——where it is proved that the holding was let for residential purposes and was being used for residential purposes there can be presumption that it is permanent. 55 C. 355 : 32 C. W. N. 184 : 1928 Cal 315 107 I. C 81.

——a permanent lease granted by co-sharers without the concurrence of one of them is not binding on that person and consequently if the property comprised in the permanent lease is alloted to him in the partition, he takes the property without being subject to the lease. 43 C. L J. 333 1926 Cal 714 F. B.

——the duty of a tenant under a perpetual tenure is to protect himself against illegal encroachments by others on the lands of which he has the exclusive possession If he fails to do so he cannot prejudice the landlord's claim of rent. 52 C. 417 : 30 C W. N 1 : 23 A L J. 751 : 1925 P. C. 97 · 88 I C. 110, P. C.

——where a permanent tenure is sold for arrears of rent the purchasers will not be necessarily bound by an agreement between the former tenants and the landlord to the effect that no abatement of rent should be claimed 52 C. 417 : 23 A. L. J. 751 : 30 C. W N. 1 88 I. C. 110 P. C.

——in case of permanent lease a consent decree of enhanced rent does not destroy the character of the tenancy. 26 C W. N. 657 : 35 C. L. J. 440.

——proof of permanent tenancy. 43 M. 567 : 38 M. J 476 : 25 C W. N. 485 . 22 Bom L R 578 : 18 A. L. J. 707 P. C., 1920 M. W. N. 532 : 59 I C 241 1921 M. W. N 719 . 41 M. L. J. 175 : 62 I. C. 750 : 63 I. C. 109 : 36 C. L J. 138 : 86 C. L J. 73.

——permanent tenancy must be proved by the tenant, it is not the business of the landlord to explain the possession 33 C W. N. 211 : 1929 Cal. 37

——the mere fact of the tenants having constructed a dwelling [illegible] in possession thereof [illegible] tle to remain on the [illegible] L T. 174 : 88 I. C.

——when the courts can infer a permanent tenancy considered 92 I. C. 963 : 1926 Cal. 634

——elements necessary to constitute permanent tenancy. 52 C. 43 : 29 C. W. N. 138 : 85 I. C. 103 : 1925 Cal 309.

——a *nim howla patta* provided for change of rent only when on survey the area was found to vary. Since its creation there was no variation of rent for a period of 70 years, held from these facts, the lease must be taken to be permanent in character with regard to the rent fixed. 42 C. L. J. 172 : 87 I. C. 758 : 1925 Cal 1248.

For other cases see, "*B. T. Act s. 3 (10) Permanent Tenure*"

(24) Price of paddy.

——where in the lease it is stated that the tenant can pay in kind or certain sum as its price he need not pay market price 84 I. C. 147 : 1925 Cal. 114.

——a *kabuliyat* fixed payment of a certain quality of paddy, the value of it at that time, and in cases of default for payment of an extra quantity *Held*, on a construction, rent in kind being contemplated, their market price as on the due date and not the amount fixed in the *kabuliyat* was to be paid 41 C L J. 171 91 I. C 935 So also in 49 C. L. J. 274 . 1929 Cal. 285 where the value stated in the kabuliyat was held to be for the purposes of stamp and registration

——contracted price of the crops is to be decreed, s 92 of the Evi. Act, bars evidence of market rate 12 C L J 649, 15 C. W. N. 249, 26 C L J. 94, 21 C W N. 860, 24 C W. N 85 *Contra* 12 C. L J. 593, 589, 626

——where in a kabuliyat it was stipulated that a certain sum of money was payable in lieu of paddy rent payable by the tenant, this did not take away the choice of the tenant either to pay money or to deliver paddy unless the money value was inserted for some other purpose than that of giving the tenant choice 105 I. C. 756 : 1928 Cal. 112

——where the kabuliyat provided the payment of rent in kind the price of which was fixed, the question whether the money equivalent is fixed for all time to come or only shows the value of the crop on the date of the kabuliyat depends upon the consideration of the entire document which will show the primary intention of the parties 55 C 808 1928 Cal. 737.

(25) Relationship of landlord and tenant.

As to burden of proof, see "*Evi. Act, s 109*"

As to creation of the relationship, see "*B T. Act. s 3 (18) Tenancy—creation of*"

As to the effect of non-payment of rent, see, "*Landlord and tenant. (22).*'

(26) Rent Receipt.

——description in the *dakhila* as tenant at will is not conclusive evidence. 25 C W N 378.

For other cases, see, "*Admissibility, Rent Receipt.*"

(27) Rent sale, see, "*B. T. Act s 148*"

(28) Rent suit and rent decree, see, "*B. T. Act. s. 148*"

(29) Res judicata between landlord and tenant

——decision of a suit between two tenants of the adjoining plots of land under the same landlord in his presence is binding on him. 38 C L. J 291

For other cases, see, "*Res judicata*"

(30) Status of tenant and incidents of tenancy.

——when the origin of the tenancy could not be traced a kabulyat subsequently *executed would determine the incidents of it.* 2 Pat. L. T. 605

——whether a person is tenure-holder or *raiyat* is a question of fact and one must look to the attendant circumstances to judge of the purpose for which the land was acquired. 23 C. W. N. 649 P. C., 45 C. 803, 22 C W. N. 674 · 45 I. A 72. *Ref.*

——when the lease was granted by the landlord's predecessor the landlord can question the status of the tenant, 1925 Cal 161.

——where the *kabulyat* does not render any help in determining the question whether the tenancy was tenures or raiyati holdings, evidence of actual user should be looked to. 88 I. C 492 : 1925 Cal. 1183

——when rent is fixed in perpetuity, a raiyat is a raiyat at fixed rates. 63 I C 592 (C).

——tenant holding permanent heritable tenancy at fixed rent is entitled to make excavations for making bricks. 50 C 694.

——there are tenancies which are heritable but not transferable. 33 C L J 693 25 C. W N 420 60 I. C. 826.

——a covenant by the tenant not to transfer the land without the consent of the landlord *is an incident which* binds the transferee of the lessees 37 C. L. J. 538.

——where the *original nature of the tenancy* is unknown, the fact that the rent has been altered once, negatives the hypothesis that the rent is fixed in perpetuity. 38 C. L J. 121 : 72 I. C. 979

——payment of uniform rent for 55 years by one family may be sufficient for holding that the tenancy was heritable, but not that the rent was fixed *for ever or* that the tenancy was a permanent one. 85 I. C. 636 1925 Cal 761.

——a betel-leaf *boroj* may be a plantation within the meaning of s. 160 B. T Act 18 C. L J 170.

——the mere fact that the lessee of betel nut plantation did not belong to the cultivating class is not enough to prove that he was a tenure-holder 87 I C 903 · 1925 Cal. 1086

——mere receipt of rent *from* a tenant does not make him tenant from year to year Tc constitute such, the rent must have been paid and received upon that understanding. 6 P. L T. 12 : 4 Pat. 139 : 84 I. C. 586.

——mukarrari tenure-holder has a right to cut trees. 1925 Cal. 139.

[illegible] foundations, belongs [illegible] 32 C. L J. 26.

[illegible] ting is liable to

(31) Suspension of rent.

——it is not possible to lay down any hard and fast rule as to when suspension of entire rent should be allowed or when only abatement of rent should be allowed in case of dispossession from a portion by the landlord. 1928 Cal. 428 : 108 I. C. 587.

(31) Suspension of rent—*contd.*

——eviction from a part will desentitle the landlord to get rent; there cannot be apportionment. 1923 Cal 162, 11 C. L. J. 591, 601, 28 C 188, 17 C. L. J 50, 5 C. W. N. 353, 21 C. W. N. 51 n. *Contra*, 24 C. 296

——but it has been recently held that the court should always endeavour to apportion the rent wherever it is possible and be very careful in applying the rule of suspension of rent which can only be applied in exceptional cases having regard to the circumstances of the cases The rule of suspension is derived from the English Common Law, and an application of the rule to this country in its rigid form can hardly lead to justice 55 C. 689 1927 Cal 737

——dispossession from a part disentitles the landlord to get rent. 34 C L J. 119

——in case of dispossession by landlord the whole rent may not be suspended 1923 Cal 153 49 C 257.

——rent may be suspended for dispossession by landlord. 49 C 257

——when a tenant is in possession of the whole demised area and subsequently has been deprived of a portion thereof by his landlord it is not open to the landlord to sue for rent in respect of the whole or any portion thereof 42 C L J. 66 90 I. C 47 1925 Cal 1187

——the doctrine of suspension of payment of rent, where the tenant has not been put in possession of part of the subject leased applies where the rent is a lump rental for the whole land leased treated as an individual subject It has no application to a case where the stipulated rent is so much per acre or bigha 52 C. 417: 30 C W. N 1 88 I C. 110: 23 A. L. J 757 **P. C**, 33 C. W. N. 715, 33 C W N 367 1929 Cal 395.

——the general rule is that there will be suspension of rent in cases where the landlord has by his action dispossessed the tenant *of a portion of the holding demised or where, owing to his action the* lessee has not been able to take possession of a part of the holding. There is an exception to this rule that there will only be an abatement where this has occurred with the knowledge of the tenant before he entered into the land that a portion of it was in the possession of another 85 I C. 781: 1925 Cal. 805

——to constitute an eviction of a tenant by the landlord, the physical act may not be necessary, and all that is necessary is some act which constitutes a substantial interference of a parmanent nature with the legal right of the tenant, 43 C L J 94, 45 C. L. J. 32, 104 I C 404 1927 Cal 273

——to constitute eviction, actual physical expulsion by force or violence is not necessary, any act of the landlord or his agent with the intention of depriving the tenant of the enjoyment of demised premises or any part thereof operates as an eviction. 25 C. L J. 53. 21 C W. N 492.

(31) Suspension of rent—*contd.*

——to justify suspension of rent which is a punishment awarded to the landlord for his illegal act and highhandedness the circumstance of each case should be looked to. Tenants will not be entitled to suspension of rent only for a mistake of the landlord to include certain portion of the land in a previous decree not comprised in the subject-matter of the suit and consequently having it sold because the tenant could have corrected the mistake in a subsequent suit, 44 C L J 27 1926 Cal. 908 94 I. C 418.

——the Common Law doctrine of suspension of rent can be applied in India as a rule of equity, justice and good conscience and should be applied with caution only. To entitle the tenant to suspend the entire rent it must be shown that the eviction was the act of landlord and was done with the intention of depriving the tenant of the enjoyment of the demised premises or land and not that it was accidental to the ignorance of the parties as to the real boundaries of the lands 1926 Cal 1148 : 96 I. C. 557.

——there cannot be suspension of whole rent where the lease contains lands in several schedules and the tenant is dispossessed from the plots of one schedule. 112 I. C. 71 : 1929 Cal. 130

——dispossession not by the landlord but by other lessee does not give any advantage to tenant. 34 C. 191 85 I. C. 781.

——the onus of proving the dispossession is on the tenant. 46 C L J. 558 1928 Cal. 136 · 106 I. C 841, 110 I C. 438 (C).

——when the landlord takes *Kabulyat from* sub-tenant but the tenant is not dispossessed by the latter, the tenant is liable to pay rent. 9 C. W. N. 871.

——where land is lost by diluvion and reformed by *alluvion* and is settled with stranger by landlord, it is no eviction. 9 C. L. J. 578 ; 13 C. W N. 853 : 36 C 856, 21 C. L. J. 102

——when lessee is prevented from taking possession by another lessee, (*per Chitty J*) it is not eviction by landlord, (*per Vincent J*) it is so If the lessor fails to put the lessee in possession of the demised land the lessee may surrender but cannot say that he will hold the land in his possession rent-free, for all time. 13 C W. N 702 : 9 C. L. J 585 2 I C 123.

——though the lessor is bound to put the lessee in possession he is not bound to put a recalcitrant (showing repugnance) tenant into possession. 9 C. L J 595

——eviction by title paramount would be a good defence to a suit for rent, if the party evicting, *had a good title*, and the tenant quitted *against his will* The same result would follow when the party seeking to evict would claim the rent and the tenant on such notice attorn to him, This doctrine of *quasi* eviction does not apply where the tenant is *induced* to attorn to the superior landlord by an offer to accept a reduced rent 18 C. W. N 552

——when a tenure-holder cannot collect rent from his sub-tenant owing to wilful interference of the superior landlord, the latter is not entitled to recover his rent even if he acts under a *bona fide*

(31) Suspension of rent—*contd.*

belief that he could lawfully take possession. 11 C. L. J 606, 14 C. W. N 446, 12 M. I A. 244, *Dist.*

——in case of oppression by landlord the tenant is entitled to damages as well 2 P L T 642

——the tenant may be justified in terminating the lease if the circumstances of the case show to an eviction of the tenant by the landlord. 43 C L J. 94

——right to suspension of entire rent continues till the tenant is restored to possession 13 C L J 119.

——when tenant is not put into possession of the entire land demised to him he can claim abatement of rent but if he pays the full rent for a long time he cannot claim abatement 1928 Cal 137 105 I. C. 741.

——when the tenant gets mesne profits from the landlord there will be no suspension of rent. 33 C W. N 614

(32) Waiver on the part of landlord

——acceptance, for long time, of rent at a rate lower than that stipulated in the kabulyat does not amount to waiver. 60 I C. 86 (C).

——acceptance of rent after notice to quit for a period antecedent thereto does not amount to waiver 33 C L J 299, 37 C. L J. 548.

——when after service of notice to quit the tenant continued in possession without payment of rent or without permission of the landlord there was a waiver and the possession of the tenant was adverse, 1923 Nag 129

——the forfeiture is waived by the institution of suit for rent for period subsequent to forfeiture. 69 I C 282

——subsequent receipt of rent due prior to forfeiture is not waiver. 37 C L J 548 : 70 I C 999

——but receipt of rent in advance for 6 months after notice to

fter becoming aware he waives the for-

LAND REGISTRATION ACT.

——the term "civil proceeding" in s 14 L Act is not meant to cover an application under ss 28 29 or 42 of this Act nor is the Land Registration Collector a Court within the meaning of the sec and time taken in other infructuous proceedings cannot be deducted under s 14 L Act 90 I C 244 7 Pat L T. 61 1926 Pat. 194

——s 78 has no application to an assignee of rent from an unregistered proprietor. 11 C W N. 141. p 143, 42 C. L. J. 134

——s 78 is controlled by s 81 of the Act 11 C. L. J. 477.

——if on the death of a registered proprietor, pending rent instituted by him, his widow is substituted in his place, she car a decree without getting her name registered. 27 C. 178.

Land Registration Act—*contd.*

——a suit fc [illegible] want of registration of name be [illegible] tration is produced before trial [illegible] F. B., 26 C. 712, 1 C. W. N. 712

——a representative of a deceased registered proprietor can sue for the rent which becomes due to the deceased, without registration of his name 2 C W N 493, 27 C. 178.

——when there is registered kabuliyat executed by the tenant, mutation of name is not necessary to maintain a suit for rent 17 C W. N. 96 n, 11 C. L J 477

——the term 'written contract' mentioned in s. 81 refers to a contract between the person who claims rent as proprietor and who is bound to pay rent to him under s 78. 27 C. L J 474.

——if during the pendency of appeal name is registered, it may be given effect to 19 C. W N. 794

——the plff. cannot evade the effect of s. 78, by recourse to the doctrine of estoppel on the ground that the deft has previously paid rent to him amicably or that he brought the deft upon the *land*, as it is the statutory bar which places the plff under legal disability 26 *C. L J 60.*

——s. 78 is no bar to a person recovering rent although the person who should have been registered as the proprietor and through whom he claims has not been so registered, s. 78 is inapplicable to the case of an assignee of rent though the name of the assignor has not been registered under the Act 42 C. L. J. 134 90 I. C. 561 1925 Cal 1175

——under s. 78 a tenant is not bound to pay the rent to a person whose name has not been registered under the Act. The section is complementary to s 6 B T Act, 86 I C. 865. 1925 Cal. 1175

——s. 78 is no bar to a person filing a suit for arrears of rent although the person who should have been registered as the proprietor and through whom he claimed as lessee, has not been so registered. This sec is inapplicable where rents claimed in the suit was claimed by virtue of an assignment. 42 C L *J. 134 90* I. C 561: 1925 Cal 1175, 11 C. L. J 141. *fol*

——s 78 is controlled by s 8 which contains a saving *for* the condition of any written contract but it is a section in aid of s 38. 46 C. L. J. 584.

——the inability of a proprietor, manager or mortgagee to obtain a rent decree by reason of their names having not been entered in the Collector's Register does not affect their title. 8 Pat 375: 1929 Pat 357.

——the disqualification in bringing suit for rent is one which attaches only to revenue-free estates already entered in the general [illegible] mortgagee fails to register [illegible] Pat. 564.

[illegible] ised but the applicant [illegible] recovery of possession [illegible] ion of title would be

Land Registration Act—*contd.*

governed by Art 120 L Act. 4 C. L. J. 568 : 11 C. W. N. 186, 1 C. L. J. 73, *Fol.*

——a decree in a Land Registration proceeding does not prove the decree holder's possession. It proves that the Collector held that he had a right to possess. 63 I C. 602 (C)

——when a registered proprietor brings a suit for rent the deft. cannot plead that the rent is due to a third person, his only remedy being to deposit rent under s 149. But where the registered proprietor has already been adjudicated as having no title s. 60 does not apply. 2 P. L T 337 · 61 I. C 386

——s 78 does not bar a suit for arrears of rent by an unregistered assignee from registered proprietor. 6 Pat. L J. 109 2 Pat. L. T 370 : 60 I. C 390

——right to collect rent, effect of registration, B. T. Act ss. 60 and 149, 6 Pat L J. 658.

——an ijaradar is merely a lessee and s 81 does not apply to a person subordinate to a proprietor. 27 C. W N 888

——application of ss 78 79, 81 27 C W. N 888

——s 81 applies to a case when one of the parties is a vendee from one of the contracting parties 34 C L J 119, 27 C. L. J. 474 not *Ref*

——a co-sharer who granted a lease of a portion of his estate to a tenant who executed a kabulyat can alone sue for rent 48 C 1078.

——the mere registration of name under the L R Act does not constitute possession in fact or in law. 6 C. L J. 472, but see below.

——[illegible]

of possession but the weight to be attached to the fact must depend upon the circumstances of each case. 20 C. W. N 51 21 C L J. 253 . 27 I C 465

Lease, see *Tr P. Act ss. 105-117*.

LEGAL PRACTITIONERS ACT.

S 3. (definitions).

——looking after other people's cases and writing petition for them cannot by themselves make a person tout within the Act, he must be a procurer of employment in any legal business. 62 I C. 829, 22 Cr L. J. 589.

——a person to be a tout there must be payment or proposal for payment as reward for bringing clients 6 Pat. 567 : 102 I. C. 340 1927 Pat 282 : 8 Pat L T. 587.

——gratuitous services defined 1929 Cal. 196 : 115 I. C. 602, 40 A. 153 *Rel. on.*

S. 4. Advocates and vakils.

——the word "practise" in sec. 4 includes the right to appear, plead and act. 4 Pat. 766.

S. 4. Advocates and Vakil—*contd.*

——vakils have no right of audience in the Insolvency Court at the Presidency town of Madras. 48 M. 331 : 85 I. C. 1035 : 48 M. L. J. 36. F. B.

——s 4 was not intended to override the special provisions relating to Insolvency in the Presidency towns, *above case.*

S 7 (Certificates to pleaders and mukhtears).

——the certificate of character to be filed with the application for the renewal of certificate under Rule 25 of the Rules of the High Court, means nothing more than a certificate that the presiding officer of the court is not aware of any misconduct of the pleader justifying actions under those secs 13 C. W. N. 415

character in the course of a trial of a case before him in which the plader was a party. 13 C W N 415.

——the renewal of licence to a legal practitioner cannot be refused on the mere suspicion that he was implicated in and privy ... serious allegations ... C. W. N. 919 ... improper conduct in ... to be no bar to the renewal of certificate of a pleader 27 C. W. N. 528 : 37 C. L. J 331.

——the conviction for perjury is good ground for striking off the name of the legal practitioner from the roll of practitioners extent of moral terpitude must be considered in such cases. 46 M. 903

——disbarment of a member of the English Bar by the Benches of his inn does not *ipso facto* lead to his being struct off the rolls of an Indian H C 46 M. 903

S. 12. (suspension and dismissal of pleaders and Mukhtears convicted of criminal offence).

——the High Court alone can take proceedings under sec 12, when a *Mukhtear* has been convicted of criminal offence implying ... has no jurisdiction to ... 164 ... offence of rioting, ... ed against him and ... to go behind his conviction by the criminal court and invite the court to examine the fact with a view to showing that the conviction was erroneous. 14 C. W. N. 1073. 26 I A. 242 · 22 A 49 : 3 C. W. N 736. *P. C.* Fol. (7 A. 290 . 5 A. W. N 48, 86 W. R Cr. R. 41), Dist. 1 M. W. N. 159, 313 *Ref.*

——when a legal practitioner is once dismissed for criminal conviction he can be re-admitted showing his subsequent good conduct. 12 C. L. J. 625.

S. 12. (Suspension and dismissal of pleaders and Mukhtears convicted of criminal offence)—*contd*

——a pleader is not bound to accept the bribe offered to him, nor to state his reasons for refusing to accept it. 35 C. 317 : 12 C. W. N. 381, *contra*. 88 I C 1048 2 O W N 682

——a solicitor may withdraw on good grounds such as for self-respect. 23 C L. J. 473

——a pleader in the *Muffissil* court can put question from his own recollection and knowledge. 13 C. W N. 340 36 C. 375 9 C L J 259.

——s. 13 (a) does not prohibit a pleader from acting without instruction, a pleader honestly believing himself justified in taking all the responsibility on himself, is not guilty of professional misconduct in not taking instruction from his client. 1 I C. 667.

——but to receive instruction from third person is misconduct 20 C. W N. 1016

——a pleader drawing money from court and not paying to the client, but driving the client to a suit for the same, is guilty of professional misconduct. 31 C 44 · 7 C. W. N 373.

——a vakil receiving money on behalf of his client and appropriating it, is guilty of professional misconduct 6 I C 310 . 5 M L. T 427, F B

——to file a document which is not genuine on the face of it is misconduct 20 C. W N. 1016

——a petition couched in disrespectful and improper language, drafted and presented by a pleader to a court in the capacity of a party, will not render him liable for professional misconduct, 24 M 17

——taking a transfer of an actionable claim is professional misconduct 23 M L J 447, 17 C W. N. 101 n., 37 M 238, F.B.

——bribing witness or including party to bribe witness, is professional misconduct. 5 C. W N 45, and acting as go-between to bribe a police is punishable. 21 C W. N. 516.

——absence of pleader at the time of hearing of case which is dismissed for default, is professional misconduct and the pleader is to explain the reason 16 C. W. N 1081, P C.

——champertous agreement with the client is professional misconduct 4 C L. J. 262

——money-lending transaction on usurious terms is professional misconduct 8 I C 677

——cheating the client is professional misconduct 11 C. L. J. 438 . 14 C W N 521 7 M. L T. 412 : 12 Bom. L R 425, P. C.

——temporary misappropriation being a temporary aberration does not justify dismissal but mere suspension 1925 Cal. 228.

S. 12. (Suspension and dismissal of pleaders and Mukhtears convicted of criminal offence)—*contd.*

——an allegation by a pleader as a deft. in a suit, that a certain officer of the court has been bribed by the plff does not amount to professional misconduct. 5 C. W. N 48.

——filing a petition on grounds untenable in law is not misconduct 4 C W N 633

——'any other reasonable cause' in cl (f) of s. 13 is not confined to misconduct of which a practitioner is guilty in his professional capacity, but embraces all causes which may afford reasonable ground for his suspension or dismissal. 29 C. 890 ; 6 C. W. N 556 F. B, 27 C. 1023. 4 C W N. 389, *Apprd.*, 5 C. W. N. 48, *overruled*

——misconduct under the Act refers to acts committed after enrolment and not before. 29 C. 890 : 6 C. W. N. 556, F. B.

——insertion of the name of pleader and then making some alteration does not amount to misconduct. 17 C. W. N. 328

——altering survey number in the petition without the permission of the court is professional misconduct. 87 I. C. 843 : 26 Cr L. J 1019.

——it is reprehensible on the part of a *mukhtar* to attest a will on the death of the testator and he should be suspended. 14 C L J 606.

——a high standard of rectitude, diligence, duty and zeal ought to be required of pleader, in the interest of the Bar. 11 Bom. L R 1150. 4 I. C. 266.

——the Act is not applicable to a misconduct committed by a practitioner not in such capacity but as private individual 19 C L. J 110.

S. 13. (suspension or dismissal for unprofessional conduct)

——imputation of criminal offence or a strong suspicion of criminal offence has no direct connection with the conduct of the pleader in his practical and immediate relation to the court and there should be a trial and conviction before disbarment. 47 C. 115, 24 C. W. N 755 31 C L J 471 : 57 I C. 931.

——a pleader making unfounded imputation in court against the fairness and impartiality of tribunal in pending trial is guilty of professional misconduct 27 C W. N. 88

——before moving a petition of transfer of a case a pleader should test the statements of the client imputing prejudice or unfairness of corruption of the Magistrate, 1929 Pat 151 F. B.

——if a pleader has any complaint against any subordinate Judge he has two courses open to him *i e*, to make a representation to the particular Judge or the H C. 26 C. W. N. 580 : 35 C. L. J. 403 1923 Cal. 212 : 69 I C. 209

——s. 13 (1) is not confined to professional capacity. 43 C 843. 31 M. L. T. 192 · 44 M L. J. 32 P. C.

——if a pleader in pursuance of a concerted movement to boycott court deliberately abstains from attending it, he is guilty of unjustifiable conduct. 26 C. W. N. 580, 35 C. L. J. 403

S. 13 (Suspension or dismissal for unprofessional conduct)
—contd

——a pleader who employs himself as a professor without the permission of the court renders himself liable to disciplinary action. 38 C L J 353

——a client should not be allowed the cost of a vindictive proceeding against a pleader though his conduct is improper. 73 I C 329 1923 M 485.

——a legal practitioner cannot represent conflicting interests: when he has once been retained and received the confidence of a client he cannot accept retainer from or enter the services of those whose interests are adverse *in the same controversy or on matters so closely allied thereto as to be in effect a part thereof. The rule is rigid* 37 C. L. J. 48, 47 A 723 88 I C. 179 23 A. L. J. 469 **F. B.**

——where a pleader was consulted by the complainant at a certain stage of a criminal proceeding he was not liable for an offence under s 3 (a) for appearing for some person accused at a later stage of proceeding in connection with a wholly different incident 8 Lah. 671.

——where a pleader after preaching at public meetings disobedience to law and order expresses his regret and undertakes to help [illegible] enewed sanad. 45 [illegible] pleader does not [illegible] 45 M L. J. 684 : [illegible]

——the conduct of the legal practitioner counselling the public not to attend court and thereby interfering with the administration of justice comes within s. 13. 1928 Cal. 853.

——a pleader is bound to attend court and conduct his case, 48 C 733 35 C L J 356 : 26 C W N 589.

[illegible]

——withdrawal of money on behalf of guardian and payment to his relation is negligence but not grossly improper misconduct within s. 13. 1925 Cal 146.

——where the retention of client's money is improper but not dishonest a severe censure is enough to meet the ends of justice. 39 M. L. T. 483 : 53 M. L. J. 669 : 26 L. W. 652 **F. B.**

——if a vakil is deceived by his clerk or if his clerk does acts [illegible] self

[illegible] on

on-

S. 14. Procedure when charge of unprofessional conduct is brought in subordinate court.

——"such court" in the first clause cannot be construed to mean the court in which the misconduct is alleged to have been committed. 72 I C. 521.

——offence committed before a Sub-divisional Magistrate cannot be taken cognizance of by Sessions Judge under this sec. 4 Pat L T. 97 : 71 I C. 703.

——any court in which a pleader practises may consider the charge of misconduct 49 C. 850 : 35 C. L J. 520.

——the sub-ordinate court can proceed under this sec. only in case the misconduct falls within *cls* (*a*) and (*b*), of s 13 of the Act. 4 C W N 389 : 27 C. 1023, but see below.

——s 14 covers all sorts of misconduct under s 13 of the Act 24 C. L. J. 190. 20 C W N. 1284. 27 C. 1023 : 4 C. W. N. 389. 1923 Pat 329, *Disapprd* 39 A. 1045.

——when the charge against a pleader consits in aiding and abetting a party to a sui[illegible] that he might defeat a [illegible] be, if necessary, to tak[illegible] not under this Act and [illegible] may result in grave [illegible] 1926 Cal 502, 54 C. 721.

——a Sub-divisional Magistrate has no power or jurisdiction to frame a charge under s 14 against a *Mukhtar* when the accusation had reference to conduct in civil court. 10 C W. N. 1059 4 C L. J 229

——C P. C. is not applicable to L. P. Act, so a case under this Act cannot be transferred 1917 Pat. 60.

——this Act makes no provision either for the transfer of proceedings or for the holding of a preliminary inquiry. *This sec* does not limit the consideration of the charge to the *court in* which the misconduct is alleged to have been committed 92 I C. 896 · 27 Cr L. J. 384 92 I C 896 : 1926 Mad. 1044.

——proceedings under this Act are judicial proceedings 6 M 252, it cannot be made part of criminal proceedings. 15 C W. N. 764 : 9 I C. 247 But the Lahore H C has held that the proceedings under this sec. is not a civil proceeding nor a criminal proceeding though being penal in its nature it resembles a criminal case. 27 Punj L R. 225 . 1926 Lah. 199 . 93 I C 780.

——in an inquiry under this Act the court may take evidence before framing a charge against the pleader but the witnesses should be examined in presence of the pleader. 54 C. 721 : 1927 Cal 536 : 31 C. W. N. 554.

[illegible] that ordinarily an "inquiry" [illegible] officer of the court where the [illegible] committed. 26 A. L. J. 1250.

[illegible] ed without being allowed to [illegible] 24 M. 83.

S. 14 (Procedure when charge of unprofessional conduct is brought in subordinate court—*contd.*

——summons or warrant cannot be issued aginst a pleader who fails to appear in answer to a charge. 18 M. L. J. 184 : 3 M. L. T. 237.

——a pleader prosecuted under the Act ought not to be put on his oath and he is bound to speak the truth 6 M. 252.

——a threatening letter to a munsiff by a pleader in the capacity of a suitor for illegal acts done to him, is not misconduct 20 C. W. N. 278 : 23 C. L. J. 237.

——but a threatening letter to a Magistrate containing improper and vulgar abuse was held to make the pleader guilty of professional misconduct 25 Bom. L. R 264 72 I. C. 353

——defiance of law by taking it into own hands is misconduct. 1923 Pat. 42

——asking the Bench clerk about the trend of a judgment before it is actually delivered is professional misconduct 1923 Pat 329.

——application of s 14—the fact that the District Judge's opinion differs from that of the munsiff does not render the proceeding improper 49 C 732 · 35 C L J 356 · 26 C. W N 589

——strict proof of pleader's misbehaviour is necessary 11 Bom. L R 1150 · 4 I C. 266

——the 'investigation' referred to in the sec. is investigation by the court 15 C W N 269 13 C L. J 457.

——the provisions of sec 14 must be strictly followed the report to the High Court must be accompanied by the opinion of the officer making the report 15 C W. N 764 9 I C. 247.

S 28 (Agreements with clients).

——the sec contemplates agreements for fees between a party and his pleader in excess of, and apart from the amount allowed in taxation 12 A 169 · 10 A. W. N. 36, 16 M 278 ; 2 M L J. 247, 1 I. C. 393 27 C W N 769.

——all agreements between a legal practitioner and his client in respect of cases then pending in court or cases not pending in court come under s 28 8 Pat L T. 175 . 6 Pat. 614 · 101 I. C 559, 1927 Pat 178

——the object of this sec is to protect improvident and necessitious litigants from unscrupulous legal advisers 12 A. 169 . 10 A. W N. 36, 16 M. 278 : 2 M. L J 247

——an oral agreement to pay full fees cannot be enforced. 3 A. L J. 579 F B

——in a suit on a promissory note executed by a pleader an oral agreement that the amount was to be liquidated by fees for professionl work to be rendered cannot be set up in defence. 50 A. 517 1928 All 274 26 A L. J. 256 . 113 I C. 93

——a promissory note given to a pleader for fees but not filed in court, is invalid. 14 M. 63

——the act does not prevent a pleader from suing his client for a fee actually allowed on taxation. 1 I C. 393

S. 28 (Agreements with clients)—*contd.*

——a suit is not maintainable under sec. 28 by a pleader against his client for fees for professional service on a contract not in writing and not filed in court. He may sue under sec 70 of the Contract Act, if possible 20 C L. J. 424, (15 C. L. J. 690 : 15 C W N. 681, 15 C L. J 660 · 17 C. W. N. 45, 25 C. 805), *Fol.*, *20 C. L. J.* 445, 27 C W N 769. 26 C. W. N. 709.

——where there is no agreement the pleader is entitled to maintain an action for reasonable remuneration. 27 C W. N. 769

——a pleader has no right to retain money realised by him on behalf of the client in one case, for his dues in another case. 4 I C 398

——where there was no legal arrangement under sec. 28, in a suit by the client for money withdrawn by the pleader on client's behalf, the pleader could not be permitted to set up the plea of lien on the money to the extent of the fees agreed upon. 15 C. W N 981.

——though an agreement between pleader and client respecting remuneration of the pleader is void if not legally made under sec. 28, yet a pleader may retain under sec. 217 of the Contract Act money on account of all disbursement he had made for the client, out of the sum that may be received by him on account of his client 27 M 512.

(S. 36 Test of touts)

——power to declare a person a tout rests with the authority mentioned in the sec after recording evidence. 24 C. W. N. 1074 : 60 I. C. 321

——provisions of this sec are exceptional and drastic, so care and caution should be exercised before action is taken against anybody who must be given full opportunity to adduce evidence 92 I. C. 749 . 27 Cr L. J 333 ; 1926 Lab. 227.

——the District Judge must be satisfied by an evidence of general repute or otherwise and must give opportunity to the person whose name is to be enlisted as tout. 45 A 676.

[illegible] applies to court over which the [illegible] 1923 Cal. 484

[illegible] t can act on general repute [illegible] 437, 69 I. C 433. 11 C. L. [illegible] 36, 28 I. C. 916. 61 I C. [illegible]

[illegible]

——a resolution or report of a sub-committee consisting of seven members out of an Association of about 22 members declaring a certain person to be a tout is not a resolution by a majority of the members and cannot be used as evidence of general repute under the Explanation to sub-sec. (1) of s. 36, 6 Pat. 567 : 102 I. C. 340 : 1927 Pat. 282.

——whether a resolution passed by a Bar Association declaring a person to be a tout is or is not regularly passed is to be determined not by reference to any rules of the Association but by

S. 36. (Test of touts)—*contd.*
reference to the Explanation to s. 36 sub-sec. 1, 1928 All. 334 : 26 A L. J. 790.

——the resolution passed by a Bar Association declaring a person to be a tout is merely evidence upon which the judicial [illegible] 1928 All 334.

[illegible] in the section cannot [illegible] to a subordinate officer.

[illegible] ore inserting the names [illegible]

Miscellaneous cases relating to Legal Practitioners and clients.

Compromise by pleader

——a counsel has got absolute power to compromise proceedings when he is appearing in court But if he compromise out of court the same is not binding on the clients unless they agree to it The relation of counsel and client is not that of agent and principal. 52 C 386 . 29 C. W N. 566 : 88 I C 413 1925 Cal 696 *contra.* A counsel has no authority to compromise a case without reference to his client. 41 C. L. J 213 29 C. W. N. 597 . 88 I. C 369 : 1925 Cal 866

——a counsel has only a limited authority to settle matters on behalf of his client, so in this particular case the decree passed on the consent of the counsel was validly reversed 32 C. W N. 44 : 1928 Cal. 378 : 106 I. C 309.

——although a pleader has no power to compromise a suit unless specially authorised in that behalf, he can bind his client by an admission upon a a question of fact relating to the suit 17 C W. N. 156, (6 C. W N 82, 21 M 274) *Fol* (11 A. 384, 22 M 538, 27 C. 428) *Ref.*

——a pleader cannot compromise a case without express authority given by the client 45 M. L. J. 453 33 M L. T, 294 P. C

——a pleader cannot compromise a case on the authority of a vakalatnama executed by a pardanashin lady without proving that the lady had the knowledge of the clause of such authority. 1928 Cal. 334 : 108 I. C. 44

Admission by pleader

——when the judgment of a court is expressly based on the admission made by a counsel in a case, if the aggrieved party disputes the factum of such admission, he should at once ask for [illegible] matter is fresh in the minds of [illegible] Agitating the matter many [illegible] help of affidavits of the legal [illegible] per thing to do 90 I. C. 775 : [illegible]

——an erroneous admission of a pleader on a point of law cannot bind the party. 42 C. L J 71 90 I. C 98 · 1925 Cal 1171, 26 C. 250 : 3 C. W. N. 222, 9 I. C. 621, 73 I. C. 594

——refusal by counsel or pleader to argue a question of law is a mere admission of law not binding on the party. 7. C. L J. 152

Miscellaneous cases relating to Legal Practitioners and clients—*contd.*

——a pleader's omission to argue on a point of law does not disentitle the court to deal with it. 27 C. 156. P. C

——pleader's wrong line of argument does not bar the client to get relief on the allegations in the plaint, 91 I C. 412.

——a pleader can abandon an issue. 25 M. 367, 377, P. C.

——pleader's acknowledgment of liability saves limitation against client. 18 A 384, 22 B. 722.

——a pleader cannot consent to settlement of a suit by the oath of the opposite party without client's express consent, 14 B. 455, 5 I. C. 514 : 20 M. L. J. 396 *contra*. no special power under the vakalatnama is necessary for a pleader to agree to be bound by the statement of a particular witness. 49 A. 842 : 102 I. C. 38 : 1927 All 584 : 25 A. L. J 729 38 A. 137 *Fol.*

——a pleader cannot refer a case to arbitration without the express consent of the client 29 A. 429.

Authority of pleader to appear in criminal case.

——no authority in writing is required for a pleader to appear in criminal case 94 I. C. 714 : 1926 Pat. 296 : 7 Pat. L. T. 534 1926 P. H. C. C. 125

Duties of Legal practitioners.

——the rights, duties and privileges of advocates in India are on the same footing as those of counsel in England and there is no difference whether they are practising in the Muffasil or in the Presidency Town 52 C. 336 : 29 C. W. N. 566 : 88 I C 413, 1925 Cal. 696.

——it is undesirable that a member of legal profession should practise in a court presided over by a new relation, 29 C. W. N. 648 : 88 I C 607 · 1925 Cal. 806

——pleaders would do well to avoid any conduct on their part which is reasonably capable of being misunderstood. If a pleader advises or acts for a client he should not appear against him in any subsequent proceedings if he feels that he might in such ... gained from his

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Miscellaneous cases relating to Legal Practitioners and clients—*contd.*

self-respecting counsel would like to conduct a case for the defence after having been called as a witness for the prosecution. 1925 Mad. 1153 : 49 M. L. J. 95 : 1925 M W N 702.

——a vakil likely to be an important witness in a case should [illegible] brief not knowing or having [illegible] witness he will retire after [illegible] ial witness. 5 Pat 777 . 101

——where a pleader has acted as commissioner in a case he has acted in a *quasi* judicial character and cannot appear for one of the parties in a proceeding to have the decree amended. 44 C. L. J 441 100 I C 309 1927 Cal 203.

——honest endeavour to re establish character for seven years entitles a legal practitioner debarred from practice to resume that 1925 Pat 250

——a counsel is entitled to accept the instructions of his client subject to this that as a matter of prudence and for one's own

——when a complaint is a manifestly improper document and brought into existence by the deliberate dishonesty of the vakil, the vakil is guilty of professional misconduct In invoking the criminal law on behalf of a client the vakil assumes a serious responsibility. 47 A 377 · 23 A L J 125 86 I. C 408 1925 All 247 F. B.

——a legal practitioner should not draft and sign a compromise petition and affidavit in a case in which he was not engaged from before and in which other lawyers were engaged to his knowledge 6 Pat 217 1927 Pat. 199 102 I. C. 337 8 Pat. L. T. 102

——when a Barrister hands over his brief to another Barrister at a fixed fee the former does not thereby entirely go out of the case and the latter would be guilty of most unprofessional conduct if he would take the opportunity of extorting a higher fee from the lay client 11 I C 321 29 Punj. L. R. 492 : 1928 M W. N 831 1928 P C 264

——members of the legal profession are agents, not of the man who pays them, but are acting in the administration of justice and are bound to exercise an independent judgment and to conduct themselves with a sense of personal responsibility. 21 A. L J 893

——a legal practitioner signing a document is presumed to know its contents 48 A 542 : 98 I C 493 : 1927 All 45 F. B

——a pleader should not take any document from the *peshkar* to his house for the inspection of his client. 115 I C 673: 1929 Pat 338 Sp B.

——a practitioner who appears for several respondents owes a clear duty to the Court to bring to its notice the fact of the

Miscellaneous cases relating to Legal Practitioners and clients—contd.

death of any respondent if he be aware of it. 1929 M. W. N. 220. 114 I. C. 601. 33 C W N. 318: 27 A. L. J. 85: 49 C L. J. 141. 1929 P. C 58: 56 M L. J. 301 P. C.

——a legal practitioner should not be an indentifier merely being told by his clerk to identify the person. Cases of careless identification by legal practitioner must be dealt with great severity. 115 I. C. 679: 1929 Pat. 339 F. B.

——after a legal practitioner has been instructed by his client he is not absolved from his obligation by the failure of the client to pay his remuneration, it is the duty of the legal practitioner to go to his client and then and there repudiate the instruction 115 I C. 676 · 1929 Pat. 337 F. B.

When senior is present junior cannot argue.

——where the senior is present junior cannot argue a ground of appeal except with the permission of the court. 12 W R. 575.

Defamatory question by pleaders

——a pleader will be presumed to cross-examine a witness in good faith and in order to protect his client's interest, so that there cannot be defamation in his questions unless it is very strongly proved. 18 C W. N. 424, 46 C L. J. 227; 104 I. C. 717: 1927 Cal 823.

Power of a Mukhtar.

[illegible] Mukhtar [illegible] legal [illegible] ourt

Service on pleader if sufficient.

——service of notice of remand of a case on pleader is sufficient 13 C. W N 142.

——unless some special reason can be shown to the contrary the pleader's knowledge amounts to notice to client. 1927 M W. N 222 · 1927 Mad. 707 102 I. C. 118.

Pleader acting as Magistrate.

——the appointment of a pleader as magistrate is not illegal 23 B 490.

Pleader can purchase at auction sale after intimating client

——a pleader who was instructed to bid on behalf of the D. Hr may purchase at an auction on his own account after informing the client and with permission of the court. 15 M. 389

Pleader's illness should be considered.

——when a pleader cannot appear owing to illness the court should allow another pleader to be engaged or adjourn the case to a future date and should not try it *ex-parte*. 35 C. 799. 12 C. W. N. 385. 7 C L J. 426.

Miscellaneous cases relating to Legal Practitioners and clients—*contd.*

Vakalatnama, acceptance and its force.

——s. 39 (old), Or 3, r 4 C P. C, does not require that the acceptance of the *Vakalatnama* must be in writing. The absence of acceptance in writing cannot be said to vitiate the authority to act All that the sec requires is, that the appointment of a pleader must be in writing and filed in court, (*per Banerjee, J*) 5 C. W. N 816 (1901)

——verbal acceptance of a *Vakalatnama* is not in compliance with cl (e), r. 45 Ch XI, of the High Court's General Rules and Circular Orders Where a pleader appears for another pleader who is unable at the moment to attend court, he ought to let the court know that he is so appearing The rule as to acceptance of *Vakalatnama* should be strictly and scrupulously observed in the subordinate courts 20 C. W N 283, (1923)

——an acceptance or act by a pleader named in a *Vakalatnama* would if allowed by court expressly or by implication, be valid and operative even without an endorsement in writing by the pleader, but r 45 (e), Ch XI p. 301, Vol 1 of the Circular Orders of the High Court requiring acceptance in writing ought to be complied with The courts should *insist on the Rule being observed by* pleaders practising before them and the pleader who does not conform to it ought not to be heard The endorsement of the pleader [illegible] may be made in the presence of the court W N. 287, (1913).

from both sides is gross

——a fresh *Vakalatnama* is not necessary to authorise a pleader for restoration of an appeal dismissed for default. 15 A 55

——a *Vakalatnama* remains in force till all the proceedings in suit 16 C W N 736, 1917 Pat 100, 20 B 198, 16 B 109

——there is no general agency between a pleader and his client. In every suit the contract of agency becomes complete with the execution of the *Vakalatnama* and ends with the termination of the suit 50 M 249 99 I C 456 : 1927 M W N 32 : 1927 Mad 157

LICENSE

——the grantor of a license is under an obligation to place the licensee in a position to enjoy the license 36 C L J 271 . 72 I C 270.

——when the grantor of a license dies his heirs can treat the licensee as trespasser without giving notice of revocation. 1922 Nag. 162 68 I C 107.

——a license is of a personal character not only as regards the grantee but also as regards the grantor. *above case*

——a licensee cannot by enjoying for any length of time acquire right adverse to that of the licensor 44 A 726 1923 A. 140 20 A. L. J. 608

——a licensee in possession does not like the tenant, by denying *title of the grantor of the license forfeit the licence and become* liable to ejectment. 75 I. C 596 . 1923 A. 403, 15 A L. J. 592 *Ref*

License—*contd.*

——in case of lease there is transfer of interest whereas in case of license there is no such transfer although the licensee acquires a right to occupy the land. The stall-holder and other person attending a *mela for selling articles of merchandise* are licensees and not tenants. 35 C. 82 : 11 C. W. N. 1053 F. B, 17 C. W. N. 166, 7 C. L J. 152, 29 M. 353.

——there is no such thing as tenancy by sufferance in India. 69 I. C. 504 (C).

LIMITATION ACT.

Scope.

——It is a branch of the adjective law and governs all proceedings. 2 Pat. L. T. 667 · 62 I C. 100.

——the Act is complete in itself 85 I C. 272 : 1925 Mad 334 · 48 M L J. 74, 32 C. W. N. 971, 51 Mad. 549 : 111 I. C, 210 : 1929 Mad. 509.

——this Act does not apply to the Laccadive Islands. 49 M. 419 , 1926 Mad 657 : 93 I. C. 341.

——plea of limitation is not a technical plea. 76 I C. 119.

——it is contrary to the sound canon of construction to *enlarge* the scope of the provisions of L. Act by importing words which are absent. 34 C. L. J 465.

——the law of limitation is a law of procedure and it is the rule of limitation in force at the time when the application is made 43 M. L. J 184 · 31 M. L. T. 135.

——the law of limitation which prevails when a suit *is brought* applies to that suit unless it be shown that one or other of the parties has acquired vested rights under some earlier statute of limitation. 86 I. C. 757.

——particular article must be applied in preference to *general* article. 55 P L. R. 1922 : 67 I C. 364, 4 Pat 448 · 1925 Pat. 765

——when the two articles applicable are equally wide that which keeps the right to sue alive should generally and apart from other equitable considerations be preferred. 4 Pat. 448 . 1925 Pat. 765.

——there is no scope for the application of any *principles of* [illegible] *In applying* [illegible] the articles [illegible] 43 C. L J.

[illegible] the legal presump- [illegible] statute, [illegible] ctly vain [illegible] it *do so* [illegible] J. 627

[illegible] 205 P. C.

——*the period of limitation is extended in cases where there* has been a suspension of the cause of action or where the cause of

Scope—*contd.*

action has accrued not on the date indicated in cl. 3 of the Schedule to the L. Act, but at a subsequent date for no fault of the pltf. 1925 Cal. 1216 : 85 I. C 1007

——in case of recurring liability to pay money every year the period of limitation runs from the time when each yearly amount falls due. 1926 Cal. 552 91 I. C 411.

——no period of limitation is prescribed for a suit for permanent injunction against the deft, but a cause of action should exist in such a case 31 C. W N. 82

——this Act cannot create any cause of action which does not exist independently of this Act. 30 C. W. N 465. 1926 Cal. 757 : 94 I C. 444.

——except perhaps in cases when injustice has been occasioned by a court by its own acts or oversight, there is no scope for the application 43 C. L J. 155

——the Limitation Act applies to Arbitration proceedings 33 C. W. N, 485 · 115 I C 713. 27 A. L. J. 254 1929 P. C 103 : 56 M L J 614 **P. C.**

——there is no limitation against a plea in defence 113 I C. 750 · 1929 All. 77, 116 I. C. 571 · 1928 Cal 810

S. 3.—(Dismissal of suits if time-barred).

——parties cannot by consent, agreement or conduct extend or alter the period of limitation. 13 W R 44, **F. B**, 20 W R. 395, 5 C. 820, 8 B. 344, 18 I. C 595, 17 C. W N 518. But see 39 M. 129 **F B.**

——a suit is taken to be instituted on the day of presentation of plaint even if filed with deficit court fee 31 C. 75, 19 C 780, 27 C. 814 4 C W N 818, 28 C 427 (*in forma pauperis*) 27 B 330 : 5 Bom L. R 198 20 C. 41, 32 M 305, **F B**, 22 M 494, 29 A 749.

——presentation of appeal without copy of decree is not a proper filing of appeal. 12 A 129 **F B**, 9 I C 222, so also the filing of appeal with insufficient court fee. 12 A 129 **F. B**, 20 M 319

——appeal filed after court-hour in Judge's house may be accepted 34 A 482 **F B**, so also the appeal filed by prisoner before the officer in charge of jail is good filing 9 M. 258.

——application for execution may be supplemented by particulars, 14 C 124, and amended so as to include new schedule 2 C W N 540

——provision of section must be given effect to even though the point of limitation is taken at a late stage. 34 C 941, 6 C. L. J. 237. 11 C W. N 959, **F. B**

——if upon the fact it is clear that a suit is barred by limitation, [illegible] , and dismiss the

[illegible] ground of limita-

[illegible] assumed to have 1927 Pat. 261 8

Pat. L T. 494

S. 3. (Dismissal of suits if time-barred)—*contd*

[illegible] ıe first time [illegible] ted and must [illegible] 356

——an appellate court ıs bound under s 3 to take note of a point of limitation which would put an end to the suit even if the plea is not taken in the trial court 90 I. C. 827, 3 Pat. L R 132 89 I. C 340 - 1925 Pat. 549.

S 4. (Where court is closed when period expires)

——if a suit ıs instituted in wrong court by *bona fide* mistake the [illegible] ut if the wrong court remains [illegible] ıd the plaint is filed on the [illegible] be time-barred and the sec cannot help 36 M. 151, 482, 44 M 817, 45 B. 443, 43 M. L. J. 579, 31 M L, J 258

——where a suit to be within limitation, advantage of holiday under s. 4 was taken but was instituted in a wrong court. s 14 will not be applicable to bring it within time when subsequently instituted in a proper court, 1929 Lah 425, 1923 M. 114, 116 P. L R 1920 *Fol.* 1921. Bom. 379 *not Fol* but it has been held by the Calcutta H. C that it may not be correct to say that ss. 4 and 14 of the I. Act cannot be applied to the same case 33 C. W. N. 221. 1929 Cal 315.

——when the parties cannot do any act owing to the closing of the court and not for their own default, they can do it at the first subsequent opportunity 18 C 231, 631, 22 M. 179 - 8 M. L. J. 265, 10 C W N. 535 3 C. L. J 339 60 I. C. 493

——when the last day of depositing decretal amount is a holiday and application and tender is made on the opening day on which the judge cannot make the order of deposit the application and tender are in time. 20 A L. J. 543 ; 67 I. C 321, 87 I C. 620 : 1925 All 687

[illegible] peal was a holiday and on the [illegible] is made and appeal was filed [illegible] was in time 89 I. C. 956.

——the general provisions of the Limitation Act applies to proceedings under special and local laws unless the latter are complete Codes in themselves 23 A. 277.

——Registration Act is a complete Code, so this sec. does not apply to a suit under sec 77 of that Act. 20 M. 249 *contra* 1 C. W. N. 20, 721.

——Ss 4 to 25 apply to the periods prescribed by other general Acts. 45 M 785 - 43 M. L. J. 168, 1 C. 226, 18 C. 631, 40 A. 198 42 A. 118 *Ref*

——when the last day of filing is a holiday but the court work on that day with the special permission of the H. C. presentation of the application on the next day is sufficient. 1923 M. W. N. 211 - 72 I. C. 13

S 4. (Where court is closed when period expires)—*contd.*

——the Bombay H C on its Original Side cannot be said to be "closed" during the summer vacation so as to prevent a party to file a short cause suit during that period as there is provision made for urgent business 51 B 848 103 I C 540 1927 Bom. 480 : 29 Bom. L. R. 931

S. 5 —(Extension of period in appeal or application).

Application of the section.

——there is considerable difference between the wording of the English Statute and the language used in this sec 110 I C. 837. 1928 Mad 690 1928 Mad 634

——broadly speaking this sec applies to cases in which the limitation period is short 32 C W. N 935 56 C 135 111 I C 88: 1929 Cal 214.

[illegible] C. P.

[illegible] Act to

[illegible] M. L.

[illegible]

——the sec. does not apply to application of substitution 1922 Lah. 131 65 I C 121

——this sec and sec 14 do not apply to an application for execution 93 I C 592 · 1926 All 345

——this sec. does not apply to proceedings under the Land Acquisition Act. 103 I C 295, 1927 Pat. 333 8 Pat L T 710.

——this sec should be construed so as to advance substantial justice when no negligence, nor inaction, nor want of *bona-fides* is imputable to the applicant 34 C 216 5 C L J 380, 17 C. W N 807, 16 C. L J. 366

——when necessary papers have not been filed along with the memorandum the court can excuse delay under this sec 36 C L J. 389, 74 I. C 383 1923 Cal 261

——in computing the period of limitation when an appeal is presented the court should exercise discretion under s 5 guided by s. 14, 35 C L J. 106.

——the court must be fully satisfied as to the sufficiency of the cause 12 C L J 615, 30 B. 329.

——to excuse the delay the delay must be sufficiently explained 92 I C 724 23 L W 212

——what is sufficient cause being a question of discretion, must depend on the circumstances of each particular case 10 C. L J. 39; 2 I C. 961, 13 C. 266, the [illegible]
so as to advance substar[illegible]

——where the dela[illegible]
1928 M. W. N 634 · 110 [illegible]

——application for [illegible]
clearly comes within this sec. 192[illegible] A. [illegible]

——this sec applies to applications under Or. 41 RR. 17 and 19[illegible]
45 M. L. J 813

S 5. (Extension of period in appeal or application)—*contd.*

——a bare mistake of law is not a sufficient cause. 12 A. 461. 10 A. W N. 149, F. B.

——there is distinction between a mistake of law and ignorance of law. 94 I C 300. 1926 Lah. 474.

——the fact that a person was not aware of the change of rule which has been given ample publicity is no ground for excusing delay 75 I. C 878

Cal 634 · 94 I C 929

Carelessness is no excuse.

——carelessness cannot extend time. 39 I. C 965, 68 I C. 777, 21 A L. J. 817 · 75 I C. 254.

——negligence of the pleader's agent is the negligence of the pleader and consequently cannot extend the period. 1927 Pat 232 101 I C 448

——the court should not apply too rigorous a test as regards the diligence of the party. 33 C. W. N. 76 1929 Cal 240

Bona-fide mistake

——a *bona-fide* omission by the appellants to sign *Vakalatnama* is sufficient cause. 21 I C. 444: 11 A. L. J 779, 103 I C. 537 1927 Lah 618, but if the names of the vakil is not inserted in the *Vakalatnama* by mistake, the appeal is not duly presented. 36 A. 47 *contra* 43 A 392, 63 I C. 726, 102 I C. 255

——*bona-fide* mistake about the *forum* of the appellate court justifies extension of time 84 I C 741 1925 Cal 212.

——presentation in wrong court by *bona-fide* mistake may amount to sufficient cause 21 B 552, 1923 A 364

——where by reason of the rules of court and the prevailing practice the party files the appeal out of time the provision of s 5 can be invoked to excuse the delay 89 I. C. 443 : 48 M. 631 : 1925 M W N 190

——where a person acting upon the advice of his pleader did not present an appeal within the time allowed by law, the delay can be excused under s 5 of the Lim Act The true guide is whether the appellant acted with reasonable diligence in the prosecution of his appeal 48 C L. J 106.

faith is sufficient cause, rt by *bona-fide* mistake 266, 13 M. 269, 10 A. 524, 317 *contra, where there is* C. L. J. 380.

S. 5. (Extension of period in appeal or application)—*contd*

——each day's delay must be explained in order to have the benefit of this sec 103 I. C 498 · 1927 Lah. 717.

S. 6 (Legal disabilities.)

——s 6 does not apply to cases for which a period of limitation is prescribed by other Acts. 37 A. 638, 37 M. 186, 29 C 813, 30 C. 532, 7 C W N. 550, 17 C. 263, 18 M. 99, F. B., 7 Bom. L. R. 697: 30 B 275

——ss. 6 and 7 import that during minority the operation of the L Act is suspended and since the minor can apply within 3 years after attaining majority he may through guardian or next friend apply before attaining majority. 1929 Mad. 394: 1919 M W. N. 158.

——s 6 applies to a suit brought by the *shebait* of an idol who represents the idol. 32 C. 129 : 3 I. A. 203 : 8 C. W. N. 809 : 7 Bom. L R 765, P C.

——s. 6 must be read in conjunction with s. 17 , 9 C W N. 537

——a reversioner who is an infant at the date of the alienation, or who is born subsequently, is entitled to the benefit of s 6, 32 C. 62 9 C. W. N. 25.

——one cannot take advantage of his minority or plead ss 6 and 7 when limitation has already begun to run before his birth. 94 I. C. 180.

——in a suit to set aside an alienation by father sons not born on the date of alienation do not get a fresh cause of action by their birth. 97 I. C. 591 : 1927 All. 54, 1925 P. C 33 *Rel on*

——a right to sue for declaration against alienation by widow is vested in the whole body of reversioners jointly and severally and [illegible] ·m all and no subse- [illegible] unj L. R 695 · 90 I. C [illegible] R 1907, 22 P. R 1907.

——where four brothers instituted suit claiming possession of a village which was the ancestral property of their joint family and the sale deed in respect thereof having been executed by their father without legal necessity and without benefit to the joint family, held that so far as the first and second sons were concerned their claim was barred under Art 126 of the Act and that as regards the other two plffs the action was also barred and that ss. 6, 7, 8 did not prevent the limitation running as they contemplated persons in [illegible] of the cause of action which [illegible] ng been born after the date of [illegible] Bom. L. R. 175 · 86 I. C. 249 : [illegible]

——an infant adopted son is entitled to the benefit of s. 6, 9 C. W. N 795 : 2 C. L. J. 87.

——the exemptions of s 6 do not apply to the assignee of a minor. 9 C. 663. 12 C. L. R. 269 F. B., 21 A. W. N 12, 26 B. 730, 22 C. W N 831.

S. 6. (Legal disabilities)—*contd.*

——s. 6 will not apply to an application for a personal decree against the mortgagor under Or. 34 R. 6 C. P. C., 33 C. W. N. 519 : 49 C. L. J 362.

——s. 6 does not apply to a person who is major but who is disqualified because of his property being under the Court of wards. 19 C. W. N. 1193, 20 C W. N 852

[illegible] *creditors or* [illegible] id does not [illegible] 6 C. L. J.

——where a cause of action accrued to a person when he was in embryo he cannot get the advantage of this sec. as he cannot be considered to be a minor in existence on the date of the conception 1929 Lah. 254, 173 P W. R 1912, 2 U P L R. (L) 39, *Ref*

——where a joint right to sue arises out of a tort one or some of the holders of such right cannot give a discharge without the concurrence of the other, unless they are members of a joint Hindu family the manager of which has implied authority to bind all the members by a discharge given by him 6 C. L. J. 383.

——the elder brother in a Mitakshara family being managing member of joint family can give a valid discharge 38 M 118, F B *contra*. 31 A 165

——in Dayabhaga family the elder brother cannot give valid discharge to bind his minor younger brothers 2 C W N 97, P. C.

——this sec applies to a case in which the act of the joint owner is *per se* a valid discharge. 13 M 236, 26 M. 20, 5 A 512

——minority is a personal privilege and transferee from a minor cannot avail of the special provision 9 O L. J. 88 66 I C 101

——in a suit for possession where a minor dies before attaining majority, his representatives will have either the total period of 12 years from the date of accrual of the cause of action or 3 years from the date of the minor's death whichever is greater 87 I C 315 . 1925 All. 692.

[illegible] an adult and some minors, [illegible] sec applies as adult can [illegible] W N. 348, (4 A 512, 13 [illegible]

——when a joint decree was passed in favour of an adult member and two minor members and the minority of the two decree-holders continued at the date of the application for execution ss 6 and 7 would save the limitation. 55 C. 608 32 C W N 192 47 C L. J 38 1927 Cal. 952 · 104 I. C 668.

——a Receiver is competent to give valid discharge, so the plea of minority does not save limitation. 18 C. W N. 138.

——lunacy by itself does not prevent starting of limitation. Suit by lunatic against adverse possession may be brought after 3 years of his ceasing of disability, so by his widow on his death, as lunatic but the reversioners would be barred 45 M. 361 . 42 M. L. J. 262

S. 6. (Legal disabilities)—*contd.*

——medical evidence could determine the age. 10 Lah. L. J 183 : 1928 Lah 250

S 7. (Disability of joint members).

——when the cause of action accrues to two brothers of the Hindu joint family when they are minors the time begins to run when the elder attains majority. 43 M. 842 : 59 I C. 662 · 39 M. L. J. 375, 53 M. L. J. 677, 38 M. 118 : 25 M. L. J. 405 F. B.

——suit for redemption by members of joint Hindu family—limitation. 23 Bom. L. R. 1191 : 46 B. 535.

——s 7 refers to s. 6 to which it serves as an appendix. 24 O. C 330 64 I C. 757.

——an elder brother in a joint Hindu family represents the entire family and can give a discharge within the meaning of s 7 on behalf of his minor brother. 87 I. C. 177 : 1925 All. 672

——Hindu father acting as next friend of plffs cannot give a valid discharge, nor can eldest among brothers. 47 M. L. J. 389 . 1925 Mad. 78.

——when a decree is passed in favour of the members of a joint Hindu family including a minor, the manager can give a valid discharge on behalf of all including the minor who cannot get benefit of s 7 in executing the decree after attaining majority. 94 I. C. 922, 52 B. 441 . 110 I. C 276 : 30 Bom. L. R 537.

[illegible] of three persons brothers and one undivided joint [illegible] the Karta of a [illegible] give discharge [illegible] 668. (25 M. 26. [illegible] 44 C. 120, 36 M.

——when a decree in passed in a suit by widow of deceased brother and minor the widow cannot give valid discharge. 27 A. L. J. 72 : 1929 All. 267.

[illegible] give discharge of joint decree [illegible] 1929 Mad. 394.

[illegible] count suit one was minor [illegible] joint family, s 7 cannot be invoked to get an extended period of limitation because the major plff was in a position to give a full discharge 115 I C. 354 : 48 C. L. J 555 ; 1929 Cal. 165.

[illegible] of limitation [illegible] 14 C W. N.

[illegible] to definite [illegible] of action of such heirs [illegible] purpose of limitation. 31 [illegible] 8 M. 118, 1921 Bom 259.

S. 7. (Disability of joint members)—*contd.*

——the position of the sons of a Mahomedan lady *qua* their right to the dower debt is not that of joint tenants but is that of tenants-in-common Where the right to recover the dower debt was inherited in part by the debtor himself *viz* the husband s. 7 will not apply to a suit by the minor son on attaining majority. 27 A. L. J. 284 : 1929 All. 142, 7 A 313 F. B *Dist.*

——as an idol does not suffer the disability of perpetual minority the bar of limitation is not saved by s 7 and consequently there can be adverse possession against an idol. 48 A 343 . 1926 All. 392 24 A. L. J. 351 93 I C. 652.

S. 8. (Special exceptions).

——in no case the disability described in s 6 can extend the period of limitation for more than 3 years 5 C W. N. 545, 24 M. 387 : 28 I A. 81 : 9 Bom L R. 303, P. C.

——if a minor dies after attaining majority his legal representative can sue for possession of property within 3 years from his death 40 B 564

——in computing the period of three years the date of the cessation of disability or the date of death is to be excluded 10 C. 748 p. 751.

S. 9. (Continuous running of time)

——the period of limitation cannot be suspended once it has begun to run unless the suspension is itself provided by the Act. 49 A. 565 : 102 I. C. 96 : 1927 All. 446 25 A L J 425

——a subsequent disability does not stop time that has once begun to run 29 B. 68.

——when time has begun to run, the minority of the legal representative cannot extend the period of limitation 27 A 704 · 36 B 498, 23 W R 285, 29 B. 68.

——time does not run against a remoter reversioner, 22 A 33 F.B

——when time has begun to run, war with alien enemy cannot suspend the period 23 C W. N 159.

——pendency of proceedings before arbitrators does not save time. 6 Pat L J 273 2 Pat L. T. 556

——limitation ordinarily runs from the earliest time at which an action can be brought and after the commencement of running of time there may be revival of a right to sue when a previous satisfaction of claim is nullified with the result that the right to sue which had been suspended is reanimated 39 C. L. J 40, 43 C 660, 33 C. 1033

——annulment of satisfaction gives rise to fresh cause of action. 2 Lab. 320 · 64 I C 454

——the time required for taking probate of will cannot be deducted in computing limitation for execution of decree 1 Bur. L. J 192

——when the cause of action depends on the result of some proceedings between parties the date of finality of the proceeding is the time of arising of cause of action. 39 C. L. J. 40.

S. 9. (Continuous running of time)—*contd.*

——the disability or inability contemplated by s. 9 is confined to such as are mentioned in the Act itself and it is clear from the mandatory words of sec. 3 that no new exemption can be recognised A saving or exception not found in the statute will not therefore be implied however much it may be within the reasons of those that are recognised by the statue or however much the ends of justice in a particular case may demand. 43 C. L. J. 155 · 1926 Cal 65

——in a suit by auction purchaser in execution of a mortgage decree for recovery of the rents of the property realised by the

gagor after the decree, period

gagor to set aside the exe-

limitation. 43 C. L J. 155 ·

1926 Cal 65

S. 10. (Suits against express trustees and their representatives)

——the section excludes implied trusts, or such trusts as the law would infer merely from the existence of particular facts or fiduciary relations 4 C, 455 · 3 C. L R. 315, 52 B, 184 : 107 I. C. 705 : 30 Bom. L. R 45 · 1928 Bom. 58.

——the sec is used in a restricted sense. 4 C. 897 p 917, 14 B. 476.

only, 45 M. 415. and does

646: but it applies to such

7 Bom. L R. 45; 13 C W.

——"trust for specific purpose" means "express trust" in English Law. 44 M. L. J. 431 : 72 I C. 842, 32 B. 394.

——a "specific purpose" must be a purpose that is either actually and specifically defined in the deed of trust or a purpose which from the specified terms can be certainly affirmed. 103 I. C. 418 . 1927 B 398 · 29 Bom L. R 241.

——the sec covers a case by one of two trustees claiming the property. 33 M. L T 225 : 74 I C. 120.

——the sec. does not apply to implied or resulting trust. 8 C. 788, 8 Bom L R 328, 32 B. 394, 31 B. 222, 45 M. 415.

Dharmakarta of a Hindu

combine, there must

te or interest vested

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in the deity and not in the trustee for the specific purpose s 10 does not apply 30 C. W. N 415 : 44 C. L. J. 399 : 94 I. C. 235 : 1926 Cal 568.

—— of State

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S 10 (Suits against express trustees and their representatives)—*contd.*

——to apply, s. 10 of the Limitation Act two conditions must combine, there must be a trustee with an express trust and an estate or interest vested in the trustee. Consequently where the effect of a deed is to vest the properties in the Deity and not in the trustees for a specific purpose, s. 10 does not apply The article applicable will be 142 or 144 and the onus is upon the trustee to show that he *did not come in the fiduciary character conferred on him by the* deed or, if he did, that his possession subsequently became adverse to the *debutter* either by disclaimer or by open and clear assertion of a hostile title. 30 C W N. 415

——this sec does not apply to a suit against assigns for valuable consideration 89 I. C. 483 : 1925 All. 822.

——s. 10 controls Art. 131 and gives the clue to its meaning. 1922 Lah. 271 , 65 I. C. 722.

——Straits Settlements Limitation Ordinance corresponds to s. 10 L A , 26 C. W. N 595 30 M L. T. 160 P. C.

——trespasser setting up a new idol is not a trustee *de son tort* for the original idol and sec 10 has no application to a suit by him but ordinary rule of limitation would apply. 89 I C. 133 . 1925 Cal 1244.

——express trusts can be proved by inference from conduct of parties and without express declaration. 1925 Pat 68

——trustees cannot by breach of trust for 12 years confer a statutory title on themselves in derogation or extention of trust. 50 C 49 36 C. L J. 35, 34 M. 257, 1922 M W N 620 : 1922 Mad. 409, 33 C 511. 70 I C. 87

——a benamder is not a trustee 11 W R. 72.

——mortgagee in possession after the mortgage-debt has been satisfied is not a trustee 9 W R 187.

——a Mahamedan son in possession of property of the deceased father is not a trustee for the daughter. 16 C. 161

——the Court of Wards is a trustee for the minor 5 M. 91.

——directors of Companies are not trustees 18 B. 119, 1923 Lah. 58 . 71 I C 899.

——transferee of trust property by a deed of gift is a person in whom the property has vested in trust. 31 C. 314

——an auction purchaser of trust property for valuable consideration is an assignee of the trustee within the sec 15 C. 703.

——obligor if a trustee 46 M. 259

——to be an assignee good faith is not necessary. 32 M. L. J. 85, 2 C L J. 546.

——where a property is not dedicated to an idol, but is purchased in its name by a private individual, it is not vested in the purcha[illegible]
of such [illegible]

——
thereby [illegible]

S. 11. (Suits on foreign contracts).

——the sec. applies to execution cases also. 14 C. 570.

S. 12. (Exclusion of time in legal proceedings).

special or local laws. 20 M. 76.

appeals. 1923 Lah. 684

o proceedings in *foreign centre*

ah. 54.

——this sec. does not apply to an application under s. 18 (1) of the Land Aquistion Act , 104 I. C. 397.

——two days of the same number are not to be included, the first day shall be excluded 13 C. L R. 153, 24 W. R 463

——the computation must be made according to the English calender. 13 C. L. R. 153.

——the date of acknowledgment of debt is to be excluded. 6 N L. J. 281 . 71 I C. 556.

——the day of attaining majority will be excluded. 10 C. 748 p 751

——the time required for obtaining the copy of the decree and judgment must be excluded even though by the rules of the H C. such copies are not necessary The word "requisite" is a wrong word, it means "property required." 47 C. L. J. 510 . 55 I. A 161 : 30 Bom L R. 842 · 32 C W. N. 845 : 109 I. C. 1 : 1928 P. C. 103 : 6 Rang 302 ; 16 A L. J. 657 P C.

——the time of delay caused by the officer of the court in granting copies should be excluded. 3 C. W. N. 55. 7 C W. N. 109, 8 C. W. N. 141, 12 A. 79, 105, 461, 28 B. 643, 12 C. L. R. 541, 12 C 30, 18 M. 374, 75 I. C. 1055

——the time that elapses between the date of judgment and ... for obtaining copy of

967, 15 C. W. N.

, 1 P L J. 573

pplication is made

461, F. B , and so

long as no such application is made non-signature of the decree will have no offect 39 C 766

——time for preparing copy of decree should be deducted even where it was due to party's not furnishing sufficient stamps and folios but were filed two days before the decree was finally proposed. 30 C. W. N. 926 · 44 C. L. J 44 : 1926 Cal 1105 ; 98 I C. 743.

... day on which the

ays

is

C.

——the vacation, intervening between the signing of the decree and the application for copy, will be excluded. 13 C. L. J. 544, 60 I. C 493.

——where the appellant did not apply to have the order drawn up within a reasonable time after judgment, and even after the

S. 12. (Exclusion of time in legal proceedings)—*contd.*

draft was drawn up he did not return it after approval, he cannot claim to deduct the whole of the time occupied in getting the copy of the order. 27 C. W. N. 156 : 43 M. L. J 765 : 68 I. C. 900 : 1922 P. C. 352.

——no period can be regarded under this sec. as requisite which need not have elapsed if the appellant took reasonable and proper steps to obtain the order appealed against. 27 C. W N 156 68 I. C 900 : 43 M L. J. 765 : 1922 P. C 352, 97 I. C. 728. (C)

——the time unnecessarily occupied is not time "requisite"

342) Ref.

——the period between the date of judgment and the date of signing the decree should be excluded 97 I. C 539 : 1927 Cal 6. (13 C. W. N 104) *Fol*, 1922 P C 352 *Dist.*

——the time during which the party fails to supply folios should not be excluded 1917 Pat 21, 1 P L J. 573

——time requisite to take the copies of both judgment and decree separately shall be deducted. 21 C W. N 217, 3 Lah L. J 166 60 I C 259, 6 Pat. L J 237 · 63 I. C. 278, 3 Pat L T. 96, 66 I C 23, 4 U P L. R 37, 3 Pat L T. 289, 25 Bom. L. R 1309

——if any of the two periods requisite for obtaining copies of the decree and the judgment overlap each other, one of the overlapping periods has to be left out of account. 47 A 509 . 87 I C. 484 · 23 A L. J. 343 1925 All 436.

——but there cannot be deduction of time requisite for obtaining copies of translation, 59 I. C 965, or the copy of lower court's judgment 68 I C. 777

——where copies are despatched by post, time of transit is to be excluded 2 Lah 280 1922 Lah 219.

——where a party who wanted to prefer an appeal applied for a copy of the order but did not put in a requisition for a decree being drawn up, he has not taken reasonable and proper steps to obtain a copy of the decree or order and hence cannot avail himself of sec 12 (1) in calculating period in filing the appeal 52 C 342 : 89 I C 277 1925 Cal 735

r and the
is filed on
356 · 1926

All. 111.

——in the case of an application for leave to appeal to the Privy Council the time requisite for obtaining the copy of judgment

S. 12. (Exclusion of time in legal proceedings)—*contd.*

may be excluded, 48 M. 939 : 90 I. C. 601 : 1925 M. W. N 788 : 1925 Mad. 1241 : 49 M. L J. 418, *contra.* 24 A L. J. 349 : 92 I. C. 897 : [illegible]

[illegible] day late, [illegible] copy of [illegible] er s, 12 of [illegible] of limi- [illegible] . R 167 : [illegible]

S. 13. (Exclusion of time of deft's absence).

——this sec. applies even where to the knowledge of the plffs. the defts, partners in firm, are, during their absence from British India, carrying on business there through agent, who is empowered to institute and defend suits. 25 C. 496 : 2 C W. N. 269 F. B, 45 B. 1228. 14 C. 457

——as a Prince could be sued by his agent his residence out of British India was no ground to apply this sec., 53 B. 12 : 115 I. C. 369 · 1929 Bom. 14 : 30 Bom. L R. 1463

——when the cause of action arose outside British India the plff could not invoke the aid of s. 13, 1928 Mad. 1088 : 1928 M W. N. 543 : 112 I. C. 139.

S. 14. (Exclusion of time of proceeding *bonafide* in court without jurisdiction).

Scope of the section

——this sec. applies in cases of defect of jurisdiction. 1923 Pat. 271.

——this sec. applies to " defect of jurisdiction" or "causes of like nature." 28 Punj. L R. 403 . 9 Lah. L. J. 477 . 104 I C 726.

——this sec does not apply to appeal 19 C W. N. 473 : 22 C L. J. 68, 23 C 325, 48 C. 110 : 25 C. W. N. 289 : 28 M. L. T. 149. 22 Bom. L R. 1370 : 3 P W R 1921 : 8 A. L. J. 1095 P. C., but the principle may be applied to consitute sufficient cause under s. 5, 5. A. 591, 12 B 30, 28 Punj L. R. 456 : 88 I. C. 327.

——it applies to execution of decrees also. 20 C. 29, 5 C. W. N. 150.

——s. 29 of the L Act. excludes the operation of s 14 in cases under s. 169 C. P. Land R. Act. 6 N. L J. 205 : 73 I. C 1021.

——this sec. does not apply where a Special or Local Law provides a special rule of limitation. 98 I. C. 1050 : 1927 All 181.

——this sec. does not apply to a suit under s. 77 of the Registration Act; the reason being that the Registration Act is a complete Code. 30 C. 532 . 7 C. W. N. 550, 18 M. 99, 17 C. 263, *Ref* 10 C. 265, *discussed*

——mutation proceeding before the Revenue Officer is not civil proceeding : the Settlement Officer, the Commissioner and the Board of Revenue are not courts, but they are executive officers of Govt. 26 A. 382.

S. 14 (Exclusion of time of proceeding *bonafide* in court without jurisdiction)—*contd.*

——the expression "civil proceedings in a court" must be held to cover civil proceedings before arbitrators whom the parties have substituted for the courts of law to be the Judges of their disputes An arbitrator should exclude the time spent in proceedings in good faith the same claim before an arbitrator without jurisdiction 33 C. W. N. 485 : 49 C. L. J 462 : 27 A L J. 254 115 I C 713. 1929 P. C. 101 : 29 L. W. 682 P C.

——this sec. does not apply to proceedings in foreign court. 8 Lah 54 : 102 I. C. 523 1927 Lah 200 35 B. 139 *Rel-on.*

——s 184 B T. Act does not exclude the application of s 14 Ss. 4, 9, to 18 and 22 will apply to a case unless expressly excluded. 33 C. W. N. 227 1929 Cal 325

——Barsa was not a territory under the administration of the Govt. of India within the meaning of this sec 20 A. L. J. 786 : 68 I. C. 978. 45 A. 18.

Parties in the previous suit

——the former proceeding should have been prosecuted by the plff, himself, either as a plff, 1 W R. 29, or as a deft. 1 W R 310.

——but if the previous suit was dismissed because it was brought in the name of the wrong person (*e. g* in the name of the manager of the plff instead of the plff himself,) this sec. does not apply. 7 C 367, 8 A. 475, *Ref.*

——defts must be the same in the two suits 5 W R. 281. 33 C. L J 366 · 60 I C 698, 43 C 660 P. C, 12 M I A. 244 P. C.

——time spent in conducting a suit wrongly filed against Traffic Manager instead of against the Secretary of State cannot be deducted in a subsequent suit against the latter. 96 I. C 144 1926 Lab. 572.

——suit against wrong person does not save limitation 1 W. R 121, 7 C. 367

——the time during which a suit was prosecuted *bonafide* against a dead man may be deducted. 12 W. R 45.

——mere defending a suit does not exclude time 25 B. L R. 863 · 1924 Bom. 39

——a former suit against a firm and a subsequent suit against the surviving partners of the firm and the heirs of a deceased partner are both against the same parties under this sec. 112 I. C. 715. 27 A L J. 73.

Causes of action should be the same.

——cause of action of the two suits must be the same 17 C. L. J 596, 9 W R 402 F. B, 8 A. 475, 112 I C 246. 1929 All 101

——proceedings under s. 46 B T. Act cannot be treated as proceedings founded upon the same cause of action as the claim in a suit for recovery of rent from a non-occupancy raiyat and consequently the period of limitation for the suit for rent cannot be extended under s. 14 L. Act owing to the pendency of these proceedings. 43 C. L. J. 45 : 92 I. C. 37 : 1926 Cal 693.

S. 14 (Exclusion of time of proceeding *bonafide* in court without jurisdiction—*contd.*

landlord does not save

plication to set aside
m. 43 M L. J. 184:

Execution case

——execution petition being disposed of on merits, time cannot be excluded 74 I C. 279 (C)

——proceedings of revision of an order in an execution case does not save limitation under this sec. 39 M. 68.

Withdrawal of the previous suit.

——withdrawal of previous suit cannot save limitation 39 M. 936, 29 B 219, 12 B 635, 20 I C. 205.

Other causes of like nature.

——where the prior application for execution is dismissed on the ground that it was not in conformity with the decree it falls within "other causes of like nature" 75 I. C 312

——an improper joinder of parties or causes of action is not "a ... the meaning of ... 34)

e.'

2

Previous proceeding in wrong Court.

——when plaint was presented in wrong court which passed ... returned three days after, on not time barred, 17 C. W. N 64 I. C. 160, 46 B. 211. extend time 17 C W. N.

——the time during which a plaint was on the file of court ... court on the ground suit if the 18 *F. B.* so

——when a plaint was filed in a wrong court and that court passed an order of return of the plaint to be filed in proper court but the party applied for a copy of the order and then filed the suit in proper court, neither the time taken in conducting the suit in the wrong court nor the time in getting the copy would be excluded 46 C. L J. 452 : 106 I. C. 324 : 1928 Cal. 46.

——the institution of a proceeding in a wrong court is not a valid institution of a proceeding which may thereafter be continued on transfer in a court of competent jurisdiction, therefore the presentation of a plaint in a court of competent jurisdiction must be deemed to be the institution of a new suit. 24 I. C. 232, (15 C. L. J. 241 , 18 I. C. 377), *Fol.* 36 M. 282.

S. 14 (Exclusion of time of proceeding *benafide* in court without jurisdiction)—*contd.*

——the time during which the wrong court remains closed before filing cannot be deducted under this sec. 30 M. 131, 14 A. L. J. 310, 36 M. 482, 44 M. 817, 45 B. 443. see *contra. below.*

——it may not be correct to say that ss 4 and 14 cannot be applied to the same case 33 C W. N. 221 : 1929 Cal 215, 44 M. 817 *not fol.*

——proceeding for enforcing a decree, taken before a court which the party *bona fide* believes to have jurisdiction, are proceeding within the meaning of sec. 14 and saves limitation. 28 C. 238 ; 5 C. W N. 150, 2 A. 722 P C *fol* 64 I. C. 60, so also where the previous application for execution fails for defect of parties. 15 S. L. R. 11.

' *bona-fide* and with due
L. J 529 P. C. 44 M. L.
9 A 348 ; 3 C. W. N. 233,
All. 404, but not in case

——time of prosecuting suit in wrong court should be deducted. 7 C. 284, 24 W R. 26, 12 M. 1, 49 A 555 · 101 I. C 750 25 A. L. J. 410 . 1927 All. 719, 14 A L J. 212, 15 A L. J. 777.

——time spent in prosecuting a restitution proceeding in a court which passed the decree after it had lost territorial jurisdiction must be excluded 95 I. C. 587 1927 Mad 813 51 M L. J 161 1926 M. W. N 395.

——proceedings taken in right court but continued in a wrong court justifies exclusion of time occupied by proceedings in wrong court. 85 I. C 778 1925 Bom. 113

——the time during which the plff was *bona-fide* seeking redress from the Revenue authorities who had no jurisdiction may be deducted 20 C 264

before a Revenue Officer
a 101 I C *254 : 28 Punj.*
L

efts , one of them got judgment in his favour which was reversed in appeal, the time during which the judgment of the lower court was in his favour may be deducted under the sec 35 C 209 7 C. L J 59 12 C W. N 326 · 3 M. L T 90 (12 M. I A 244 P C , 7 M. I A 323, P C.), *Fol* affirmed by the P C in 43 C. 660 20 C. W. N 522 24 C L J. 1

——*time cannot be deducted under this sec. on the basis of an* application which would not lie to any court at all 92 I. C. 299 . 27 Bom L R. 1273 1926 Bom 51

——Insolvency proceeding does not save limitation. 47 B 244 : 24 Bom L R 509 67 I C. 757

——deduction of time spent in proceeding for assessment of mesne profits, putni sale being set aside, suit for recovery of money. 26 C W N 271.

S. 14 (Exclusion of time of proceeding *bonafide* **in court without jurisdiction)**—*contd.*

Due diligence

——the plff [illegible] within the meani[illegible] negligence or def[illegible] it on the merits [illegible] C. W. N. 473

Bona fide claim

——a claim cannot be *bona fide* [illegible] ing the claim, althou[illegible] be erroneous. 29 C

Decisions differin

——time of proceeding in a civil court relying on the decision of the H C *is to be deducted* in a suit in the Revenue Court relying on a later decision of the H. C 44 A 296

S 15 (Exclusion of time during which proceedings are suspended)

——this sec applies to the limitation prescribed in the schedule to the Act and does not control s 48 C P. C. which is self-contained 45 M. 785, 1928 Mad 1154

——the Limitation Act does not prohibit the making of an application for revival of pending execution. 49 A 276 , 100 I C. 692 · 1927 *All* 16, 25 A L. J. 201 F. B.

——this sec applies to an absolute stay and not to a limited stay as would be ordered by the notice under Or 21 r. 53 (1) (b). 26 Bom L R. 317

——an order of attachment in execution of a decree or of attachment before judgment is not an injunction or order staying a suit within the meaning of this sec 13 A 70 ; 17 B. 198, P C, 21 C W N 1147

——this sec applies both to suits [illegible] where certain time is allow[illegible] execution proceeding a subs[illegible] three years from the exp[illegible] [illegible] allowed to the judgment debtor is within time. 94 I. C. 482 1926 All 473, (4 A. 60, 155) Dist

——in case of joint Jt Drs. stay order against [illegible] extend the period of limitation agai[illegible] 1928 Mad 627 28 L.W 60, 30 [illegible] 116, *Diss Contra*, 9 Lah 519 , 1 [illegible] 549 1927 Pat 344) *fol.*

——the time during which execution is stayed by injunction shall be excluded 35 C. L. J. 135, 87 I. C. 205 ; 1925 All 572, 6 Pat 635 102 I C 327 : 8 P L. T. 770.

——the time during which execution was stayed by an injunction order shall be excluded 38 B. 153, 34 A 436, 40 M. L. J. 124 : 13 L W. 37 ; 61 I. C. 255, 34 C L J. 183.

——stay at the instance of the D. Hr. will not save limitation.

S 15. (Exclusion of time during which proceedings are suspended)—*contd.*

——every order for adjournment of an execution case is not an

ears from last application
. execution is barred 1925

——order of the appellate court staying execution, appointment of receiver, time to be excluded 3 Pat L T 565 . 66 I. C 97.

——if in a single suit against several defts the plff is entitled to a deduction of time as against one deft he is entitled to a deduction against all the deft under s 15 (2) 3 Pat. L T. 643 . 1922 P. 549

——right to demand the rent falling due is not suspended by the pendency of an ejectment suit 48 C 65 57 I C. 992.

S. 16 (Exclusion of time of proceedings to set aside execution sale)

——the word "proceedings" in this sec includes a suit for
tion-purchaser's suit for possession
r conducted a suit for setting aside
L J. 133 but see 1917 Pat 58.
plies no deduction of time under
law or in equity 26 C. W. N 364 :

S 17. (Effect of death before right to sue accrues)

——s 6 of the L Act must be read in conjunction with s 17, and the operation of earlier sec must be regarded as qualified by and subject to the exception prescribed by the latter sec 9, C. W N. 537.

——in a suit for an account accruing to the employer on the death of his manager, limitation will not run until administration has been taken out to such manager's estate 7 C. 627

——in a suit for account of a partnership business on behalf of a minor by the Administrator General, time runs from the date of the issue of administration 23 B 544, P C

——the executor of a will capable of probate in British India is a legal representative capable of
from the date of the testator's
when he obtains probate. 20 C
W N 455 P. C , 24 I C, 852 : 37 M

S 18 (Effect of fraud)

——this sec applies only when the plff. has been kept from the *knowledge* of his right to do something by the fraud of the other party and not where he is thus kept from *exercising* his right. 25 I. C. 884, 43 A 440 : 60 I. C 774.

——if the plff be fully aware of his right, inspite of the fraud practised upon him, he is not entitled to the benefit of this sec 19 C. W. N. 533 : 24 I. C. 249

S 18. (Effect of fraud)—contd.

——to bring the case within s. 18 the plff. must allege when the fraud pleaded came to his knowledge. 3 Pat. L. T. 529 : 31 M. L. T. 209 · 67 I. C 914 : 37 C. L. J. 430 : 27 C. W. N 294 : 25 Bom. L. R. 680 P C.

——the burden of proof as to the knowledge of the plff. is on the deft 16 C. L J 126. But see 36 C. 654, 1 C. W. N. 67

——when a a person relies on s. 18 he must establish that there has been fraud by means of which he has been kept from the knowledge of his right to sue. Once this is done the burden is shifted on the other side to show that the plff. had knowledge of the transaction before the period of limitation 49 C 886 : 36 C. L. J. 295, 5 Pat L J. 200.

——the mere fact that some hints ... party, which perhaps have led to a compl constitute clear and 886, 17 B 341 P C.

——assurances by the D. Hr. does not save limitation. 1923 Rang 103

——'fraud' denotes active deceit in defrauding a person of his rights It means deliberate and intentional concealment of facts by which the ignorance of the plff. was brought about 16 I. C. 547, 8 W. R. 23, 27 A. L. J, 342 115 I C. 798 : 1929 All. 213.

——'fraud' under this sec must be the 'fraud' of the deft. 2 C. 1 . 25 W. R 425.

——'fraud' before and subsequent to sale should be proved when the petitioner comes after 30 days of the sale. 17 C. W. N. 478, 16 C. L. J. 581.

——subsequent fraud does not extend time 1921 M. W. N. 539

——it is not always necessary to prove "'fraud' subsequent to sale. 16 C W N. 894, 47 A 850 · 88 I. C. 500 : 23 A. L. J. 760

——particular allegation of fraud must be made and proved 17 C. W N. 524, 24 C. L J 335, 15 I A. 119 . 15 C. 533 P. C., 1921 Pat. 181, 2 Pat L. T. 401.

——fraud may be proved by theories and inferences from facts proved. 18 C. W N 185.

For other cases relating to fraud sec. 'Fraud'.

——in a suit to set aside a deed of gift limitation does not run until the fraud of the defendant became known to the plff. 26 C. W. N 479

——the suppression of one or more notices relating to sale may give rise to the presumption of fraud. 5 P. L T. 61.

——but the ... gence, is in- t. 397. show the facts 2 C. W. N. T. 231 ·

... 40 1929 Pat 228.

S. 18. (Effect of fraud)—*contd.*

——a Jt. Dr. applied to set aside an auction sale more than 30 days after the date of sale relying on fraud to get over the bar of limitation, but the fraud, if any, was not by the decree-holder but by the auction purchaser, held the section would not apply to save limitation. 86 I. C. 745 1925 Cal. 1227

[illegible] of a minor [illegible] the estate, [illegible] tion for the [illegible] plead limi- [illegible] 33 . 88 I. C. 61 : 1925 Cal. 584

——application for setting aside a sale may be made after the limitation period, where the fact of the sale has been concealed [illegible] fraud of the opposite pa[illegible] C W. N 894, 19 C. W. N [illegible] 7 C. W. N. 305, 32 M. L [illegible] 306 . 99 I. C. 946 44 C. [illegible]

[illegible] was not discovered by the [illegible] demand for possession was [illegible] resistance 27 C W. N. [illegible]

S. 19 (effect of acknowledgment in writing).

Scope of the section.

——the sec. applies to rent decree. 3 C L. J. 347, 9 C W N. 1025 and also to liability of rent. 10 C. L. J. 517

——an acknowledgment of rent decree saves limitation 34 C. L. J. 195, 26 C. W. N. 486, 10 C L. J 517, 3 C. L. J. 347, 9 C W. N. 1025, 9 C. 255 P C, (29 C. 192, 4 C. L. J 533), *Dist*

[illegible] a kabulyat to [illegible] W. N. 263. [illegible] omise petition

——there may be acknowledgment in respect of any property or right 104 I. C 572.

——where the liability is admitted the creditor can persue his claim in any way recognised by law. 109 I. C. 872 : 1928 Mad 713 F. B.

What amounts to acknowledgment under this sec

——an oral acknowledgment is not valid. 11 I. C. 445, and it must be signed. 34 A 464. 15 M. 380. 109 I. C. 398 1928 All. 310 : 26 A. L J. 420, signature in a deposition containing a statement is not sufficient. 109 I C. 398 1928 All. 310 : 26 A L J. 420

[illegible] any class or community [illegible] ords). 31 C. 1043 . 9 C. [illegible] ita), 8 W. R. 39 : ('Sree

S. 19. (Effect of acknowledgment in writing)—contd.

pay

by th

27 M. L. J. 631 : 26 I. C. 911, 31 C. 1043 : 9 C. W. N. 83, *Rel. on.*

——illiterate person may acknowledge by getting his name written by other person. 6 M. L. J. 309, 7 B. 515, 2 Pat L. T. 355.

——signature may be put in any place. 10 B. 71, 1 A. 683 5 B 89

——if the body of the document is written by the plff. and the debtor puts his signature, that is sufficient. 27 I. C 747.

——but it has been held by a single Judge of the Madras H. C. that an acknowledgment to be valid must be in writing signed by the party, mere initial will not suffice. 96 I. C. 700 : 1926 M. W. N. 392 1926 Mad 827

ate as acknowledgment I. C. 754

d of "rupees 2115 bal without stamp paper.

——an unstamped acknowledgment cannot be given in evidence for any purpose including the purpose of saving limitation. 21 B. 201. F. B., 1923 Cal. 659.

——a compulsory registrable document though unregistered may operate as an acknowledgment 5 C. 215, 3 A. 523.

——an acknowledgment in *abichal-nama* saves limitation 23 C. W. N. 921.

——acknowledgment in a letter settling an account saves limitation. 43 A 216 : 59 I. C. 941.

——a letter written in reply to a letter sending a statement of account and stating that the account sent is correct, is not an acknowledgment 1925 M. W. N. 484 : 1925 Mad. 1215 : 49 M. L. J. 306, 39 C 789, 1924 Mad. 352 *Fol.*

——where the writer of a letter admitted the existence of a running account between the parties and added that his representa- found to be due, A. L. J. 248 : 87

91 I. C 833 : 1926 Mad. 675

——in a suit for damages a letter by the legal adviser suggesting settlement and headed "without prejudice" does not operate to extend limitation. 90 I. C 135.

——mode of signature in letter by writing Sri Sri Hari Saranam by *guru* to *chella* may amount to acknowledgment within this sec 75 I. C. 1004 : 1925 A. 8.

——an acknowledgment made in a document to which plff. is not a party is a valid acknowledgment. 1928 Cal. 850, 33 C. 1047 *fol.*

S. 19. (Effect of acknowledgment in writting)—*contd.*

... should be a promise to pay under s. 19 is there should ... before the claim is barred.

——a statement in a letter that arrears of rent have not been paid as accounts have not been settled between the parties amounts to an acknowledgment of liability. *1925 Mad. 1260. 22 L. W. 195*

——acknowledgment by a person in a written statement filed in a different suit saves limitation 7 Pat. L. T 9 1926 Pat. 478.

——assigning a wrong date to the debt does not make the acknowledgment inoperative 26 A 313.

——in a suit brought for definite sum claimed as due under accounts an admission by the deft. that account must be taken and settled is a sufficient acknowledgement 46 M. L. J 468 1924 M. W. N 355.

——statement in the plaint in a suit for redemption by a co-mortgagor admitting the rights of the other mortgagors is an acknowledgment 64 I C 979.

——specification of debt in insolvency petition is sufficient acknowledgment. 16 C. W N 346, 35 B. 483.

——requisites of acknowledgment in case of mortgage. 48 C. 1046 : 26 C W N 113.

——mention of property as mortgaged property in the list of property to be sold under a decree amounts to acknowledgment 85 I. C 330 · 1925 All 174

——whether a particular endorsement does or does not constitute an acknowledgment of the right depends upon its terms 33 C. L J. 433

——an implied acknowledgment in the statement of the witness does not save limitation 73 I C 952 : 1923 Mad. 634, 45 A 679. 70 I. C. 593.

... must be a conscious ... 25 All 353.

... the existing liability ... proof *aliuende*. 1925 ... M 34 *Rel.*

——an endorsement on a promissory note is an acknowledgment saving limitation from that day, it making no difference that such endorsement is below an account showing what has already been paid on the promissory note 25 Bom L R 144 : 72 I C. 249

——an acknowledgment of past liability unaccompanied by an allegation *of discharge should not in all cases be interpreted as an* admission of a subsisting liability. 45 M 443, 46 M. L J. 1

——an admission that a certain person has purchased the property is not an adm... title in the property as ... the purchase was bad ... 478 : 1925 Pat 473 : 1925 ...

S. 19. Effect of acknowledgment in writing—*contd.*

——a letter reciting that the writer would see whether any amount was due, is not sufficient, 31 C. 195; 8 C. W. N. 168, 36 M 68 nor a letter saying that the writer will sign after looking into the account is sufficient, 19 C W N 170, but an expression of willingness to pay the amount due on comparison of account saves limitation 12 L. W 352 59 I. C 898

——an unconditional acknowledgment has always been held to imply a promise to pay, because that is the natural inference, if nothing is said to the contrary. 33 C 1047: 33 I. A 165: 10 C W. N 874. 4 C L J 94 8 Bom L. R 501 3 A. L. J. 525 P. C, 41 M L J 217, 46 B 24, *contra*, 1922 Lah 425.

——the distinction between an acknowledgment and prom to pay is sometimes difficult to draw, specially as an unconditio acknowledgment has always been held to imply a promise to p 36 C L J 228.

——a new consideration is not required for an acknowledgme nor an actual promise to pay 50 C 974

——where evidence was taken and there was nothing b endorsement in proof of admission, the mere fact that in some othe case the deft merely admitted the execution of deed is not a acknowledgment, 45 A 679

——a promissory note found to be invalid as it was mad payable bearer one may amount to an acknowledgment of debt 9 I C 626: 1926 Mad 4. 1926 M W. N. 141.

——striking the balances from time to time by the executant of a bond imports a promise to pay the debt furnishing a fresh cause of action 1929 Lah. 421, (33 C. 1047 P. C, 1922 Bom. 183, 1929 Lah. 264) *fol*., 119 P. R. 1908, *not fol*

The debt must be identified

——the debt must be identified by the acknowledgment, no oral evidence as to that is admissible 17 A. 198: 22 I. A 31 P. C., 2 Bom L. R 715, 8 I C 81, 13 C. L. J. 139

Conditional acknowledgment how far effective.

——an unequivocal and unqualified admission of debt should be established 30 C. 699 7 C. W. N. 651.

——if the acknowledgment be conditional the condition must be fulfilled to give effect to it. 40 M 701.

——acknowledgment of debt in case certain circumstances exist is sufficient. 26 C. 204

——a statement contained in a letter that if upon a comparison of accounts any amount is found due the writer will pay it, is a sufficient acknowledgement. 1928 Pat. 221. 7 Pat. 238: 107 I C. 533, 111 I C 617 30 Bom. L R. 688.

Who can acknowledge.

——the person making the acknowledgment may not have interest in the property at the time when it is made. 29 A 90

——an agent's authority to acknowledge on principal's behalf may be express or implied, it is presumable from circumstances 85 I. C. 633: 1925 All 176.

S. 19. Effect of acknowledgment in writing—*contd.*

——acknowledgment by the manager of the Hindu family binds the other members 37 C 461 . 14 C W. N. 741 : 11 C L. J 484. but where the creditor deals with all the members the manager's acknowledgment cannot bind others 25 M. 220, F B

——acknowledgment by junior member of Hindu joint family does not save limitation. 1923 Lah 135 : 71 I. C 737.

——acknowledgment by a son does not bind the father of a Hindu joint family 32 M. L. T. 317.

——person having general authority to settle and pay claims may acknowledge 24 C. W. N 153.

——an acknowledgment by *karta* binds the infant son 19 C W N. 860

——the *karta* of a joint family has the same authority to acknowledge a debt as he has to incur it and the acknowledgment need not be expressed as having been made in his capacity of *karta*. 41 C L. J. 535 : 88 I C 1025 : 1925 Cal 1153

——an acknowledgment by a natural guardian will bind the minor if it was for his benefit. 30 A 422 : 5 A L. J. 375, 8 Bom. L. R. 212, 18 M 456.

——an acknowledgment by a Hindu widow is not binding on reversioner. 86 I C. 353 . 1925 Cal 863, 17 C. L J. 488 : 17 C. W. N. 605 23 A 227 25 M. L J 131 : 15 Bom. L. R 489, P C.

——an acknowledgment by the muktar-i-ans of a person not specifically empowered to make such acknowledgment is not valid under s. 19 L. Act 44 A 546

——acknowledgment by the legal practitioner binds the client. 18 A. 384.

——acknowledgment of certificated guardian binds minor if it be for his benefit 26 B 221, F. B 17 M 221

—— [illegible] tors of a company [illegible] not necessary to [illegible] l to make the ack- [illegible] I. C 177.

——an acknowledgment of debt by the Court of Wards, binds the ward 43 C 211, 34 M. 221.

——the acknowledgment by one mortgagee of the mortgagor's right of redemption does not operate against his co mortgagee. 18 A. 458, 34 A. 371, 17 B 173.

——an acknowledgment of liability in writing made by some of the Jt Dr , within three years from the date of the last application for execution would save limitation as against them all. 22 I. C. 709, *contra*, 16 C. W N 493.

——a mortgagor may by his acknowledgment of the first mortgage bind the puisne mortgagee 40 M. L. J 129 : 62 I. C 833.

——an acknowledgment of mortgage debt by the mortgagor extends the period of limitation against purchaser from him, whether he had notice of it or not. 32 C. 1077 : 9 C. W N. 868,

——acknowledgment of the Jt Dr. mortgagor may save limitation against a third person auction-purchaser of the mortgaged

S. 19. Effect of acknowledgment in writing—*contd.*

property, if the acknowledgment was made before attachment. 22 C. W. N. 278. (22 C. 909, 16 B 197) *Ref.*

——*an application* by the decree-holder for certifying certain payments in satisfaction of a redemption decree amounts to an acknowledgment of the decree *as an outstanding one.* 38 B 47, 43 C 207 So also the statement by the *D. Hr.* in his execution petition that he had received a certain sum from the Jt. Dr 24 C W N 272.

——acknowledgment by one of two joint debtors that the original debt was joint, saves limitation in a contribution suit by the other. 25 C. 844 25 I A 95 : 2 C. W. N 402, P. C.

Acknowledgment to third person.

——under this sec an acknowledgment need not be addressed to the credito [illegible]
it differs from [illegible]
lent to a new [illegible]
person entitle[illegible]
C L. J. 529.

——acknowledgement need not be to the creditor himself or to any person representing him A statement in a kobala referring to a mortgage debt as subsisting amounts to an acknowledgment under this sec. 91 I C. 461 . 1926 Cal 636

[illegible] may be made to third person [illegible] P. C., 32 B 296, 16 C. W. N. 346, [illegible] J. 94 P. C., 23 Bom. L R 606 [illegible] 713, *contra*, it must be made to the pltf or his representative. 43 C. 613 : 10 C W N. 551 · 3 C. L. J. 576 6 C L J 141.

Acknowledgment of part of the debt, effect of.

——acknowledgment of part of a debt is sufficient. 6 C L J 141, but only to the extent of debt acknowledged. 16 C. W. N. 493, 72 I. C 692 : 1923 Cal. 71.

Pltf. must prove acknowledgment.

——the pltf must give cogent proof of acknowledgment 44 M. 360

Acknowledgment of barred debt.

——an acknowledgment of barred debt, cannot give fresh start of limitation. 26 C W. N. 636, 26 B. 782, 23 W. R. 462, 67 I. C 293 (C). 48 M. 693 . 85 I. C 297 1925 Mad. 251, 52 B. 521 : 30 Bom L. R 733 ; 1928 Bom. 319 ; 112 I C. 24, 6 C. L. J. 544, 16 M. 220, *contra* 72 I C. 692 1923 Cal 71. *below.*

——it is open to a borrower to make a promise in writing signed by himself to pay a debt of which his creditors might have enforced payment but for the law of limitation 72 I. C. 692 ; 1923 Cal. 71.

S. 19. Effect of acknowledgment in writing—*contd.*

Effect of acknowledgment relating to limitation period.

——an unconditional acknowledgment implies a promise to pay the debt 1929 Lah. 264, 115 I C. 764 1929 Lah. 263 · 30 Punj. L. R. 240, 33 C. 1047 **P. C.** *fol* 30 Punj L R 226 115 I. C 853.

——acknowledgment gives a fresh start and does not extend only the period already commenced 13 M 135.

[illegible] fresh start

[illegible] to a fresh

[illegible] C

[illegible] the period

"thing done"

[illegible] W. N. 605 :

[illegible]

——the law to be applied is the law in force at the time of the suit and not the law in force at the time of acknowledgment. 34 A. 109.

——the word prescribed in s. 19 means prescribed by any law for the time being in force and is not limited to the first schedule. 80 I. C 743 (A), 30 M. 426 . 11 C W. N. 1005 6 C L. J. 379 ; 4 A L. J 625 **P C.**

——the word "prescribed" in s. 19 means prescribed by the schedule, 5 N. L. J. 178 . 65 I C. 716, 26 B 782 *contra* "prescribed" is not restricted to Sch. 1, 1925 All 68

S. 20. Effect of payment of interest on principal.)

Difference between s. 19 and s 20

——the difference between s 19 and s. 20 is in case of acknowledgment it must have been made by the person against whom the right is claimed but under s 20 the payment should be made by a person liable to pay the debt *i e.* a joint debtor may make the payment in order to save limitation. 1929 Mad. 419 : 1929 M. W. N 146 · 56 M. L. J 630

Mode of payment

——s. 20 does not specify any particular mode or form of payment 25 C. 844 25 I. A. 95 : 2 C W. N. 402, **P. C.**

——payment may be made by any medium. 24 B. 619

——payment of money by the court to the D Hr. could not under the circumstances extend the period. 87 I. C. 989 1925 Mad. 703 : 48 M. L J 506

——handing over of the money by some menial servant saves limitation. 61 I C 918

——entry of payment in deft's book is no payment. 19 M. 340, 13 B. 338, 6 B 103, payment must be such as may be sufficient answer to a suit 24 B. 493, 29 M. 234.

——if a cheque is delivered to a payee by way of payment and the payee receives it as such it operates as a payment. The *fresh period of limitation therefore runs from the date on which* the cheque is handed to the payee and not from the date on whic[illegible]

S. 20. Effect of payment of interest on principal—contd.

it is actually cashed. But if such a cheque given in part payment is not signed by the debtor in token of such payment the claim is barred by limitation as there is no acknowledgment within s 20, 29 C. W. N. 496 89 I. C. 508 : 1925 Cal. 937, 42 C. 1043 : 19 C. W. N. 742 *fol*

——payment for principal by cheque is sufficient. 19 C. W. N. 724 · 42 C. 1043, 23 C. 592

——payment by way of adjustment of account is sufficient, 1929 Mad 432.

——but part payment of the principal must be in the handwriting of the debtor. 49 C. L. J. 371 : 1929 Cal 432.

——in case of part payment by cheque fresh period is to be computed from the date when the cheque is actually handed over and not from the date on which the cheque is cashed. 89 I. C. 508 : 1925 Cal 937. N. 29 C. W. · 496, 42 C. 1043 : 19 C. W. N. 742 *fol.*

——payment of Government revenue ... rtgagor in possession ... mortgagee ... 20 (2). 97

... there are two debts payable to the same creditor it is the intention of the debtor to which debt he makes the payment that saves the limitation and not the appropriation by the creditor. 30 Punj L. R 233 . 1929 Lah. 288 (44 B. 392, 83 P. R 1904, 1921 All. 335) *Dist.*

——in case of part payment of the principal the endorsement must be in the handwriting of the person making the payment, 29 Punj. L. R. 438 : 108 I C. 727 1928 Lah 151, 28 C. L. J 222 *fol.*

If endorsement as to payment is sufficient.

——endorsement of payment saves limitation although actually no payment is made 10 M. L. J. 25, 16 I. C. 754, 23 I. C 15 *contra*, actual payment is necessary 1929 Mad. 432, 51 M. 549 : 111 I. C. 210 : 1928 Mad. 509.

——it is the fact of payment that extends the period of limitation from that date Statement made after limitation period of a payment made within period saves limitation. 19 N. L. R 6 : 71 I C. 17.

"Before the expiration of prescribed period"

... re after the period 55 C. 1210 : 114 I.

—— the person liable to pay" does not mean the entire body of persons liable to pay and includes one of several mortgagors. 90 I. C. 774 : 1926 Cal. 150.

——the purchaser of the equity of redemption is "a person liable to pay the debt" with s. 20 (1), 44 C. L. J. 189 : 1926 Cal. 1218 · 99 I. C. 204.

S. 20. Effect of payment of interest on principal —*contd.*

——payment may be made by any medium 24 B. 619.

——handing over of the money by some menial servant saves limitation. 61 I C. 918.

——" the person making the payment " in s 20 of the Limitation Act means the person who in substance, though perhaps not in form, makes the payment. So where a person sends money through a messenger or post, " the person making the payment " is not the messenger or the postman but the person who sends the money. 53 C 163 94 I C. 657 . 1926 Cal 510.

——payment by pleader may save limitation. 20 C W N. 28 n., so also payment by court. 44 M 97. 41 M. L. J. 423, and by menial servant 61 I. C 918

——payment by principal debtor does not give a fresh starting against his surety. 28 B 248, 21 C W N 482 : 44 C. 978 . 25 C. L. J 238

—— ... cannot extend the period in ... 19 C. W. N. 860. 25 M. 22(... '41 · 5 I. C. 484, *not fol.* *Co*

——payment by *karta* even on behalf of his minor brother saves limitation. 31 C. L J 7. (37 C 461, 11 C L. J. 484, 19 C W. N. 860) *fol.*

——the managing member of the joint family, even though he is not the guardian of his minor brothers, is their agent, within this sec. 11 C. L J. 484 : 14 C W. N 741 . 5 I C, 484.

... ther, the debt ... t made by one ... 11 C. W. N.

——payment by mortgagor after transfer of portion of mortgaged property saves the period against the transferee also. 11 C W. N. 107, 9 C W N 868 : 32 C. 1077.

——the agent who can give the creditor the benefit of s 20 has to act within the terms of his authority If he exceeds the authority he cannot bind the principal, 87 I C. 989 · 48 M L. J. 506 : 1925 Mad 703

——payment by co-mortgagor saves limitation against others 99 I C. 424 : 1927 All. 209.

——an agent who is authorised to pay an amount under a bond it includes the payment of both principal and interest unless the authority is specific. 1926 Mad. 1176 . 98 I. C. 162 · 24 L. W. 638 : 51 M. L. J 472.

——a Hindu widow may make a payment keeping the debt. of her husband alive. 112 I C 491 : 1928 Mad. 972.

To whom Payment is to be made.

——payment of interest to one of several mortgagees enur for the benefit of all the mortgagees to save limitation. 110 I. C. 561 : 26 A. L J. 722 : 1928 All. 387.

S. 20. Effect of payment of interest on principal—*contd.*

Payment of interest or principal.

——"interest" in s. 20 means the whole or any part of the interest. 35 A 378, but it is otherwise in case of redemption suit. 18 A. 295, 26 A 167.

[illegible] expressly
B. 103,
tion by
C. 835,

[illegible]

——the question whether the payment of interest can be said to be made "as such" is one of fact in each case. 93 I. C. 295 : 1926 All 329.

——payment towards interest must be made "as such" i.e., it must expressly be towards interest. It has nothing to do with the general right of the creditor of appropriation of money either towards interest or towards principal 1925 Cal. 1030 : 87 I. C. 746, 90 I. C 774, 28 Bom L. R. 569, 96 I. C 311 : 1926 Bom. 423, 51 M 549 : 111 I. C 210, 1928 Mad 509

——where there is nothing to show if it is for principal or interest, the court is entitled to find out on evidence for what purpose the payments were made. The expression "person liable to pay" does not mean the whole or entire body of persons liable to pay and includes one of several mortgagors. 90 I. C. 774 : 1926 Cal 150.

——payment not expressly made for interest nor proved as such, is payment for principal. 22 C. W. N. 190.

——where payment is made towards a debt, the court can find out whether it has been made for interest or principal. 44 C. 567.

——where there are several debts, payment of interest may be presumed to have been made to all 8 I. C. 8.

——where there is simple and usufructuary mortgage of the same property payment of usufruct under the usufructuary mortgage cannot be said to amount to payment of interest under the simple mortgage. 49 A 430 : 25 A. L. J. 353 : 1927 All. 417 100 I. C. 670.

——payment of interest saves limitation even though a part of the principal is paid at the same time. 1923 M. W. N. 561 . 74 I C. 777.

Payment of principal.

——the fact of payment of principal must appear in the handwriting of the person making the payment. 23 C. 546, F. B., 26 B. 246, 17 N. L. R 40 : 62 I. C. 297, 29 Bom. L. R. 438 . 103 I. C. 727 : 1928 Lah. 157.

——where the debtor is literate the whole entry recording the payment of principal should be written by himself, 35 C. 813 : 13 C. W. N. 177, 38 M. 438, 41 B. 166, and if that be not done, in that case also, the endorsement will amount to an acknowledgment of liability under sec. 19, 40 M. 698, 17 M. L. J. 80.

S. 20. Effect of payment of interest on principal—*contd.*

——but in case of illiterate person the endorsement may be in the handwriting of a third person and the debtor may subscribe his mark, 23 C W. N. 930, 7 M. 76, 7 M. 55, 2 Pat. L T, 355, 52 M. 356 : 109 I. C. 702 1928 Bom. 417 : 30 Bom L R. 500.

——illiterate person affixing a mark is sufficient. 23 C. L. J. 222 : 23 C W. N. 262.

——in case of joint debtors it is sufficient if the writing is made by the debtor paying the debt. and it is signed by both 25 Bom. L. R. 354 : 74 I. C. 302.

Payment of decretal amount.

——debt. under this sec. includes money payable under a decree, and decree means not only a final decree but also a preliminary decree for sale. 49 A 147: 98 I. C. 818. 25 A. L. J. 154 : 1927 All 159.

——part payment of decretal amount credited in execution petition presented within 3 years, amounts, if the fact be proved, to a certificate of payment and saves limitation. 41 M. 251, 20 C L. J. 131 *Ref.*

——when there is no order of interest in a decree, payment without the writing of the Jt Dr. cannot save limitation 22 C. W. N 325

——when the payment for interest is under a decree and it is certified by the D Hr. in his petition of execution it saves limitation. 22 C W. N 325 : 23 C. L J. 390, 20 C. W. N 272, 26 C W N. 519, 523.

——but the D. Hr must certify payment within such time as is required to save the application for execution from being barred by limitation 23 C. W N. 320 See 24 C W. N. 38 n

——a payment of interest as such to mortgagees decree-holder by auction purchaser of the equity of redemption, saves limitation, 44 M 544. 40 M L. J. 218

Payment of rents and profits of lands.

——receipt of rent and produce of land as interest saves limitation 35 C L J. 58 : 64 I C. 903. 72 I. C. 492

——In the case of an usufructuary mortgage the receipt of profit by the mortgagee does not give fresh starting point to a suit for redemption 110 I. C 560.

Payment of mortgage debt.

——payment of interest of mortgage debt extends the period of limitation as regards personal decree under Or, 34 r. 6, 18 C W N 220 n, 31 C. L. J. 7, so also when the mortgagee is in possession, 47 B. 1206.

——receipt of rents by a sub-mortgagee does not extend the time for redemption of the original mortgage. 24 Bom. L. R. 713 : 1922 B. 356. 70 I. C. 906

——where payment was make by mortgagor after mortgage decree and equity of redemption was purchased by third person prior to such payment, it saved limitation as against purchase-

S. 20. Effect of payment of interest on principal—*contd.*

of the equity of redemption. 44 *C. L. J.* 475 : 98 I C. 381 : 1927 Cal. 193.

——payment by co-mortgagor saves limitation against others 99 I. C. 424 : 1927 All 209, 1929 All. 380.

S. 21 (1) Agent of person under disability, (2) acknowledgment by one of several joint contractors.

——an acknowledgment not stating the amount of liability is not a proper acknowledgment 115 I C 263 : 1928 Cal. 850

——under this sec. a partner *ipso facto* has no authority to acknowledge or to make a part payment, but if he has general authority to contract debts or make payments he has implied authority to keep the debt alive 1928 Mad. 972, 41 M. 427 F. B. Fol.

——ordinarily in a going mercantile concern the authority of one partner to sign acknowledgment on behalf of the firm is to be presumed, but in case of cessation of business one partner has no power to make an acknowledgment so as to save limitation under s 21 (2) 27 Panj. L R 593 · 1926 Lah. 616 . 7 Lah. 403.

——where a partnership business was dissolved but one partner who was entrusted with the winding up of its affairs endorsed a partpayment of a certain amount for interest upon a pro-note in favour of a person who had no notice of the dissolution the part payment would save limitation against the firm. 1925 M. W. N. 707.

——s. 21 (2) should be limited to cases expressly covered by it and the term "only" in that sec is not a mere surplusage 44 C. L. J. 475 : 1927 Cal. 193 : 98 I. C. 381.

——to apply s 21 (2) it must be shown that the acknowledgment made by one partner was impliedly authorized by the other [illegible] was act necessary for or [illegible]. Acknowledgment made in [illegible] business saves limitation.

——s. 21 (2) only lays down that one of the joint contractors [illegible] acknowledgment made by [illegible] acknowledgment is not binding [illegible] 1928 All. 387 : 110 I. C. 561.

S. 22. (effect of substitution and addition of party).

[illegible] where the new plff. is added or [illegible] may himself be considered [illegible] of the right of the original [illegible]

——this sec applies to a case where the new plff. is introduced and not to a case where an amendment is made with regard to the description of the plff. 32 C. W. N. 396 : 1928 Cal. 485 : 113 I. C. 24.

——where the addition of a deft. is not essential to the maintainability of the suit but is merely made to protect the interest of

S. 22. Effect of substitution and addition of party—*contd*

the deft. S. 22 is no bar. 26 C. W. N. 488 : 1922 Cal. 149, 33 C. 1079, 33 A. 272, 28 B. 11.

——distinction between necessary and proper party. 1922 Pat. 326

——where a new deft. is added at the court's instance after the ... of the suit s 22 of the L Act applies and bars ... deft. 36 C 519 · 11 C. W. N ... F. B (24 C 640, 27 C. 640, 14 ...342, *Expld*, 33 C. 613 : 10 C. W N. ...8 B. 11 p. 20, 14 A. 524, 85 I C. ... 614 · 52 C 783 · 90 I C. 426. 1925 Cal 716

——when partners are added by the court after the institution of the suit under R 10 (2) C. P. C, s. 22 provides that the date when they are added is to be deemed to be the date of the institution of suit so far as they are concerned for the purposes of limitation and the rights which they may have acquired under the L. Act, are sufficiently safeguarded. 1927 P. C. 252

... which a person who was ...a deft. is subsequently ... plff is not a "new plff." 19 C. W. N 1269, 66 ...

——this sec does not apply when the deft. is transferred from the category of deft to plff. 19 C. W. N. 1269 : 21 C. L. J. 611, 38 C. 342 : 13 C. L J. 3

——s 22. applies equally to the addition or substitution of the deft. after the expiry of the period of limitation 9 C. L J 523 · 36 C 675

——when the amendment is made by adding plff. not to represent the title originally asserted but to bring on the record as plff a new entity s. 22 cl (1) applies 76 I. C 119, 20 C. W N. 833 . 18 Bom. L. R. 642 35 I C. 322 P. C., 33 M. 165 : 7 M. L T. 185 · 5 I. C 931 *fol.*

——when in a partnership suit plaint is allowed to be amended by putting in the full name of the partners who were at first described in their names constituting the term it was not addition of new party. 50 C 549 · 75 I. C 81, (12 C W. N. 8, 20 C. W N. 49, 37 C 229) *Ref.*, 90 I C 685 : 27 Bom. L R. 1122 : 1925 Bom 527.

——this sec is not bar where a party is already on the record and only his capacity is changed by the amendment of the plaint, 37 C 229, 14 C. W. N. 261. P C., 17 C 580, P C., 30 M. L. T. 57, 7 C W. N 575

...

ged and the estate of the deceased was made party and the sons

S. 22. Effect of substitution and addition of party—*contd.*

were again reinstated as defts. the suit should be deemed to be filed as on the date of reinstatement 96 I. C. 887: 1926 M. W. N. 592 · 1926 P. C 88

——when administratrix sues in that capacity on behalf of a minor who has come of age, owing to *bona-fide* mistake and the minor then applies to be made plff after limitation period the suit is not barred 20 C W. N 49.

——this sec does not affect a case when amendment is made with the leave of the court. 19 C. W. N. 1193.

——addition of superfluous party after time does not affect the case 16 C W. N. 96.

——joinder of proper but not necessary party after limitation period is not fatal 27 Bom L. R 1168: 1925 Bom 547: 94 I. C. 575 (22 B 672, 28 B 11) *Approved Contra, below*

——s 22 applies to a case even where a person who is added as a party is not a necessary party but only a proper party. 33 C W. N 248 49 C L J 16 1929 Cal. 188 *but see above cases.*

——the substitution of the Official Assignee in suit brought by a person adjudicated an insolvent amounts to the addition of a new plff under this sec. 28 Bom L R. 554 95 I. C 538: 1926 Bom. 366

——right to redeem is not lost although party is added after limitation period 23 Bom L R 405.

——where a co-executor unwilling to join in the suit is added as party-deft after the period of limitation the suit is time-barred. 40 M. L J 532 · 1921 M. W. N 248 · 29 M. L T. 281: 63 I. C 104.

——a suit under Or. 21 r 63 C. P C. fails if the necessary party is added after the period of limitation. 33 C. L. J. 201.

——application to set aside auction sale against ostensible purchaser, real owner being brought on the record after 30 days, is not barred 1923 All. 462

——when one of the several vendees in a suit for pre-emption is impleaded after the expiry of one year the whole suit will fail 73 I C 364.

——s 22 does not apply to execution proceedings. 2. Pat. L T 619 61 I C. 30, and it does not apply to application for setting aside *ex-parte* decree 6 Pat. L J. 463: 2 Pat. L T. 771. 69 I C 536

——the sec. applies to suits only and not to aplications. 1923 P. 88.

S 23 (Continuing breaches of wrong).

——when property is attached under s 146, Cr. P. C suit for declaration of title may be brought by plff at any time if he was in possession at the time of order, at it creates a continuing source of injury 20 C W N 481 22 C L. J 283.

——wrongful attachment before judgment is a continuous tort and this sec applies 6 Bom L R. 704

——refusal of wife to come to her husband is a continuous cause of action to the husband 16 B. 714, 34 A 412.

S. 23. Continuing breaches of wrong—*contd.*

——in suit to establish the right of a temple to collect the offerings paid by pilgrims, the cause of action accores every time the offerings are wrongfully received by the alienees of the temple authorities 40 M. 412.

——an obstruction to a watercourse is continuous wrong. 7 I A. 240 : 6 C 394 : 7 C. L R. 529 P C

——infringement of right of way is a continuous wrong. 1 C. W. N. 96.

——when damages are for personal injury caused by throwing sulphuric acid on the face there is no continuing wrong. 25 Bom. L. R 1333.

——obstruction to public right of way is a continuing wrong. 26 C W. N. 587, 1925 Nag. 189.

——where damages are claimed for personal injury inflicted by throwing sulphuric acid on the face, there is no continuing

place once for all by the non-performance of the agreements on the date of sale 87 I. C 804 · 1925 All 448

——in a suit to recover money the liability to pay which is a recurring liability arising every year the period of limitation runs from the time when each yearly amount falls due The mere failure to sue for the money for any particular year for more than twelve years would not bar a suit for the amount which subsequently became due 91 I. C 411 (C)

S 24. (Suit for compensation for act not actionable without special damage)

——the word "act" in the sec. includes an "omission" 95 I. C. 913 1926 All 605 24 A. L. J 550

——s 24 is not only applicable to suits based on torts 95 I C. 913 : 1926 All. 605 · 24 A. L J. 550.

——the effect of this sec is not to extend or limit the limitation period but to modify the date or time from which the cause of action arises 10 Pat. L. T 191 · 1929 Pat 245

——special damage must be proved to sue for compensation. 18 C. 91, 10 A 498.

S. 25. (Computation of time).

——time must be computed according to English Calendar 13 C. L R. 153 29 I. C 983.

——the period shall be calculated according to the Gregorian Calendar 6 B 84, 24 C. 382, 47 All. 66 : 1925 All. 138.

——mistake of the numbers of days of the month in the bond does not affect period of limitation. 6 C 239 6 C L R. 553, 17 M. 61.

S. 25. Computation of time—*contd.*

——where a notice under s. 9 of the Act is given to file a claim on a certain date and the claim is filed on the following day, it is sufficient compliance with the notice under cl. (3) of s. 25, 61 I. C. 532 : 25 C W N 71.

S 26 (Acquisition of right to easements).

——para (2) of sub-sec. (1) controls para (1) of that sub-sec. A title to easement is not complete merely by efflux of the period of 20 years, no absolutely indefeasible right can be acquired until the right is brought in question in some suit. Whether the enjoyment has been peaceable and open and as of right are questions of fact 33 C W. N. 517.

——the object of this sec is to make easy the establishment of rights of easement · it is remedial and not prohibitory or exhaustive as to the modes of acquiring easement right. 91 I. C. 712 : 1926 Cal 507 53 C 1016

——the sec. is not exhaustive. 90 I. C. 356 : 1925 Pat 748.

——this sec. does not govern a claim to take water from a tank where that claim is based on a lost grant. It applies to cases of easements acquired by prescription. 1923 Cal. 291 : 67 I. C. 244.

——the pltf is not to prove actual uses for the 2 years. 26 C W N 121

——where a way has been used peaceably and openly without interruption for twenty years, user as of right may be inferred. 111 I C 196 29 Punj L. R 567.

... for the ... rup- ... sant ... 19:

——the owner of dominant tenement is entitled to so much ... ight and air as will suffice for the ordinary purposes of inhabitancy or business according to ordinary notions of mankind, there is no infringement unless, what is done, amounts to nuisance. 42 C. 46, P C.

——the claim in respect of new windows which did not receive the same amount of light as were enjoyed by the old windows is quite distinct from the claim in respect of old windows. 96 I. C. 546 : 1926 Nag 474 : 9 N. L. J. 136

——to determine whether nuisance has been proved the existing state of things must be considered. 39 C. 59.

——obstruction to ancient lights when amounts to actionable nuisance 31 C W. N 419 : 45 C. L. J. 474 : 1927 Cal. 345. 103 I. C. 370

... right of way is not an easement in the legal ... s not necessary ... proved. 36 C.

... is not a case ... by this sec. 65

I. C. 003 (C).

S. 26. (Acquisition of right to easement—*contd.*

——in case of right of fishery the plff. is not to prove user for 20 years. 3 Pat L T 53 : 64 I. C. 346.

——where a right to discharge water on another immoveable property is claimed the onus is on the dominant owner to prove all the points which are necessary to establish an easement under sec. 26 L. Act. 26 Punj L. R 42 : 84 I. C 676 1925 Cal. 297

See other cases under "Easements."

S. 27. (Inclusion in favour of reversioner of servient tenement).

——s. 27 does not apply to a donee or transferee from a Hindu widow in virtue of powers as representing the estate 41 I C. 47 (c).

S. 28 (extinguishment of right to property).

——when a person remains out of possession for 12 years, his title extinguishes and he cannot retain possession even if he gets it without the help of the court. 18 C. W. N. 904

——right of the true owner is lost by adverse possession and it is not revived by re-entry. 32 C. L. J. 151

——the owner must be aware of the dispossession 45 B. 1020. 23 Bom. L. R. 416

——when the right to property is vested is one person it is not transferred by the mere lapse of time to the person actually in possession. 45 A. 419. 54 M L. J. 623 **P. C.**

——the cause of action for maintenance accrues from time to time 73 I C. 235 (C).

For other cases see 'adverse possession' and "Art. 144"

S. 29. Savings

——Arts II and III of the L Act, are applicable to special period of limitation. 46 C. 199, 22 C. W N. 802, 27 C. L. J 874, 24 C. W. N 4

——s 29 excludes the operation of s 14 in a suit filed as contemplated by s 169 P. C Land Revenue Act 6 N L J. 205. 73 I C. 1021

——The amendment of S. 29 by Act X of 1922 does not

——the sec applies to the Income-tax proceedings. 1929 Lah 170

Art. 2. For compensation for an act or omission done in pursuance of an enactment,—90 days, from the act or omission

the alleged act was not done in pursuance of any enactment. 31 C W N. 835 39 M L T 343 28 Punj L. R. 453; 1927 M. W. N. 334 · 1927 P C 72, 103 I C. 1 P. C., (4 Lah. 428: 79 I. C 268, 4 Lah 432 · 79 I C 185) *reversed*

Art. 3. To recover possession of immovable property under s. 9 of the Specific Relief Act, 6 months, from the date of dispossession

——the *word* possession in sec 9 of the ...
possession physical or const
ed to obtain recovery of p
who has dispossessed his ter
W N. 616 *dissented from*,
——when a non occupancy ... essed of his holding by
the ... decree a suit by the
by Art 120 or 142,
only remedy. 31 C.
... 7 C W. N. 218 *overruled*.

Art. 5 Under the summary procedure referred to in s. 128 (2) (f) C P. C. 6 months, when the debt becomes due

——*Art*. 5 does not apply to suits on promissory notes filed under Or 37 C P C 52 C 954 41 C L. J. 368 · 29 C. W. N. 589, 85 I. C. 400 1925 Cal. 781

Art 7. (Suit for wages of house-hold servant, artisan or labourer—1 year from due date).

——the Art applies to house-hold servants 26 O. C. 327.

—— a *cook* is a domestic servant and a suit by him comes under this Art 28 I C 956

——a motor-car driver is an "artisan", within this sec 104 I C 520. *1927 Rang.* 279, 5 Rang. 477.

——when the servant is appointed on monthly salary, limitation commences from the end of each month. 5 W. R 33.

——suit for wages becomes time barred against the principal debtor after one year even if a surety enters into a first contract. 64 I. C. 361.

——a weighman in a shop is not a house-hold servant artisan or labourer and a suit by him for wages does not fall under Art 7 but under Art. 120. 90 I. C 120: 23 A. L. J. 1059; 48 A 161. 1926 All. 172.

——a suit for wages as a domestic servant must be brought within one year under this Art but it is open to a master instead of paying the ... to give credit in his account books in which case ordinary law of ...
39 M. L. T. 415.

Art. 8. For the price of food or drink sold by the keeper of hotel,—1 year, when the food or drink is delivered.

Art. 9. For the price of lodging, 1 year, when the price becomes payable.

——*quære*, whether Art 8 and 9 apply to a claim for boarding charges. 1926 Cal. 530 91 I. C. 839.

Art. 10. (Suit to enforce a right of pre-emption—1 year from physical possession or date of registration.)

——time begins to run from the date of physical possession and not symbolical possession 1922 P. 601, 1 Pat. 578: 69 I C. 666.

——property in the possession of tenant does not admit of physical possession within this Art 73 I C 903. So limitation runs from [illegible] Punj. L. R. 780, 86 I C. 130: 23 [illegible]

——w[illegible] le becomes in effect an absolute [illegible] A. W. N. 61 F. B

——physical possession means *personal and immediate possession.* 24 A. 17: 5 C W. N. 888, P. C.

——constructive possession is not physical possession. 20 A. 315: 18 A. W. N. 61 F B.

——an equity of redemption is not capable of physical possession. 9 A, 234 7 A. W. N 24

——where the subject of sale is not capable of physical possession, and there is no registered deed of sale, a suit for pre-emption is governed by Art. 120, 20 A. 315 18 A. W. N 61 affirmed by P. C. in 24 A. 27: 5 C W. N 888, 4 A 218, F. B, 5 A. 187

——registration when compulsory 62 I C. 797.

——a suit by one pre-emptor against another is governed by Art 120, 7 A. 167 · 4 A. W. N. 315

——sale with a right of pre-emption, vendor in possession. 40 M L. J 443, 29 M L T. 251: 62 I C 27

——a mere share in joint property is not capable of physical possession and this Art does not apply. 68 I C. 895 1923 Lah. 75.

——the rule applicable to property such as an undivided share in a mahal which is not by its nature capable of physical possession [illegible] physical posses-[illegible]on does not start [illegible] possession. 89 [illegible]

——right of pre-emption cannot be pleaded in defence. 45 M. L. J 389, 24 M. 449, 29 M. 336, 40 M 1134, *fol* 13 M. 490, 20 M. 305 *not fol.*

Art. 11. (Suit to establish the right against an order in claim case—1 year from order)

——where a claim is disallowed this Art. applies. 83 I C. 233: 1924 Cal. 744.

——when a claim case is not tried on merit but is rejected on the ground of delay, this Art applies. 41 M. 985 F. B., 45 C 785,

Art. 11. (suit to establish the right against an order in claim case—1 year from order—contd.

23 C. W. N 87 n., 1923 Nag 69; 69 I C. 522, 6 M. L J, 68; 71 I. C. 404

——where an application under sec. 335 (old) was dismissed for default without enquiry into the matter of resistance, Art 11 applied 34 C 491 11 C W N. 487, 31 M. 5; 3 M. L. T. 106; 17 M. L. J 554, *Fol.* 1 C W. N 24 (1 C L. J. 296, 32 C. 537.) *Dist*

——*dismissal of an application for default bars a suit beyond a year.* 1923 Cal. 164.

——*merely because* the claimant does not adduce evidence or is absent, it does not follow that there are no materials before the court to inquire into the matter. If the court does not enquire and dismiss the application, this Art. applies. 6 C. L. J. 362, 14 A 335 23 I. C 349, 19 A. 253, 33 C. 577, *doubted.*

——*where there was an order of attachment before judgment* but it was not effected and a claim case was preferred and disposed of, this Art applied. 45 M. 90 · 41 M. L. J. 594: 1921 M. W. N. 764

——*where there was an attachment before judgment but claim was preferred after the order for sale and was disposed of this Art. applied* 44 M 902: 41 M L J. 252 F. B.

——*where claim against attachment before judgment is dismissed but subsequently the execution proceeding ends adversely to the D. Hr. but the order is reversed in appeal and whereupon the property is again attached and fresh claim is preferred which is also dismissed time runs from the dismissal of the last claim case* 87 I. C. 756 1935 Cal. 1147.

——where the claim is refused on the *ground that higher court* alone has the jurisdiction, this Art. does not apply. 14 L. W. 12

——suit under Or 21 r. 63 C. P. C. fails if the transferee of property prior to suit is added as party after *limitation period.* 33 C. L J. 201 · 25 C W. N. 544

——where on the mortgagee's [illegible]
to be a burden in a suit
gage null and void this Ar

Art. 11 A (Suit to establish right, against order under Or. 21 r. 103, C. P. C., 1 year from order).

——a suit to set aside an *order* passed under Or. 21 r. 100 C. P. C. is governed by this Art 4 Pat. L. T. 93; 71 I. C. 484

——this Art does not apply where the order was passed without investigation into the fact of the case. 34 C. 491; 11 C. W. N 487, 6 C. L J 362, 27 M 25, 26 C. W. N 853: 35 C. L J. 537, (45 C. 785, 41 M 985, 31 M. L. J. 247) *Dist.*

——if the application is dismissed for the applicant's failure to adduce evidence, this Art. will apply. 20 I. C. 969, 10 I. C. 401

——petition for delivery of actual possession being refused under Or. 21 r 99 regular suit must be brought within one year 24 C. W N. (1001, 59 I. C. 772, 19 A. L. J. 53: 60 I C. 905, 3 P. L. T. 33 P C

Art. 11 A. (suit to establish right against order under Or. 21 r. 103, C. P C., 1 year from order)—*contd.*

——a " person against whom " includes a decree holder. 44 A. 607, 15 C 521 19 A L. J 53 *Fol.*

——application of the Art—C P. C Or 21 r. 100, 38 C L. J. 150

——where the cause of action alleged by the plff. is one that has arisen subsequent to the date of the order made on the application under Or. 21 r 100 this Art does not apply. 50 C 311, 38 C. L. 7. 150, 1924 Cal. 97.

——where the auction purchaser brought a suit to set aside an order against him but the same was dismissed a subsequent suit for partition of the judgment debtor's share with the deft is not barred by this Art 49 M. 596 95 I. C 209 1926 Mad 653, 91 I. C. 961, 1926 M W. N 165 1926 Mad 232

——a suit against order under Or 21 R. 100 passed on 31-11-1919 must be filed on 23-12-1920 and not on 24-12-1920. 90 I. C. 827

——where the plff.'s application under Or 21 R. 100 was dismissed on the ground that in as much as his possession has not been disturbed the application was one which did not come within the provision of Or. 21 R. 100 C P. C, the provision of this Art does not apply 84 I C 876; 1923 Cal 607

——the purchaser of a holding at an auction sale took possession of the holding, whereupon the defts alleging dispossession applied under Or 21 R 100 for possession, an order was passed in their favour under Or 21 R 101 and more than a year after the auction purchaser sued for possession as landlords on the basis of abandonment, held the suit was not under Or 21 R 103 and was *not barred under one year's period of limitation.* 30 C. W. N 163. 90 I C 575 42 C L J. 578 1926 Cal 377.

——where after delivery of symbolical possession in the prior suit the executing court rejected the plff's application for khas possession on the finding that the defts were on the land in their own [illegible] one year was barred under this

[illegible] *it is shown that there was a* [illegible] property or that immovale property was sold in execution of a decree 1929 M. W. N. 174. 115 I. C. 504 1929 Mad. 69.

Art. 12. (Suit to set aside sale—1 year from confirmation)

——when the sale is sought to be set aside on the ground of fraud, Art. 95 (3 years) applies. 34 C 241 5 C. L J. 385, 13 B. 221, 9 M 457, 96 I C. 529 1926 Pat. 402 5 Pat. 759: 8 Pat. L. T. 124

—— when it is found that notice has not been served under s 10 of the Public Demands Recovery Act and a suit is brought to set [illegible], Art. 142 [illegible] 5 C. L. [illegible] sale and [illegible] 24 I. A.

Art. 12. (Suit to set aside sale—1 year from confirmation) —contd.

——*when in* pursuance of a money decree against father joint family property was sold, *in a suit by* son to set aside the sale to the extent of his share this Art. will apply. 1926 M. W. N. 767 : 1928 Mad. 1190 98 *I. C. 31, 25 B. 327 P. C. fol.* 34 C 390 P C Dist

——where the sale is void and not binding on the plff. this Art does not apply. *19 A 308 : 17 A.* W. N. 71, 18 A. 147, 11 B 439, 8 C. 329, 12 B. 8, 11 B. 130.

——where the decree-holder purchases without leave the sale is voidable *and an* application to set it aside is governed by the Art. *3 Pat. L. T* 529, 31 M. L. T. 209 : *67 I. C. 914.*

- Art. applies. 11 C. 287, 6 C

L.

just be a party to the sale pro B, 9 *M. 460, 5 A.* 614, 9 C. L R

this Art. does not apply 18 *M. 478.*

——when a suit is brought within one year from the date of revival by the *Board of Revenue* of the Commissioner's order, it is not time-barred. 23 C. 775, P. C.

——in a suit to set aside a revenue sale under the Bengal Public Demands Recovery Act this *Art* applies. *45 C. L. J. 73 ; 31 C W. N. 299 . 1927 Cal. 315 100 I. C.* 997, 23 C. 775 *Rel on.*

——a *putni-sale* becomes final ... purchase-money, it ... ulation and

——w ... cannot be

it is not se ...

impugned ... W. N 805 *Contra 30 M,* 414 : 17 M. L. J. 294

——*this Art.* does not affect a defence set up by a party in possession 67 I. C 894.

——this Art ...

take

need

Act ...

1925 ... 28 C. W. N. 556.

Art. 14. (To set aside an act or order of Govt. officer, one year from the date of act or order).

——the order contemplated by Art. 14 must be such an order which the officer is empowered under the law to pass and which would be effective unless set aside and which further *is* an order which *under the ordinary law* is liable to be set aside by a suit in the civil court. 29 C. W. N. 839 : 89 I C. 193 : 1925 Cal. 953.

Art. 14. (To set aside an act or order of Govt. officer one year from the date of act or order)—*contd.*

——if the act or order is illegal or *ultra vires* Art. 14 does not apply. 109 I. C. 545 : 1928 Bom. 180 : 30 Bom. L R. 431.

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Collecto

affecting

104 I. C. 781.

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95 I C 950.

——a suit for a declaration that certain plots allotted to a party in a Batwara proceding are not included within certain estate is maintainable and Art. 14 is not a bar to the same 96 I C. 632 : 7 Pat L T. 779 1926 Pat. 421 6 Pat 73.

——a suit to recover possession of certain lands allotted to the plff. under a Collectorate *partition is not governed by this Art.* 53 I. A 176 . 97 I C 217 . 1926 P. C. 60 7 Pat. L T 483 5 Pat. 735 . 31 C. W. N 341 P. C.

——a suit to declare the order of the Commissioner under s. 178 of the Bombay District Municipal Act to be illegal, comes under this Act. 51 B 105 100 I C. 98 1927 Bom 55.

Art 16. (To recover money paid under protest, one year, when the payment is made).

——Art 16 applies to a suit for the recovery of penal assessment illegally levied by Govt for an alleged wrongful taking of water 86 I C. 267 ; 1925 Mad 474 21 L. W. 155.

Art 19. Suit for compensation for false imprisonment 1 year, when the imprisonment ends.

——nothing short of actual detention and complete loss of *freedom will support an action for false imprisonment. A person* released a bail cannot be regarded as under imprisonment so long as he is on bail. Time begins to run from the date on which he was enlarged on bail. 30 C. 872 · 7 C. W N. 729 P. C

——in a case of false imprisonment the question is who is liable for the imprisonment ?—the party who takes out the warrant or the court which issued the warrant 9 Bom 1

Art 22. (Suit for compensation for personal injury).

——in case for damages for personal injury caused by throwing sulphuric acid on the face Art. 22 applies. 25 Bom. L. R. 1333.

Art. 22. (Suit for compensation for personal injury)—*contd*

——in a suit for damages for personal injury caused by throwing sulphuric acid on the face, the period of limitation is one year and time begins to run from the date of the injurious act done. 84 I. C. 796 : 1924 B. 290 : 25 Bom L. R. 1333.

Art. 23 (Suit for compensation for malicious prosecution).

——the period of limitation for a suit for malicious prosecution is one year from the time of acquittal, the cause of action cannot be suspended. 47 B. 28 . 24 Bom. L. R. 507.

——a suit for compensation for wrongful act will fall under Art 23. 89 I C 861 . 1925 Rang. 311 : 3 Rang 268 (26 A. 482, 13 *M 445, 1923 P. R. 160*) *Ref.*

Art 27 (Suit for compensation for inducing a person to break a contract with the plff.—1 year, from the date of the breach)

... governed by this Art when the ... dar ... nals ... the ... 88 :

Art. 29. (Suit for compensation for wrongful seizure of moveable property).

——in a suit for damages for illegal attachment of standing crops this Art applies. 18 N. L. R. 96 : 65 I. C. 665, 32 C 459, 4 N. L. R. 49, 25 M L J. 447 *fol.* 36 C. 141 *Dist. But see. Art 36.*

——a seizure under a writ of court is *prima facie* not wrongful and a suit for compensation does not lie under this Art 35 C L J 480, 19 M 80, 38 M L. J. 314 *fol.* 31 M. 431, 42 C. 85, 31 M. L. J 257 *Dist.*

——this Art. applies where attachment is illegal *ab initio.* 1925 *All. 131.*

Art. 30. (Suit against a carrier for compensation for loss or injury to goods, 1 year, when the loss or injury occurs).

——this Art. applies where there is no contract to deliver goods- 3 ... W. N. 851. ... s must be admitted by the

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——a suit for compensation for non-delivery of goods by Railway Company is governed by the following Art. and not by this 3 Pat. L T. 767 : 103 I. C. 383 : 1927 Pat 335.

Art. 31. (Against carrier for compensation for non-delivery etc., 1 year from when goods ought to be delivered.

——a suit by consignor for compensation for loss or damage in respect of goods consigned by Railway is governed by Art. 31, whether the action is laid in tort or in Contract. Art. *31 is not*

Art. 31. (Against carrier for compensation for non-delivery etc., 1 year from when goods ought to be delivered—*contd.*

limited to suit by consignee. 52 C. 372 29 C. W. N 277 · 86 I. C. 127 : 1925 Cal. 559, 44 C. 16 *Diss.*, (26 B 562, 33 A. 544, 42 A. 390). *Ref*

on for non-delivery is laid in contract C. 974 · 1995 Lah. 90 I C. 135, 6 Pat.)6 , 1928 Cal 371

——where major portion of the goods is delivered on certain day the balance also ought to have been delivered on that day. 103 I C. 383 . 1927 Pat 335 8 Pat L. T. 767.

Art 32. (Suit for misusing property, 2 years from knowledge of perversion).

——suit for ejectment and damages against a tenant for excavation in violation of the condition of the tenancy comes under this Art 25 C W N 930 : 62 I C. 778.

——under cl (a) i e. where the raiyat uses the land in a manner which renders it unfit for the purpose of tenancy, Art 32 L Act, (2 years) applies. 24 C. 160 1 C W N 223, 26 C. 564 3 C. W N 464 F.B So also where there is kabulyat but no stipulation of penalty by way of ejectment 20 C. W. N 610.

——but in case of breaking a condition on breach of which the tenant is under the contract liable to ejectment Art 1 Sche. III (1 year) of the B. T. Act, applies. The period of limitation for a is 2 years (Art. or 49 L. Act.)

ing a lar common and not

Art. 36 (Suit for compensation for any malfeasance, misfeasance or nonfeasance—2 years from when it takes place).

——there is a great divergence of opinion as regards the cutting and misappro- will apply. 36 C. 141 . 12 9 C W N. 376 , others . N. 308, 7 C. W N. 728, I I C 213 : 25 M L. J. 441. The period of limitation for a suit to recover compensation for cutting down trees is 2 years (Art. 36 L Act) and for removal of trees is 3 years (Art. 49 or 49 L Act) 10 C L J. 25, 25 C. 692 : 2 C. W. N. 265 F. B. *Fol*

——a suit for compensation for damages caused to the plff's building by reason of the deft. closing up certain drains comes

Art. 36. (Suit for compensation for any malfeasance, misfeasance or nonfeasance—2 years from when it takes place—contd.

under this Art. and the offence is a continuing one. *92 I. C. 994*: 1926 Lah. 242

——a suit for damages for personal injury caused does not come under this Art. *25 Bom. L. R. 1333 : 84 I. C. 796 ; 1924 Bom. 290*

——suit for damages for taking wrongful civil proceedings and for slander of goods falls under this Art. and not under Art 49. 46 C. L. J. 455. 106 I. C. 277. 1728 Cal. 1.

——suit for damages caused by loss of goods due to the capsizing of boat is governed by this Art. 107 I. C. 723 : 1928 Cal. 306

——Art. 36 deals with compensation for malfeasance and misfeasance independent of contract and a claim by the liquidator of a company under s. 235 of the Companies Act, not being independent of contract does not fall within Art. 36. 47 A. 699 : 88 I. C. 785. 23 A. L. J. 473. 1925 All 519

——where the plff's oranges got deterioration on account of their detention by the Police in the Thana and he filed a suit for compensation 3 years after the date on which the oranges were taken to the Police, Art. 36 and not Art. 49 was applicable. 43 C. L. J. 203. 90 I. C. 509. 1926 Cal. 177.

——where in [illegible]
Collector [illegible]
reasonabl[illegible]
were dete[illegible]
damages t[illegible] plaintiff's suit for damages against the defendant was governed by Art. 36 and *not* by Art. 48 ; Art. 42 cannot apply as the defendant never had possession of, or control over the goods. 30 C. W. N. 465. 94 I. C. 444 ; 1926 Cal. 757.

Art. 37. (Suit for compensation for obstructing a way or a water course ; 3 years, from the date of obstruction)

——an obstruction to a water course being a continuous act of wrong as to which the cause of action is renewed *de die diem* s. 23 applies and a suit brought more than 3 years from the date of obstruction will not be barred. 5 C. 394 : 7 I. A. 240. 7 C. L. R. 529 P. C.

Art 39. (Suit for compensation for trespass upon immovable property, 3 years, from the date of trespass)

——a suit for damages for wrongful but not fraudulent encroachment on the plff's coal mine and extracting coal comes under the Art. or Art. 49 and not Art. 48 or Art. 96. 31 C. W. N. 82 : 1927 Cal. 117. 101 I. C. 62

——the cause of action in a suit to have a drain closed on the ground that it passed through plff's land was held to count from the last act of trespass, each act of trespass causing a fresh right of action. 24 W. R. 97.

Art. 40. (for compensation for infringement of copyright ect., 3 years from the date of the infringement).

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Art. 42. (For compensation for injury caused by an injunction wrongfully obtained, 3 years, when the injunction ceases).

——no suit lies for damages against deft for maliciously and without resonable and probable cause, obtaining perpetual injunction which was subsequently dissolved on appeal. 42 C. 550. 21 C L. J. 68 : 18 C W N. 1189 : 28 I. C. 296

——this Art does not give rise to a cause of action for damages for an injury by an injunction wrongfully obtained unless a cause of action existed independently of this Art 30 C. W. N 465 1926 Cal. 757. 94 I C 444.

——time begins to run as soon as the injunction is at an end 16 C. L. J 34

his favour
loss of part
and not by

Art. 44. (Suit to set aside transfer by guardian—3 years from attaining majority)

——this Art applies to transfers which are voidable and not void. 1929 M. W N 124 1929 Mad 313. 56 M. L J 332.

——transfer by unauthorised person is a nullity and need not be set aside, and so in that case this Art. does not apply, Art. 144
L J 394, 68 I C 731,
8, 28 C L J 496, 16 C. W.
C. 27 I C. 687, 32 A. 392,

——Art 44 has no application to an alienation effected not by a guardian but by a wholly unauthorised person. 87 I C. 1018.

——in case of transfer by natural guardian, this Art. applies 38 C L J. 213, 24 C. W N. 1016 : 32 C L. J. 48, 31 I C 188, 23 M. 271 4 C. W. N. 329 : 27 I. A. 69 P. C, 13 C. L. J. 277, 38 B. 94, 38 M 175, 40 M. L J 475 : 62 I C. 630, 45 B. 446, 17 N L. R. 183 · 66 I C. 303, 103 I. C 365.

——if the date of attaining majority is disputed the minor is to prove that. 38 C L. J. 213, 1923 Lah 254 : 70 I. C. 984.

——'guardian' includes any guardian *de facto* or *de jure*, and is not restricted to one appointed under the Statute. 13 C. L. J. 277, 24 I. C. 110, *contra*. It does not apply to cases of alienation by *de facto* guardians. 108 I. C 529 : 1928 Mad. 226, 34 A. 213, 38 M. 1125, 17 M. L. T. 138, 17 Bom. L. R. 1134, 27 I. C. 695, 19 I. C. 235, 1 I. C. 545.

Art. 44. (Suit to set aside transfer by guardian—3 years from attaining majority)—*contd*

——the remedy contemplated by Art. 44 is open to a ward for three years from the date of his attaining majority and that remedy is not lost, by the mere fact that he purports to transfer his interest in the property such as it is at the date of the transfer, to a third person 49 B 309 27 Bom L R 211 86 I. C. 979

——a suit by the son within 3 years of his attaining majority against the alienation by the father is not barred by the fact that the elder son attained his majority long before and did not take any step questioning the alienation 98 I. C. 31 : 1926 Mad. 1190 , 1926 M. W N. 767 24 L. W. 475.

Art 45 (To contest an award under any of the Regulations of the Bengal Code, 3 years, the date of final award).

——the award contemplated by this Art. presupposes a contest between the parties and a decision into the points at issue after proper investigation 55 C 201 · 1927 Cal 902 : 104 I. C 655, (6 W. R 317, 11 W. R 389, 3 C W N. 99, 49 C 37) *Ref.*

Art 46 (By a party bound by award to recover property, 3 years from the date of final award or order).

——where a disputed claim to land was submitted by the parties to arbitration and the arbitrator's award was only filed in court under s. 526 C P. C (old), but the pltf. did not apply for execution thereof, his claim was barred after 3 years from the date of the award under Art. 46, 29 C W. N. 633 : 52 C. 314 27 Bom L R. 166 · 86 I C. 245 : 48 M L J. 20 P. C.

——a person who was not a party to an award or order is not bound by it and is not therefore debarred from bringing a suit for possession under the twelve year's law of limitation. 3 W. R 165, 5 C. L. R. 452

Art 47. (Suit against order under Cr. P. C—3 years from final order).

——when a Magistrate makes order under s. 145 Cr P. C. a suit against that comes under this Art. 38 M. 432 : 21 I C 564, 45 A 306, and the plff cannot escape this Art by changing the form of the suit. 45 A. 306, but see 20 C W. N. 481.

——but where a suit is not for the recovery of any property but for a declaration of plff's. right to put up dams in a river and to irrigate their lands thereby, this Art. does not apply. 35 C. 851.

——when the order is out of jurisdiction Art. 142 applies 60 I. C. 860 (c).

——this Art applies also to the representative of the party under s. 145 Cr. P. C, 23 C., 731 F. B.

——an adverse order passed in a proceeding under s. 145 Cr. P. C against the junior member of a Hindu joint family does not affect the other members 66 I. C. 678, 23 C. 731, 29 A 1 *Ref.*

——where an order under s. 145 Cr. P. C. does not affect the possession of the parties this Art. has no application 30 C.

Art. 47. (Suit against order under Cr. P. C.—3 years from final order)—*contd.*

W. N. 873: 1926 Cal 1022 97 I. C. 73, 99 I. C. 532 1927 Mad. 304 1927 M W. N. 35, similarly in a suit by one of the successful parties in a proceeding under s. 145 Cr. P. C. against others for deciding their rights *inter se* Art. 47 will not apply 1926 M. W. N 793 *51 M. L J. 652*

——where the plff. continue in possession the Art does not apply 20 B 270.

——to apply this Art the suit should be to set aside the effect of the summary order of a M with regard to possession in the interest of the public peace. It does not apply to a suit brought in consequence of an order under s 146 Cr P. C., 111 I. C. 152.

——an order restraining possession under s. 522 C P C is an order respecting the possession of property within the meaning of Art 47, 86 I. C. 744. 1925 Mad. 799 48 M L J 372

——the date of Magistrate's order is the date of the final order and not the date of the order issued by the H. C., 12 C W N. 840.

——this Art. does not apply where no legal right of the plff. to sue exists on the date of the Magistrate s order but it accrues subsequently. 102 I. C 360 1927 Mad. 586. 52 M. L. J. 482 25 L. W. 563

Art. 48. (Suit for specific moveable property lost etc.—3 years from knowledge of possession.)

——"specific moveable property" means property which one can demand the delivery *in specie*, 22 C 877, it does not cover money. 11 C W N. 862, 6 C L J. 535, 37 M 381 14 I C. 254, in some Allahabad cases it has been held to cover money also. 5 A 341, 29 A 579.

——G P notes and title deeds are specific movable property 12 C W N 1010, 15 M. 157.

——limitation runs when the plff first learns in whose possession the property is When the plff. entrusts certain jewels to a person for sale and the latter pledges them to a pawnee, a suit to recover the jewels or its value from the pawnee falls under this Art 40 M. 678

——deposit of minor's money in bank, liability of bank 24 Bom. L R. 513.

——cause of action for loss in transit arises on the day the plff. ascertains the shortage. 75 I. C. 669. 1923 A. 342.

——the term "conversion" means dishonest conversion. *ejusdem generis* with the words that precede it and the words in the third column presupposes the existence of the property in the possession of some person 31 C. W N 82 101 I C 62 1927 Cal 117.

Art. 48 (Suit for specific moveable property lost etc —3 years from knowledge of possession)—contd.

27 A. L J. 170 49 C L J. 415; 32 C. W. N 323: 10 Pat L.T 155: 31 Bom L R 702 1929 P. C 69: 114 I. C 604 P C.

——a suit for damages for the wrongful attaching, cutting and removing of the crops is governed by this Art, or Art 49 1928 Cal 106 · 105 I C 763

Art 49 (Suit for other specific moveables etc —3 years from the taking of property or its injury or unlawful possession)

——specific moveable property means property of which one may demand the delivery *in specie* and not its equivalent. 11 C W. N 862, 22 C 877, 6 C L J. 535, 37 M. 331, *Contra*. 29 A 573, 5 A. 341.

——limitation runs from the date of knowledge of possession of the property. 40 M 678

——where the original possession was lawful but since then it is unlawfully detained Art. 48 will apply, otherwise Art. 49 applies 38 M 783

——but where the deft took two necklaces from the pltf. on condition that their price would be paid if they were approved, otherwise they would be returned and the deft failed to pay the price or to return the necklaces, suit would lie under this Art, limitation running when the deft.'s possession becomes unlawful *i.e.* when the deft. failed to return them after notice. 105 I. C. 224.

——when under erroneous order of the Magistrate, the possession of the property is taken, this Art applies. 30 M. 12: 16 M. L. J. 541.

——when G P Notes are unlawfully pledged by the trustee, suit to recover them lies under this Art 12 C. W. N. 1010.

——when gold is deposited with goldsmith, suit to recover lies not under this Art but under Art 145 (30 years). 23 C. L. J. 145.

——the word moveable property includes money. 6 C L. J. 535

——this Art applies to suit for compensation for trees wrongfully cut and removed 73 I. C 33.

——this Art applies to a suit for damages against occupancy tenant for having cut down trees in his holding. 94 I C. 336: 1926 All. 462.

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——where specific moveable property has been [illegible]ited with the deft, and there has been demand and refusal this Art. does not apply, but Art 145 applies. 33 M. 56: 20 M L. J. 41.

——Art. 49 is a general Art. for the recovery of specific moveable property while Art. 145 is a special Art 26 C. W. N 772, 33 M. 56, 60 *fol.*

——mere silence on demand being made does not constitute refusal. 35 M. 636.

Art. 49. (Suit for other specific moveables etc.—3 years from the taking of property or its injury or unlawful possession)—*contd.*

——this Art does not apply where the plff does not claim in personal capacity. 17 C. 3, P. C

——an '*idol*' is not a specific moveable property. 38 C. 284 . 15 *C. W. N. 36.*

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M. W N. 143 1925 Mad 185

——a minor may sue to recover the ornaments of his mother forming her *ayautuka* stridhan within 3 years of his attaing majority though it is more than six years since mother died. 32 C W. N. 133 1929 Cal. 42

As to suit for crops removed, see, *Art. 86.*

Arts 52-53. (For the price of goods sold and delivered, 3 years from the date of delivery or when fixed period expires)

——supplying goods from time to time in continuous dealing constitutes one cause of action 24 Bom. L R. 998, 1923 Bom. 113, *Contra* 11 W. R 529.

——in a suit for recovery of price of articles Art. 52 applies and not Art 115 65 I C 687

——"goods" in this Art. include fruits before they have been gathered, so a suit for recovery of fruits comes under this Art. 66 I. C. 120.

——it does not apply to a contract of returning goods in kind. 4 Lah L J 268 , 65 I. C 691, 49 I C 231, 2 Lah L J. 191

——this Art applies to a suit to recover advance of grain and the period as amended by the Punjab Act of 1904 is six years 27 Puj. L R 700 95 I. C. 25 . 8 Lah. L J 322, (2 Lah. L J. 191, 1922 Lah. 271) *fol*

——in the case of a supply of goods by a tradesman on credit for which payments are made on presentation of bills, Art 52 applies and limitation runs from date of delivery of the goods 88 I C 747 ; 1925 Pat. 806.

Arts. 57-60 (For money lent or deposited—3 years from loan or demand)

——when money is deposited for safe custody Art. 60 and not 59 applies and letter of request for the payment thereof is not demand 25 C W. N. 981.

——there is no distinction between money lent and money deposited with regard to the agreement to repay 25 Bom. L. R 503 ; 73 I C. 978

——in order to apply this sec. it is not necessary to prove that the defts were carrying on business only as bankers ; it is sufficient

Arts. 57-60. (For money lent or deposited—3 years from loan or demand)—*contd.*

if he deals with the plff as banker. 93 I. C. 215; 1926 Bom. 168, 28 Bom L R 73

——distinction between deposit and loan shown. 29 Bom L R. 427 1927 Bom 433, 102 I C 145, 28 Bom. L. R. 73, 98 I C 554 · 1927 Pat 91

——the word "deposit" in this Art covers all payments of the customers' moneys made to the banker which make up the credit balance in favour of a customer in the banker's hands 102 I. C. 408 1927 Bom 362 29 Bom L R 423

——to apply Art 60 it is necessary to show not only that there was a deposit but that the deposit was under an agreement that it shall be payable *on demand* 51 M. 549; 1928 Mad. 509; 111 I C. 210

Art 61 (For money payable to the plff for money paid for the deft 3 years, from when the money is paid.)

——a co-sharer has a right to be re-imbursed in respect of money realised by creditor by coercive process A suit for contribution is not barred under Art. 61 or 99, having been brought within three years of the setting aside of a sale, under Art. 120 having been brought within six years of the date of payment. 26 C W N 340

——a suit by co-sharer for the recovery of money paid in excess of his share is recoverable under this art. 19 A. 244, 8 M. L. J 271

——but a suit for contribution against a *dispossed* co-sharer is not maintainable 6 C W. N. 903.

——money paid to save estate from revenue sale is recoverable under this Art 25 C 844 2 C W N. 402 *P C.*

——according to the Madras H C for the application of this Art it is immaterial whether the payment was made *voluntarily* or involuntarily 26 M 686 F B But according to the Calcutta H C realisation of money by sale is not payment within this Art. or Art 99, 18 C W N. 480 in such case Art 120 applies 26 C. 241.

——a suit for the recovery of share of costs and money due for the redemption comes under Art 61 or 115 1922 Cal. 79 · 70 I C. 289, 3 C. L J. 93 *Dist*

——a suit by sureties against principal debtor is governed by Art 81, 55 P. L R 1922 67 I C. 364.

——this Art applies to suit for contribution by a partner of a firm. 5 Lah L J 310 72 I C 385

Art. 62. (Suit for money received by deft.—3 years from the receipt of money.)

——this Art applies only to those cases in which on the date of the receipt of the money by the *deft.* the receipt is for the use of the plff and not to cases in which subsequent incident makes the receipt for the use of the deft. 101 I. C 322, 1927 All 437.

——this Art. does not apply to cases where the deft. ought to have received but failed to receive money. 30 M. L. J. 311.

Art. 62. (Suit for money received by deft.—3 years from the receipt of money)—contd.

——'received' denotes 'actually or constructively received'. 10 I. C. 658 : 21 M. L. J. 705

——this Art. is applicable when the deft. has received money which in justice and equity belongs to the plff. under such circumstances as in law renders the receipt of it a receipt by the deft to the use of the plff. 49 C. 884 : 36 C. L J. 295, 32 C. 527, 2 C. 398, 46 C. 670 P. C.

——a suit for money had and received does not lie by one tenant in common against another who has received more than his share. Only appropriate remedy would be an action for an account 45 M. 648

——where by an arrangement some of the co-sharers realise rent of joint immovable property for division among all the co-sharers the relationship between them is that of principal and agent and a suit to realise the share of the rent by the co-sharer is governed not by this Art. but by Art. 89 111 I C 635 : 1928 Lah. 688. 10 Lah. L. J. 355. (24 A 27, 27 C W N 725, 45 M. 648) *Rel. on* (24 C. 309, 32 C. 527, 1924 All 812) *Dist.*

——suit for money received by the pleader of the plffs for his use is governed by Art. 62. 35 C. L J 330

[illegible] Art 62 in a suit to recover [illegible] take in excess of the amount [illegible] (31 M. 230) Ref 12 C. 533, [illegible]

——a suit by one co-sharer for partition of family property and to recover a certain sum received by another co-sharer, is governed by Art 120, but in a suit to recover money only, this Art. would apply 30 A. 318, 45 B. 313, 16 N. L R 182 : 59 I C 455.

——when one heir recovers debts due to the deceased on behalf of all, a suit by others comes under this Art. 50 C 610 27 C. W N. 941, 37 A. 233, 24 C. 308, 6 A. 442, 16 I C 882, 41 M L. J. 274, 69 I. C 274, in case of fraudulent concealment sec. 18 will apply 21 I. C. 394 · 25 M. L J. 531, 69 I C 274.

——a suit against co-mortgagee for money received by him, comes under this Art 32 C. 527 · 1 C L J. 107.

——where same agent is employed by two principals and money belonging to one is lent by the agent to the other, the liability of th[illegible] actual paymen[illegible] by other co-s[illegible]

——in case of joint money-lending business if the money is invested by one he is bound to account for the sum to the other and Art 89 and not this Art. applies. 27 C W. N. 725 · 32 M. L. T. 86 P. C.

——money paid by the purchaser for discharging incumbrance cannot be recovered more than three years after the date of payment

Art 62. (Suit for money received by deft—3 years from the receipt of money)—*contd.*

or the date of dismissing a suit for possession. 74 I. C. 416. 1923 M. 392.

——when money is paid to one person for the interest of the other, latter must sue under this Art. 23 C W. N. 983

——a suit by zeminder against under-naib for collection-money had and received for the use of the zeminder but for which he was to account to the naib, who was to account to the zeminder, comes under this Art 104 I. C. 704 (c).

——a suit for recovery of surplus sale-proceeds taken away by deft falls under this Art. 30 C. 440 : 7 C W. N. 520, 20 C. W N 983, 62 I. C 953.

——suit against ex-agent for money realised by him after the termination of agency, comes under this Art 29 I C. 986

——suit against tenant for compensation money awarded by Govt comes under this Art. 3 C. W. N. 208.

——suit against a *benamdar* who has realised money comes under this Art 25 A. 62, 30 M. 298, 28 I. C. 495.

——a suit by claimant against D. Hr. who has taken away money deposited in court, is governed by this Art. 38 M 972

——mortgagee not certifying the payment made to him out of court after the preliminary decree but before final *decree* nor crediting it as directed by the mortgagor holds it to the use of the mortgagor 104 I C. 419. 1927 All. 710; 25 A. L. J. 823.

——to apply this Art, although privity of contract is not necessary there must be sum privity of legally recognised nature. 1929 Lah 290, 41 M 923 *fol.*

——suit to recover money received under void assignment of a mortgage-debt comes under this Art. 30 M. 459 : 17 M L J. 452

——a suit for money under s. 73 (2), C. P. C. is governed by this Art. 39 M 62

——the period of limitation for a suit for refund of advance paid under a void agreement is three years from the *date* when the agreement is discovered to be void and ordinarily the time from which limitation will start is the date of the *agreement* in the absence of special circumstances 1925 M W. N. 400 · 88 I C 557 : 1925 Mad 885, 48 M L. J. 598.

——a suit for the recovery of the value of offerings *made* to a shrine and misappropriated by the deft. comes under this sec. 92 I. C 731 1926 Lah. 228.

——a suit for money realised by a shebait on *behalf of* the idol comes under this Art. 1928 A. 689 : 27 A. L. J. 229. 114 I C. 734. 25 A. L. J. 1047 *Fol.*

——a suit against a matwali for money received by him on behalf of the deity comes under this Art. 50 A. 265; 25 A. L. J. 1047 : 108 I. C. 452 · 1928 All. 134, 44 M. 831 P. C. *Rel on.*

Art 64 (Suit for adjusted account—3 years, when the accounts are stated).

——suit on adjusted account comes under this Art. 21 C. W N. 591, 63 I C. 280

——this Art. refers to suit for money due on account stated but not for money due on a balance 19 C L. J. 263 : 25 I. C. 89, 23 Bom. L. R 1186.

——this Art does not apply unless the account stated was signed by the deft 10 C, 214 13 C. L R 445, F B

——this Art does not apply where the money found to be due is a definite sum entered in the account books 1923 Lah. 645.

——in every case it is not necessary that there must always be a reciprocity of demands 1923 C. 578

——suit on a balance of account stated 62 I C. 502.

——in ordinary suits upon account art 64 applies and unless it is shown that it cannot apply to a claim, Art 120 which is residuary, cannot apply 1925 M 1260 22 L W. 195.

——a settlement in order to constitute a fresh cause of action in law must be settlement of a mutual, open and current account. 86 I C. 942 · 1925 Mad. 1147

——suit by commission agent where accounts have been stated and balance struck comes under this Art 100 I. C 874 : 1928 Lah 51

——a *sarkhat* is not a promissory note but a mere acknowledgment of liability and cannot be made the basis of a suit so as to constitute a fresh cause of action 89 I C 402 23 A. L. J. 900

Art 65. (Suit for compensation for breach of a promise to do anything at a specified time or on the happening of a contingency, 3 years, when the time arrives or the contingency happens).

——subsequent agreement between the parties as to the amount of damages before the date fixed for delivery does not show that

Art 66 On a single bond where the day is specified for payment.—3 years, from the day so specified

personal covenant to make the the realisation of the mort- rties, the suit is governed by L R 931 · 43 C L. J 545 : 31 M W N. 535 24 A L J. 615.

95 I C 839 1926 P C 56 · 24 L W 50 P C, 7 All 509 P C. *Fol.* [illegible] ion of Art. 116 was referred to the P C. ruling V. N. 872 : 1928 759 : 32 M. I

Art. 66. On a single bond where the day is specified for payment,—3 years, from the day so specified—*contd.*

J. 357 P. C. and has held that a suit on a personal covenan under a registered bond is governed by Art. 116 and not by Art 66 and the period of limitation is 6 years. Similarly it ha been held by the Full Bench in 52 M. 105 : 1919 Mad 53 . 56 M. L. J 10 F. B.

Art 73. (On a bill of exchange or promissory note, 3 years the date of the bill or note).

——limitation in suit on promissory note payable at sight. 8 I C. 475 . 1925 Cal 1065

Art. 74, 75 (Suit on instalment bond or promissory note —3 years from expiration or term of default or waiver.

——failure to pay instalment in case of whole becoming due on default. 1923 M W. N. 699. Waiver in such case, what amounts to. 19 N. L. R. 170

——in the case of an instalment bond where on default of any one instalment the whole becomes payable at once Art. 75 applies and the *terminus a quo* provided by the Art. is the date of default 26 Punj. L R 328 6 Lah. 163 · 89 I. C. 294 : 1925 Lah 394, 53 C. 277 : 96 I C. 594 : 1926 Cal 789.

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87 I. C. 162.

——where the bond recites "If we fail to pay the instalments we shall pay interest at 12 annas *p. c. p. m* If we fail to pay one ... all the instalments in a ... ption of the creditor to ... N. N. 275 : 1929 Cal 399 ... 32 C. W. N 250 : 1929

For other cases see "Instalment and waiver."

Art. 83. Suit upon contract to indemnify, 3 years, when the plff. is actually damnified.

——a suit by the plff. against the deft. for the recovery of the money paid by the plff. under a compromise was governed by the Art 29 A. 627 4 A L. J. 501

——suit by an agent to recover the amount due from his principal is covered by this Art. 1928 Lah 424, (1927 Lah 826, 1926 Lah. 152, 1923 Lah 473 · 1921 Lah. 167, 23 P. R 1915) *fol.* 115 I. C 767 : 30 Punj L. R. 35.

——where a person is entrusted with money to pay to another and fails to pay or delays in payment a suit for damages against him falls under this Art 95 I C. 913 · 24 A. L. J. 550 : 1926 All 605

——where a party to a contract undertakes to pay money to a third person and no time is fixed, no cause of action arises until demand is made and ignored. 49 A 603 : 101 *I. C.* 691 : 1927 All 435 : 25 A. L. J. 411, 34 A. 427 *Expl.*, 24 A L. J. 550 *fol.*

Art 85. (Suit for balance due on mutual, open and current account—3 years from the close of the account year).

——Where one party only borrows or lends it is not a mutual account, an account which is settled is not an open account, an account which is closed is not a current account. This Art. applies only to mutual, open and current account. 29 Bom. L. R 375 : 102 I. C. 225 ; 1927 Bom. 225, 47 B. 128 *Rel.*

——the account must not only be mutual, open and current, but there should also be reciprocal demands between the parties 24 I C. 128, 37 B 128, 3 Pat L T. 492 : 66 I. C 30.

——'open account' is one which is continuous or current, uninterrupted or unclosed by settlement or otherwise consisting of series of transactions. 6 C L J 158, 62 I C. 898, 1923 Lah 347 : 73 I. C. 916, 100 I. C. 815 28 Punj L. R. 146, 1923 Lah 347 *Rel on.*

——'current account' is an open or running account between two or more parties or an account which contains items between the parties from which the balance due can be ascertained 6 C L. J. 158, 23 Bom. L R. 540 : 63 I. C 950

——'mutual accounts' are such as consist of reciprocity of

533 : 1918 Pat 221

——an

side creating

1921 · 59 I

Mad. 819

——where the balance was sometimes is favour of the plaintiff and sometimes in favour of the deft. it was mutual, open and current account 112 I C. 715 : 27 A. L J. 73.

——to make an account mutual both the parties need not keep account. 10 M. 199.

——for the application of this Art, actual demand is not necessary, it may be inferred from balancing of account. 6 B 134, 3 A. 553 *contra*, 24 I. C 128, 5 C. 759, 10 M. L. T 409

——the balance need not be in fact in favour of one party at

——In a suit by master for refund of excess recovery drawn by the servant from time to time this Art. applies 87 I C. 832 : 1925 Nag. 295.

Art 85. (Suit for balance due on mutual, open and current account—3 years from the close of the account year) *—contd*

——a suit by a principal against his commission agent on the basis of an open and current account relating to the dealings between them, is governed by this Art. 92 I. C. 674 : 1926 Lah. 283.

Art. 89 (Suit for account—3 years from refusal to account or termination of agency).

——when after partition one brother recovers outstandings originally due to the joint family there is an implied contract of agency between him and others for rendering accounts and a suit by the latter is governed by this Art. 1929 Lah. 407 . 30 Punj L. R 275, 24 A. 27 P C *Rel.* 24 C 309, 1921 Bom. 384, 32 M 191 *Discussed.* 45 M. 648 F B. *Dist.*

——when the suit is for money due on adjusted account Art. 89 does not apply even if the agent be in service 21 C W. N. 591

——a suit for recovery of money found due on an account and a suit for account are really one and the same thing. 16 C W. N 1042.

agent for
I C 332
limitation
. 97, P. C.

40 C. 108 *Reversed.*

——a demand by one only does not start limitation as against him, so in the absence of joint demand limitation runs from the termination of agency. 2 Pat. 585 : 4 Pat. L. T 531 : 1923 P 464.

——non-compliance with the demand amounts to refusal and ... 26 C. W N 61, 48 C. 248, 44

ers amounts to refusal. 43 C.
. W. N. 61, 44 C 1 P. C., 30

death of the principal by
nder this Art although the
presentative. 26 C. W. N

——where a person engaged a pleader for conducting several ... his representatives for
was barred by limitation
ears, as the death of the
249 : 99 I C. 456 : 1927
l, *fol* (17 C W. N. 5, 25

A. ... *Diss.*

... by the legal representative of a prin-
1925 All 682
nt is created by
the latter falls
275 : 7 Pat. L T

Art. 89 (Suit for account—3 years from refusal to account or termination of agency)—*contd.*

——where a date is fixed for settling accounts limitation for suit for account against agent commences from the date so fixed. 91 I. C 487 : 1926 Lah 200

For other cases see "*account* "

Art. 90 (Other suits by principals against agents for neglect or misconduct, 3 years, when the neglect or misconduct becomes known).

——in a suit by the principal against his agent for recovering secret profit limitation runs from the date on which the plff. comes to know that the deft is making secret profit. 103 I. C. 221 . 1927 All 436 25 A. L. J. 448.

——knowledge of the agents' negligence includes constructive knowledge, 6 I C 456, but the limitation does not run when the principal comes to know that there is sufficient cause for a good case being run against the agent 25 I C 706

——"misconduct" should not be construed as including everything that may in ordinary parlance be called misconduct ' Negligence or misconduct refer to what is termed negligence or misconduct of agent in the conduct of the agency 1928 Mad 906 : 109 I C 332

——this Art is a residuary article with regard to suits between principal and agent 1928 Mad. 906 . 109 I. C 332.

Art 91. (Suit to cancel or set aside document—3 years from knowledge).

——there is distinction between a suit for concellation of document and a suit for declaring a document to be null and void A suit of former nature is governed by this Art and a suit of latter nature is governed by Art 120, 50 A. 510 : 109 I. C 54 : 26 A. L. J. 289 : 1928 All 267.

——this Art does not apply where the cancellation of document is not essential 26 C. W N. 479. 14 M 26, 15 M 6, 16 M 138, 30 A 375, 35 A. 149.

——but where the cancellation of an instrument is the substan- [illegible] ncіden-

[illegible] I. 849

[illegible] ie can-

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R 1909 *Ref.*

——this Art applies only to a suit by party who is or whose predecessor was a party to the instrument. 1923 Rang. 82 : 74 I. C 164.

[illegible] ed not be set aside in order

[illegible] 12 governs the case. 26 C.

[illegible] uch is the case in case of

[illegible] W. N. 562 : 7 C L J. 528 :

Art. 91. (Suit to cancel or set aside document—3 years from knowledge)—*contd.*

——in a suit by reversioner against the alienee from Hindu widow Art 141 and not this Art applies. 34 C. 329 : 11 C. W N 424. 34 I. A 87 : 5 C. L J. 334 9 Bom. L. R. 602 : 17 M. L. J. 154. 4 A L J 329 P. C, 30 C 990 : 7 C. W. N. 864, *reversed*, 31 B I 8 Bom L R 675, 33 C 257 : 9 C. W. N. 636 : 1 C. L. J. 408, 40 B 51, but in a suit against a donee from such widow under particular circumstances, the plff, must set aside the gift and this Art will apply. 2 C L J 144

——though a suit to set aside an instrument may be barred to a person, he may question it by way of equitable defence. 30 M 169 17 M L J 19, 30 M 44

——Art. 91 does not apply to a suit for possession and partition after declaration that an instrument under which the defendant claims is void 34 C L. J 563, 30 C. 433 *Ref.*

——onus of proof of the plff's knowledge is on the deft 34 C. L. J 563, *contra* 1921 M W N. 722 41 M. L J 474, 31 M L. J 352

——where the plff and his guardian were perfectly aware of the facts entitling them to set aside an award plff must prove that he attained majority within 3 years of the suit, 89 I. C. 773 · 1925 P. C 216, 52 I. A 265 P C

——where a person is *prima facie* bound by a decree, he cannot by suing ostensibly for possession ignore the decree and evade the operation of law, and where such a decree is an impediment to the plff's way in obtaining relief inconsistent with it, he must bring his suit within the period prescribed by law for setting aside a decree 6 P. L T. 634 : 4 Pat. 510 87 I C 849 : 1925 P. 625.

——cancellation of an award comes under this Art. and a decree incorporating an award cannot be impeached without cancelling the award, 28 Punj L R 106 100 I. C. 596. 1927 Lah 172: 9 Lah L. J. 191.

——limitation runs from the date of award and not from the date of refusal by the court to file it. 5 Rang. 186 P. C., 1925 P. C. 216 : 89 I. C. 773, 52 I A 265 P. C.

Art. 95. (*To set aside decree obtained by fraud, 3 years, when the fraud becomes known*).

——a suit for declaring that a certain decree and an auction sale of properties held in execution thereof are not binding on the [illegible] plff is in effect one to get them set aside [illegible] falls under Art. 95 and [illegible] C. 241 : 5 C L. J 385, 26 [illegible] to set aside a sale on the [illegible] C. 1324 : 3 C. W. N. 399, 5 [illegible]

——this Art. is inapplicable to a suit brought by the real owner for possession of immovable property and to set aside a sale in execution of a fraudulent decree passed [illegible] *[illegible]dar*, because the real owner [illegible] the fraud was practised [illegible] not necessary for him to have [illegible]

Art. 95. (To set aside decree obtained by fraud, 3 years, when the fraud becomes known)—*contd.*

——a transaction tainted with fraud is voidable and not void. A decree obtained by fraud or collusion or any other unlawful means [illegible] justice and it cannot be treated as [illegible] that can be made to a decree as [illegible] ground that it was passed without [illegible] passed it had no territorial or pecuniary jurisdiction over the subject matter of the suit. 30 C W N. 59.

——a suit to set aside a decree on ground of fraud falls under Art. 95 and the period of 3 years runs from the date when the plff. had notice of it 85 I C 629 . 1925 Cal 819.

——a suit to set aside a compromise entered into between the plff and the transferors of the defts. is governed by Art 95, 22 C W N. 860 46 I C 867.

——a sale in execution of a fraudulent decree is not void but voidable Such a sale can be set aside without setting aside the decree. 20 C W N 659 · 33 I C. 767.

——the knowledge predicated by the terms of this Art. is not mere suspicion but such definite knowledge as enables the person defrauded to seek his remedy in court 6 A. 406; 4 A L J 140, 3 I C. 316.

[illegible] t the plff had [illegible] the fraud at a [illegible] the suit. The [illegible]

——when it is doubtful at what precise time the fraud became known to the plff the onus is on the deft to show that the suit is out of time, 31 M. 230 . 18 M L. J. 19.

Art. 96. (For relief on the ground of mistake, 3 years, when the mistake becomes known)

——a suit to recover from landlord excess of cess paid by mistake falls under Art 96 and not Art. 62. 4 Pat 448 1925 Pat. 76 : 93 I. C. 129 : 1925 Pat 765 1925 P H. C C. 345, 12 C. 533

——in a suit for refund of excess price paid in case of shortage of delivery of goods this Art. applies and limitation commences to run from the date of knowledge of short delivery 48 M 925 : 1925 M. W. N. 688 : 1925 Mad 1255 : 49 M L J 228

——a suit for amendment or rectification of a mistake in a lease [illegible] the date of [illegible] part of the [illegible] commit- [illegible] 31 C. W.

Art. 97. (Suit for money paid upon an existing consideration which afterwards fails, 3 years, the date of the failure)

——in a suit by auction purchaser for portion of purchase-money drawn out by another D. Hr in rateable distribution on the ground of absence of saleable interest of the Jt Dr. in the properties, the limitation period commences on the date on which the sale is set aside and not on the date on which the purchaser has lost possession 30 C W N 79 . 1926 Cal. 297 : 91 I. C. 768.

——in a suit by a purchaser deprived of possession by successor in office of a service inam, to recover purchase-money limitation period commences from the date on which he lost possession, 1925 M. W. N. 101 : 86 I. C 755 : 1925 Mad. 749 : 48 M. L J 217

——when a Hindu reversioner purported to sell the estate to which he had a reversionary right agreeing to give proprietory possession of the same on the death of the widow and the vendor sued for possession or in the alternative for recovery of the purchase money with interest, held that the transfer was inoperative and the [illegible] rest and the e discovered of the widow . 346 P. C.

——where the alienee from widow pending declaratory suit by reversioners stipulated for the refund of the purchase money with damages in case the purchaser was dispossessed by the reversioner, and the reversioner recovered the possession of the property, in a suit by the vendee for refund of the purchase money time ran from the date of dispossession and not from the decision of the Privy Council. 1927 Lah 570 : 9 Lah L. J 468 ; 29 Punj. L R. 208 . 9 Lah. 191 : 106 I C 804.

——but where owing to defective title of a vendor the vendee is dispossessed under a decree, the limitation for a suit for damages for breach of covenant begins from the date of the decree although there is appeal and second appeal from the decree. 60 I. C 235 : 27 M L T 304 ; 39 M L. J 449 . 50 I C. 673, 32 I. C. 176 19 M. L T. 163. (31 M. 452. 38 M 887, 24 M. 27, 26 A. 519, 31 A. 68) *fol*

[illegible] patni sale paid money into *court* ubsequently consequent ey *from the* te *Art.* 97 first court. *R.* 532 : 30

——when a suit for specific performance of a contract failed and the plff. sued for the recovery of earnest money it was *governed* by Art. 97, 45 A. 378 : 21 A. L. J. 265 : 1923 All. 321, (25 A. 618, 31 A 68), *Ref.*

——a lessee was successfully sued and evicted by a *third party*. The lessee sued for the return of premium for failure of *consideration*, held that the period of limitation ran against him from the time of

Art. 97. (Suit for money paid upon an existing consideration which afterwards fails, 3 years, the date of the failure —*contd.*

——where an execution sale is declared a nullity for want of any saleable interest in the Jt Dr a suit by the purchaser for recovery of the purchase-money is governed either by Art 97 or by Art 120 and in either case limitation period starts from the date of the decree of the first court 31 M L T. 169 192: M. W N. 561 1923 Mad. 23.

——where the vendee plff. compromises an adverse claim to the property sold by payment of money, the cause of action for refund of the purchase money, on failure of the consideration, arises on the date of payment 50 I. C 815, 38 M 887 *Fol*

——where moneys were lent on mortgage executed on behalf of a Mahamedan minor and a mortgage decree was also passed and the properties sold "but in a subsequent suit by the minor the mortgage was declared void and the sale was also set side, in a suit for money brought against the persons who acted for the minor this Art. applied because the true date of the failures of the consideration for the loan was the day on which the decree was passed setting aside the mortgage 31 C W. N. 830 46 C. L J 344 26 L. W 429 : 52 M. L. J 579 25 A. L J. 918 : 29 Bom L R. 863 : 1927 P C. 99 4 O W. N. 517 P. C.

——where the vendor was unable to give title and the vendee found himself unable to obtain possession, he had a right to sue for the purchase money limitation of which under this Art ran from the time when he found himself unable to obtain possession 25 A L. J. 841 103 I C 165.

——where the suit by the vendee to recover the property purchased by him failed, suit to recover the consideration money from the vendor would be governed by this Art. and the 3 years' period began to run from the date of the failure of the suit. 103 I C 385, 19 C. 123 P C.

——where a contract for sale of land was entered into and the vendor failed to perform his part of the contract a suit by the vendee to recover the advance money is governed by this Art 56 C. 455 . 33 C W N 115 1929 Cal. 216.

Art. 99. (Contribution suit by a person paying more than his share, 3 years, the date of the payment in excess of share)

——s 99 applies only to suit for a personal decree under a charge created by sec. 82 T. P. Act but not to a suit to enforce the charge itself. 33 A. 708, 11 I. C. 145 : 8 A L. J. 854.

Art. 99. (Contribution suit by a person paying more than his share. 3 years, the date of the payment in excess of share)—*contd*

——a claim for contribution creats only a personal liability against the co-sharer 14 C. 809 F. B., 15 C. 542, 22 C. 800, 25 C. 565, 2 C W. N. 425, 12 C W N 231 n, 26 B. 437, 4 Bom. L. R 90, 14 A 273, F. B. (26 M. 686 F. B , 28 M. 493, 15 M. L. J. 219) *Dist.*

——whether the party seeking contribution has voluntarily made payment or is compelled to pay by coercive process *e. g* execution of decree, a right to contribution arises when the person has paid in excess of his share for the joint liability of all. 57 I. C. 884

——limitation of suit for re-imbursement of money realised by co-ercive process from one is governed by Arts. 99 and 120. 26 C. W. N. 340

——a co-mortgagor redeeming a mortgage becomes assignee of the original security and therefore the limitation for his suit for contribution is the same as that for a suit by a mortgagee on his mortgage 25 C W N 283 : 57 I. C 868, 26 A. 407 F B. 4 C. L. J 79, 31 A 165, 6 A L J. 67

——the Art does not apply to a case where not the *whole* but only *a part* of the money due under a joint decree was realised from the pltf. 20 M. 23, 7 M. L J. 44, 1 P L. R. 149, 26 A. 407 F. B.

——a co-sharer compelled to pay the whole of the revenue of a taluk acquires a charge on the shares of his co-sharers 14 B. L R. 155, 22 W. R 411, *contra* A co-sharer paying Govt. revenue does not acquire a charge on the property of other co-sharer but acquires only a personal right which should be exercised under this Art. 111 I C. 84 : 9 Pat. L T. 573 : 7 Pat 613 1828 Pat. 641.

——the cause of action in a suit for contribution for payment made by defaulting patnidar, who purchased in a sale against the former co-owner of the patni does not arise till the sale is set aside and limitation begins to run from that date. 3 C. L J 93

——where one co-judgment-debtor makes payment of the whole decretal amount which is accepted by the court, the "date of payment" from which the limitation runs in a contribution suit is the date of acceptance of the deposit by court 49 C. L. J. 5 ; 56 C. 192 : 114 I C 134 32 C W N. 1030 1928 Cal 361, (35 C. 844 P. C , 3 C. L. R. 450, 4 C. 529 36 I C. 392 *Dist.* 3 U. B. R. 261 *Rel. on*

Art. 102. (Suit for wages not otherwise provided, 3 years, when it accrues due).

—— wages due to an employee become due on the date when he leaves the service. 19 W. R. 159, 18 W. R. 466.

——a suit by a *benamdar* for wages falls under this Art. 26 C. C. 327 ; 10 C. L. J.

——a suit for commission by a broker against the principal is one for money under a contract and is governed by Art 115 and not by Art 102 Wages in Art. 102 is in general used for remuneration for mechanical or muscular labour, specially to that which is ordinarily paid at short intervals. 30 A. 81 : 36 I. C. 371 : 14 A. L. J. 873.

Art. 102. (Suit for wages not otherwise provided, 3 years when it accrues due)—*contd.*

——suit for wages by a weighman in a shop is governed by Arts. 7 and 102. 90 I C. 120.

——a suit by *Dwaris* of a temple to recover their dues as remuneration in respect of their services in connection with the temple is not governed by this Art. as they in fact hold a hereditary office *and are not paid a regular recurring wage but certain fees as* emoluments attaching to hereditary office. 5 Pat. 249 : 94 I. C. 826 : 7 Pat. L. T. 465 : 1925 Pat. 205.

Arts. 103, 104. (Suit for dower, 3 years.)

——applications for leave to sue in *forma pauperis* for dower does not constitute demand. 24 W R. 163 P. C.

——when there is registered deed of dower Art. 116 applies, otherwise Arts 103 and 104 apply 7 C W. N. 210 : 37 C. L. J. 108, 44 C 759, 36 C L J. 379, 50 C 253, the distinction between prompt and deferred dower is immaterial in this connection 50 C. 253.

——when the husband executes a mortgage bond for the amount of the dower, the dower debt ceases to be a dower debt and becomes a mortgage debt in a suit for which this Art. does not apply. 99 I. C 553 1927 All. 269

——when a suit is brought by the heirs it is still a suit on a contract enforcible by them. 50 C 253 · 36 C. L J. 379 . 1923 Cal. 152

——when widow remains in possession of property in lieu of her dower, cause of action accrues from the date of dispossession. 33 A. 568, *10 I. C 282, 8 A. L J 578*

Art 105. (Suit by mortgagor to recover surplus collection by mortgagee, 3 years).

——Art. 105 applies to cases when the mortgagor sues for the recovery of the surplus collection only and not for redemption. 26 C W. N. 123, 1922 Cal. 189

——a mortgagor can, under Art 105, sue the mortgagee for loss occasioned to the trees on the mortgaged property within three years from redemption by deposit in court or otherwise. 50 I. C. 152 6 C. L J. 54

Art. 106. (Suit for an account and a share of the profits of a dissolved partnership, 3 years, the date of dissolution.)

——a suit for account after the expiration of the term of the fixed terms partnership is governed by this Art. 69 P. R. 1902.

——a suit by the heir of a deceased partner against the surviving partner of his ancestor for an account of the share of the profits of the partnership including the good will and trade marks of the business, is governed by this Art. 9 C. W. N. 537.

——suit for partition of partnership property comes under this Art. 30 A. 279 : 5 A. L J. 278

——where a partner sued the heir of a deceased partner for balance due to the plff, on settlement of account three years after the death of the co-partner, it was time barred. 78 P. L. R. 1909.

Art. 106. (Suit for an account and a share of the profits of a dissolved partnership, 3 years, the date of dissolution) —contd.

——an irregular expulsion does not put an end to partnership Hence a suit by a partner who has been irregularly expelled, for account and a share of the profits, is not governed by this Art, but by Art. 120 12 C. W N 455

——a dissolution of partnership at will may be inferred from circumstances *e. g.*, quarrel, although no notice to dissolve may have been given. 25 M. 149 · 11 M. L. J. 353

—— a representative of a deceased partner can sue for a share of assets collected after dissolution by surviving partner, though a suit for a general account was barred by limitation 28 M. 344, 3? M. 263, 6 B 728, 20 B. 15.

——a suit for an account by one partner against another after dissolution of the partnership is barred, if brought more than 3 years after dissolution, even though the instrument of partnership was registered 22 M. 14: 8 M. L J 151, 14 M. 465; 1 M L. J. 4??, 18 C. 506

——when dissolution may be inferred from circumstances. 36 M 185 17 C. W N. 1006 11 A. L J, 556 . 18 C. L. J 13 14 M. L T. 7 P C

——when the divided members of a Hindu family run a business it is partnership business and if one member puts an end to the business s 253 Contract Act applies and a suit for share and profits is governed by this Art. 63 I C. 548 , 19 A. L. J. 525

——where a firm is not dissolved Art. 106 does not apply but only Art 120 25 C W N 847 66 I. C. 811.

——a suit for declaration that plff retired from a partnership on a certain date that the partnership was dissolved at that time so far as he was concerned, and for accounts and share of profits found due to him on such accounts being taken, is governed by Art 106 22 C W. N. 104, 43 I. C. 893 : 27 C L J. 403

——in a suit for account of a partnership, time begins to run from the date of dissolution of the partnership and where there has been a previous settlement, then from the date of the last settlement. 16 C. W. N. 299 . 15 C L. J. 204 : 13 I. C 25

——where the parties to a contract agree expressly or by necessary implication to continue the partnership as if no dissolutions had taken place upon the death of one of them, the suit for accounts would not be barred under Art. 106. 1922 Lah 34); 1?? P R. 1914: 27 I. C 69: 218 P. L. R. 1915, 25 M. 26 pp. 31, 32

——a suit to recover money paid to deft. to be used in a joint purchase of property, is governed by Art 89 and not by Art ?? or 106 as the deft. was acting only as the agent of the plff 43 I C. 434

——a suit by the heirs of one of two brothers who carried on joint business is one for account and a share of the profits of a dissolved partnership and is governed by Art. 106. 3? I. C. ???, 38 M. 1099.

Art. 106. (Suit for an account and a share of the profits of a dissolved partnership, 3 years, the date of dissolution) *—contd.*

——a suit for price of articles delivered to a partner during the course of partnership and for the partnership-business, is governed by Art. 106 and time begins to run from the stoppage of the business. 10 I. C 250: 214 P. W R. 1911: 163 P L R. 1911.

Art. 108 (By a lessor for value of the trees cut down by the lessee, 3 years, when the trees are cut down).

——Art 108 applies only to suits by a landlord for recovery of the value of trees cut down by the lessee. 25 I C 704.

Art. 109. (Suit for mesne profits, 3 years,—when the profits are received).

——mesne profits can be allowed only for 3 years prior to the date of the suit. 2 Pat. L T 648

——the words "wrongfully received" include receipts of profits that connot be legally substantiated 26 C W N 386 1922 Cal 225.

——Art. 109 governs a suit by a usufructuary mortgagee for mesne profits against his mortgagor who is in wrongful possession of the mortgaged property 15 A. L J. 33: 39 I C 663

——a court cannot award mesne profits for more than three years as provided in Art 109 19 C. W N. 1167 26 I C 890, 22 C. W N. 263; 27 C. L J. 257 43 I. C 781, 68 I C. 903 · 2 P L. T 648, 29 C W N 937 89 I. C 1000

——when in a suit for possession and mesne profits relief as to mesne-profits was not agitated owing to the oversight of the plff's pleader, in a subsequent suit for mesne profits from the date of the institution of the prior suit to the date of recovery of possession, it was held that (1) the prior suit did not suspend the limitation

——Art. 127 is not applicable to Mahomedans and profits can only be recovered under Act 109 for three years 13 I. C. 791. 1921 M W N 45

——"*wrongfully received*" *in the Art includes receipt of profits* under a claim or title that cannot be legally substantiated 17 M. L J 168 28 I C 85 2 L W 169

——under the present law it is actual receipt of the profits that gives the starting point for limitation. 24 I C. 566 10 N L R 76.

——the application for mesne profits is not a suit but only a proceeding in the suit. 68 I C. 903. 2 P. L T. 648

——Art. 109 does not admit [illegible]
cause of action ma
received beyond 3
89 I. C. 1000, 43 C

For other cases see "mesne profits".

Art 110. (Suit for arrears of rent, 3 years, when the arrears become due)

——road cess is recoverable as rent 21 C. 722, so also *dak cess* 21 C. 132, *choukidary* tax. 22 C. 680. Royalty, 44 C. 759: 21 C W. N. 577 32 M L J 357 P. C. *Jodi* 1923 M. W. N. 524: 1924 Mad 73 74 I C. 968.

——arrears become due not always necessarily on the close of the period, but it may be at different times according to Legislation, custom, contract or special circumstances. 8 C. W. N. 162; 27 M 143 6 Bom L. R 241 P. C, 46 M 579: 1923 M. W. N. 252 1923 Mad 461.

——limitation cannot run when the same person is the receiver and payer of rent 46 M. 579 · 1923 M W. N. 252: 1923 Mad 461.

——suit for rent under registered Kabulyat is governed by Art. 116. 15 C 221, 19 M 52, 1 P L J 37, 23 I. C. 753, 19 C 453, 27 C 205, 37 B 656 *Contra* 34 A. 464, 26 A. 131. But a suit for rent under B. T Act is always governed by Art. 110, 17 C 469, 19 C 1 F. B., 4 C L J 553.

——suit by assignee of rent comes under this Art and not under Art 2 Sch III B T. Act. 4 C. W. N. 605, 1 P. L. J. 506: 38 I C 102 3 P L W. 179 2 I C 989, 63 I. C 424.

——suit for enhancement of rent suspends the running of limitation period 30 C 1033 8 C. W N. 1 P. C.

——suit for rent by co-owner against co-sharer who occupied the property after the time fixed for such period is governed by Art 120 and not by Art 110, 39 M. 54 33 I. C 705.

——in a suit for rent time runs not from the end of the fasli but from the date the rent becomes due under the terms of the tenancy 37 M 540 12 M. L T. 437: 16 I. C. 934: 12 M. W. N. 960 22 M L J 451 11 M L T 212: 15 I. C. 393.

Art. 112. (For a call by a registered company, 3 years, when the call is payable)

——this Art is not applicable to suits not brought by the company itself 10 B 493, 160 P. L. R 1903

——suit by third person after the liquidation of the company, whether this Art or Art 120 applies. 102 I. C. 705 · 1927 Lah. 543: 9 Lah L. J. 293

——cause of action for suit to recover the amount of unpaid calls arises on the date of forfeiture of share. 49 B. 715: 27 Bom L. R. 574 . 83 I C 96 .1925 Bom 321.

Art. 113, (Suit for specific performance of contract, 3 years, the date fixed for performance or from notice of refusal

——a suit for possession of land based on a decision of an award cannot be regarded as a suit for specific performance and Art. 113 does not apply. 51 I C. 999 (c), 33 C. 881 : 4 C. L J. 162, 1922 All. 410, 23 M. 593: 10 M. L J. 208, 34 A. 43, 16 I. C. 804: 32 P. R 1913, but where the amount distinctly provides for the doing of something Art. 113 applies 26 A. 397, 34 A. 43 p. 46.

Art 113 (Suit for specific performance of contract, 3 years, the date fixed for performance or from notice of refusal) —*contd.*

——the terms of this Art. relate to performance of any contract including contract for conveyance. 45 M 645. 49 I. C 335 1922 P. C 345 P. C

——suit for the specific performance of contract of sale comes under Art. 113 6 A 231; 4 A W. N. 42, 2 A. 718, 23 B. 283, 45 M 645 P. C.

——a suit based on a lease is not a suit for specific performance. 35 C 346 12 C. W. N, 459 7 C. L J 439, 34 C 564 *Dissented*

——suit for possession of land based on compromise is not a suit for specific performance 25 W. R. 521, 19 I. C 411, 1923 Lah 672.

——a suit for specific performance of a contract to execute a *kabuliyat* contained in a compromise entered into in previous suit for adjustment is governed by this Art 7 C. W. N. 158

——where there was an agreement to sell a property in the event of success in litigation Art 113 applied to a claim based on it and limitation begins to run from the date of success 66 I C 622

——where a person who has agreed to execute a lease fails to do so and the promisee does not demand execution within 3 years from the completion of the agreement a suit for specific performance is barred. 4 P L J 447 52 I C 452. 1920 Pat 17.

——a suit for specific performance of contract is to be brought within 3 years from the date when the performance is refused 43 C. 790; 23 C L. J. 26 35 I C 305, 20 C W N 370

——in a suit for specific performance of contract of sale in which no time was fixed for execution of the conveyance the plff impleaded as additional deft. an execution purchaser of the property with notice of contract The auction-purchaser was made party more than 3 years from the date of the refusal by the vendor to perform the contract It was not alleged or proved that the auction purchaser refused to perform the contract more than 3 years before he was made party, the suit was not time barred. 38 M L T 29. 55 I. C 533. 1920 M W N 122

——in case when the right to sue for specific performance vests in a third person to whom the ascertainment of the date on which performance becomes due need not necessarily be known, time begins to run from the date of refusal of performance 41 M 18; 41 I. C 807, 6 L W 192

——when there is no time fixed for performance, time begins to run from the date when the performance is demanded by one party and refused by the other. 17 I C. 399; 1912 M W. N. 1004, 11 I. C. 25

——a suit by a patnidar for settlement and possession of choukidari chakran lands transferred to the zemindar is governed by Art. 114 and not by this Art. 46 C 173 16 A L J 964: 23 C. W. N 198; 48 I C. 262 P. C

Art. 113. (Suit for specific performance of contract, 3 years, the date fixed for performance or from notice of refusal) —*contd.*

——a suit for specific performance of contract to resell is governed by Art. 113, 29 I. C. 898.

——where a suit is premature because no demand was made prior to institution, the plaint cannot be returned. The court will have to consider whether costs should be disallowed. 11 I. C 25.

Art. 114. (For rescission of contract, 3 years when facts entitling rescission becomes known.)

——Art. 114 applies to rescission of contract as between a promisor and promissee. 3 A. 846

For other cases see "Specific performance."

Art 115. (Suit for compensation for breach of contract. 3 years, when the contract is broken).

——suit for specified sum of money is governed by this Art. 12 C. L J. 423 and for money lent 5 C 830 : 6 C. L. R. 355

——a suit by broker for commission comes under this Art. and not Art 102 39 A. 81.

——suit against a share-holder for claim for unpaid calls comes under this Art and not Art. 116 or 120. 52 B. 477 : 1928 B 252 110 I. C 33 30 Bom L R. 549.

——suit for doctor's fee, 13 W. R. 96, suit for repairing charge, 9 B. 280, suit for purchase of stores. 14 C. 250, suit for marriage expenses 3 A 385, suit for account under an agreement to render account year by year, 1 C L J 211, 11 C. L. J. 43, 14 C. W. N 122 suit for malikana, 33 C. 998, 15 C. L. J. 684, suit against surety, 21 C. W. N 479, suit for misdelivery of goods. 19 I. C 477 is governed by this Art.

——suit for loss of goods if founded on tort is not governed by this Art, but by Art 30, 3 M. 240, 19 B 165.

——suit for royalty, 2 Pat 749 suit on hatchitta containing unqualified promise to pay, 1923 Cal 578 comes under this Art.

——Art. 115 [illegible] pensation made in [illegible] made by one or [illegible] applications to a [illegible] s. 235 Company's [illegible] ll. 519.

——the plts. e[illegible] to look after certain village and collec[illegible] between the parties. [illegible] After some time th[illegible] for accounts was g[illegible] 89 I. C. 275 : 1925 Pat. 494

——where the parties were trading independently agreeing to equalise the profits on taking accounts, a suit for an account does not come under this Art. but Art 120, would apply. 1927 Mad. 774, (11 C. L. J. 43, 14 C. W. N. 122) not fol.

Art. 116. (Suit for compensation for breach of contract registered—6 years when the contract is broken).

——a suit for specified sum of money on a registered bond comes under this Art. 15 C. L. J. 17, 23 C. 645, 4 C. L. J. 510, 20 C. W. N. 401, 6 B. 75, 4 A. 255, 3 M. 359.

——a suit on a personal covenant in a registered mortgage bond is governed by Art 116 and not by Art. 66 1928 M. W N. 873, . C . 5 Pat. 585 . 43 C. L. J. 4 A. L J 615 : 1926 P. C. P. C. *applied*. see also . B

——a suit under a registered dower deed comes under this Art. 27 C. W. N. 210.

——this Art applies to a suit under registered mortgage bond ade against the mortgagor. 34 C. 5 A. 461, 11 M 56, 2 Pat. L. T. . B.

——this Art applies to instalment bond also. 11 C. W. N. 903, 18 C 506, 30 A 400 · 5 A L J 416

——a suit to recover damages for breach of covenant of a lease, the terms of which were embodied in a registered *putta* is governed by this Art. 35 C 683.

——a suit for the breach of a contract on the basis of the document is governed by this Art. 50 A. 661 109 I. C 409 1928 All. 313 . 26 A. L J 426, 44 C 759 *Rel. on*

——a suit for breach of duty declared by s 108 of the T P. Act is governed by this Art. if the lease is registered. 101 I C. 707 ; 1927 Pat 248 . 6 Pat. 606 : 8 Pat. L T. 590 (19 C 123, 26 B 750) *Dist.*

——suit for rent due under registered kabulyat and not under the B. T Act is governed by this Art 19 C 489, 27 C 205 : 4 C. W. N. 76, 15 C. 221, 37 B 650, 19 M. 52, 3 M. 76, 23 I. C 753, but according to the Allahabad High Court Art. 110 (3 years) applies 34 A. 464, 6 A. 138.

——but a suit for rent under a registered *Kabulyat* in respect of subject under the B T. Act. is governed by the limitation provided in that Act and not by this Art 19 C 1 F. B., 4 C. L J. 553, 11 C. W. N 57 · 5 C L. J. 19, 23 C. L J. 111.

——suit for account against agent under a registered instrument comes under this Art. 39 A. 355, 14 C. W. N. 122, 11 C L J. 43, 1 C. L. J. 211.

——this Art. applies to a suit for damages between a vendor and a purchaser 45 B. 955, 100 I. C. 40 : 1927 Mad 273, 38 M. 887, 38 M. 1171, 35 M. 39.

——when the mortgaged property is not situate within the jurisdiction of the Registering officer the deed will be treated as simple registerd money-bond and this Art. applies. 29 C. 654 : 6 C. W. N 856.

——limitation runs from the date when the contract is broken or where there are successive breaches, from the date when the

Art. 116 (Suit for compensation for breach of contract registered—6 years when the contract is broken)—*contd.*

breach, in respect of which the suit is instituted occurs or when the breach is continuing, from the date when it ceases. 15 C L J. 17

——suit for breach of covenant for quiet enjoyment comes under this Art 1923 Mad 392 : 74 I. C. 416, 1923 Mad. 28

——the word "compensation" need not be restricted to a claim for unliquidated damages and can be held to include claim for a sum certain 49 B 596 , 89 I C 59 . 1925 Bom. 440.

——this Art is applicable to a suit against surety liable under a registered contract 1926 Nag 449 · 95 I. C. 707, 9 B 320, 9 B. 461.

——a suit brought more than six years after the sale deed for recovery of damages for failure to pay the amount left in the hands of the vendee for clearing a prior mortgage is barred by time 87 I C. 804 1925 All 488.

——a suit for breach of all covenants whether expressed or implied under a contract in writing and registered is governed by this Art 27 C W. N 1025.

——the words express or implied contained in Art. 115 are also intended to be read into Art. 116 49 B 596 : 27 Bom L R 637 · 89 I C 59 1925 Bom 440

——the word "contract" includes an implied contract, 1929 All. 293 27 A L. J 433, (1927 Pat 248, 1925 Bom 440 ; 1924 Cal 148, 49 M L J 666) *Rel on*

——the word "registered" in Art 116, of the L Act, refers only to the Registration Act and does not include the deposit of the memorandum and Articles of Association of a Registered Company. 49 M 468 1926 M W N 450, 1926 Mad. 616 . 94 I. C. 515 . 24 L W. 102 50 M L J 320 F B , 42 M 33 *overruled.*

——when the mortgage money is payable on demand and a suit is instituted after 6 years from the date of the mortgage, a personal decree is barred 27 A L J 110 1929 All 139.

——a suit for refund of the purchase money under an invalid sale is governed by this Art and time runs from the date when the defect is discovered. 117 I C 654 : 1929 Pat. 388 : 8 Pat. 432

Art 117 (Suit upon a foreign judgment, 6 years, the date of judgment.

——applicability of the Art. 102 I. C, 523; 1927 Lah. 203 · 8. 8 Lah. 54)

Art. 118. To obtain a declaration against an adoption, 6 years, alleged adoption becoming known

——this Art governs a suit which is in effect and substance one for a declaration that a particular adoption is invalid. 45 C. L. J 280 32 C W N 153 · 1927 P. C. 229 : 29 Bom. L. R 1393 116 I. C 488 24 L W 449 P. C.

——this Art applies to suits for declaration against adoption and not to suit for possession 48 M. 1 : 1925 Mad 497.

——this Art. applies to a suit to set aside adoption and to recover possession of property 8 Pat. L. T. 34 , 1927 Pat 145 · 6 Pat 506.

Art. 118. (To obtain a declaration against an adoption, 6 years, alleged adoption becoming known)—*contd*

——suit for possession by reversioner against alleged adopted son within 12 years of the Hindu widow's death is within time. 87 I C. 938; 1925 All 79.

——the omission to bring within the period prescribed by Art 118 a suit for a declaration that an alleged adoption is invalid is no bar to a suit by the reversione
death of the limited owner 39
15 C. L J 172: 16 C W. N
A. L. J 814 24 Bom. L R 15

——this Art is no bar to a suit by a reversioner on the allegation that the gift to the alleged adopted person does not affect his reversionary interest, as the plff. in such a suit can treat the adoption as a nullity and contest only the gift 8 Lah. 48 96 I C 749. 1926 Lah 654, 48 B 411 P. C *fol* So also this Art. does not bar a suit brought by a natural son for a declaration that the deft is not a validly adopted son of his father and for an injunction restraining the deft. from interfering with the enjoyment of the property in as much as in suit the injunction prayed for is the main relief, declaration being only incidental. 1926 Mad 1123 51 M L J 557.

Art. 119 (To obtain a declaration that an adoption is valid, 6 years, where the rights of the adopted son are interfered with.)

——under Art. 119 to establish interference with the rights of the adopted son something incompatible with the recognition of adoption must be proved 58 I C. 394 22 Bom. L R 974

——under this Art an adopted son where adoption is challenged and rights interfered with, must institute a suit for having his adoption declared valid within 6 years from the date of interference 20 Bom L. R 836 47 I C. 639: 43 B. 63.

Art. 120 (Suit for which no period is prescribed—6 years, from right accruing.)

——this Art is applicable to all declaratory suits 1929 All. 529.

——the court ought not to regard a case as coming under this Art unless clearly satisfied that it does not come under any other Art 32 C. 527 · 1 C L J. 167 26 C. 564, F. B

——suit for declaration that certain lessee is *benamdar* of the plff. comes under this Art 35 A. 149, 25 C 49.

——suit for declaration of title to property comes under this Art. 11 C. W. N. 186, 1 C. L. J. 73, 1 I C 810, 33 C L J. 592 · but when there is prayer for confirmation of possession or injunction this Art. does not apply 23 C. L. J 571.

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9 Lah.

Art. 120. (Suit for which no period is prescribed—6 years. from right accruing)—*contd.*

——a suit for declaration of right or status is governed by this Art. 21 C 157 · 20 I. A. 155 **P. C.**, *36 A.* 492, 20 A. 35 *F. B.* 37 A. 94, 1 C L J 93, 15 B 422 : 22 B. 430 : 25 C. W. N. 847, 41 C. L. J. 31 : 1925 Cal. 518 86 I. C. 6.

——when a person is in possession he need not sue to rectify an entry in a settlement record made against him. 1918 Pat. 225, as cause of action. 23 C. L. J. 561, 1917 Pat. 108. But if a suit be must be brought within six W. N. 883.

——where an owner is in possession of the property he is not bound to file suit for a declaration of his title because of an adverse entry in the settlement khewat Time runs from the date of denial of title or dispossession. 102 I C. 172 ; 1927 All. 597, (17 A. L. J. 588, 53 I C 1005) *fol.*

——where the suit is brought for declaration as to land being held rent free with prayer for confirmation of possession and for injunction but the latter prayers are found to be unnecessary the suit comes under this Art. 49 C. L J. 281 1929 Cal. 417.

——where a suit for declaration of title and confirmation of possession was brought more than six years from the date of final publication but within six years from the date of the attempted dispossession it was not time-barred. 25 C. W. N. 1022, 10 Lah. L J 546 : 30 Punj L. R. 48 : 1029 Lah 379.

——a suit for declaration cannot be dismissed on the mere ground that the cause of action first accrued more than 6 years back when an adverse entry was made against the plff. in the settlement khewat as any fresh act which can amount to a fresh invasion of the owner's right or a fresh attempt to cast a cloud on his title may create a fresh cause of action. 1929 All. 529.

——where the suit is for declaration of title and confirmation of possession and the cause of action alleged is that during the settlement operation the properties were recorded in the name of others, this Art. will apply and not Art. 144 and limitation will run from the date of final publication. 97 I. C. 635 : 1926 Cal 30.

——an order refusing the mutation of name does not amount ... of title is governed by ... even if a prayer be made ... 10 C. 535 ... ainst the order of the ... 45 A. 461. 24 A. 521. 27 A. 313.

——in a suit for declaration of title against the refusal of the Revenue authorities to enter the name of the plff. in the Revenue Register, the order of refusal is the starting point of limitation 42 M. L. J 457 : 30 M. L. T. 266 : 67 I. C. 600. (11 C. W. N. 1951 *Rel* (22 C L J 283) 31 A. 9, 36 A. 492, 30 M. 383, 41 C. 240 *Dist. Contra*

Art. 120. (Suit for which no period is prescribed—6 years from right accruing)—*contd.*

knowledge of the entry is the date of starting. 20 A. L. J. 231 : 66 I C. 148.

——fresh invasion of the right of the plff. gives rise to fresh cause of action 98 I. C. 811 1927 All. 148, 100 I. C 732 . 28 Punj L. R. 490 : 1927 Lah 119, 9 Lah. L J 484

——suit for contribution by a mortgagor for the amount paid in excess of his dues 25 C. W N. 283

——in a suit by co-sharer landlord against another co-sharer for share of rent collected by the latter Art 120 and not Art. 62 applies 34 C. L. J 508.

——in a suit by co-sharer landlord against another for share of profits Art. 120 applies 29 C. W. N. 270 . 1925 A I R 93 P. C.

——Art. 120 and Art. 10 applies to a suit for accounts against the *karta* of the joint family 25 C W N. 365 32 C. L. J. 25.

——Art 120 applies to a suit for contribution against person enjoying benefit of non gratuitous act. 25 C. W N 813.

——this Art applies to a suit for declaration of title to immoveable property, 26 C. W N. 206 33 C. L. J 592, 1 C. L. J 73

——this Art. applies to a suit for dissolution of continuing partnership. 25 C W N 847

——a suit to enforce an award is governed by this Art 45 B. 329, 49 B. 693 : 1925 Bom 519.

——limitation runs from the first denial of title, subsequent denials do not amount to fresh invasion giving rise to fresh cause of action, 91 I. C 605.

——this Art. applies to a suit by a shareholder of a limited company for " [illegible] 49 M. 468 : 1926 M. W. N. 450 :

——a cl[illegible]mpany under s. 235 Companies [illegible]ie begins to run from the date when the liquidator was appointed. 47 A. 669 : 1925 All. 519 · 23 A L J. 473 : 88 I C 785

——when one party raises a party wall with the consent of the other party neither party can be allowed to commit a tresspass on the party wall so increased, e. g by opening windows therein. A suit for injunction directing the deft. to close the windows so opened is governed by Art. 120 49 B. 586 27 Bom L R. 503 : 87 I. C. 877

——Art. 120 is the proper article for suits to enforce obligation arising out of decrees. But the fact must not be lost sight of that Art. 120 is a residuary article and can only be applied when no other article is found suitable 1925 Mad 1260 : 22 L. W. 195

——a suit under s, 53 T. P. Act. is governed by Art. 120 L. Act. 1926 Mad. 66 22 L W 592.

——Art. 120 applies to a claim to an office and to property appurtenant thereto if the office be not hereditary and if it be hereditary Art. 124 applies. 33 C. L. J. 151.

Art. 120. (Suit for which no period is prescribed—6 y from right accruing)—contd.

——Art. 144 and not Art. 120 applies to a suit for a declar that certain pathway is a public one and nobody is entitle obstruct it S 23 applies to such a case. 26 C. W N 587.

——where the suit was for setting aside of a deed of gift an declaration of title and under the averments made in the plain deed of gift was void *ab initio* Art 120 was applicable and not 91 and 93, 26 C W N. 479

——*where the Jt. Dr is found to have had no saleable int and suit is brought to recover the purchase money* Art 120 apply 36 C L. J 132. 27 C. W. N. 183. 50 C 115.

——Art. 120 applies to a suit by reversioners for the move after the death of the widow. 49 C. 45: 25 C. W. N. 585. 3 L. J 421, 44 M. 984, and also to a suit by reversioner restra the waste of moveables by widow. 44 M. 984: 66 I. C. 10.

——suit by reversioner comes under this Art. 25 C. W. N 33 C L J 421, 44 M 984 30 M. 402, 14 B 512, 16 M. 138 2 33 F. B., 37 A 195 38 M 396, 37 A. 195, 20 C 906, 23 B P C but a suit for immoveable property is governed by Art. 23 B 725. P C.

——adverse possession against a Hind ... of the reversioners also and a ... property is governed by Art. 12... is governed by Art 141, 32 C. ... 112 I. C. 496

——suit to declare a right of pre-emption against the heir mortgagee by the conditional sale who has foreclosed, is governed this Art and by Art. 10, where the subject of sale does not ad of physical possession and there is no registered deed of sale W. N 888: 24 A 17. 28 I. A. 248 P. C. affirming 20 A. F B. also when the property is in the possession of tenant. 28 424 3 A L J 191

——suit for restitution of conjugal right among Hindus governed by this Art. 13 A. 126, 28 C. 37: 5 C. W. N. 195 ... of

——a suit by Mahom...

[illegible]

... recover from the son of a deceased pleader, mon which had been received by the pleader in his professional capac is governed by this Art. 25 A. 55, if a suit be brought on the cau of action arising from the decree against the father then Art 1 applies. 27 M. 243.

——this Art applies to a suit to set aside order of Govt. C. W. N. 365: 1925 P. C. 150

——a suit by a shareholder in a limited company for the accru of arrears of dividend due to him falls under Art. 120 and not und Arts. 62, 115 or 116. 15 M L. J. 520.

Art. 120. (Suit for which no period is prescribed—6 years from right accruing)—*contd*

——where the substantial relief sought is the cancellation of documents or declaration of its validity, and recovery of law is only an auxiliary or incidental relief the suit will be governed by Art. 91 or Art 120 and not by Art. 14 6 C. W. N 849 · 4 Bom. L R 832 . 29 I. A 203 25 A 1 P C

——a suit for construction of a will is governed by Art 120, but the right to sue does not accrue from the death of the testator or the date of the probate. 37 C L J 482

——claim for profits received by deft. comes under this Art. 50 C. 475.

——suit for compensation by some joint tenants against some others who had the exclusive possession of joint land. 23 C 799, suit for compensation money withdrawn by the deft from the Collectorate representing himself as the owner, 5 C 597, 3 C. W. N 202 (Art. 62 is also applicable), suit to recover surplus sale-proceeds of a sale for arrears of revenue, 20 C 51 F B. overruling 18 C. 234 suit for refund of money paid on decree afterwards reversed, 2 C. L. R 354, 13 M 437 suit by a purchaser of a decree to recover money of deceased J. Dr, in the hands of his agent 13 A 368, 16 M 36, suit against trustee for possession of share and for account and recovery of profits 7 A 25 and suit to recover compensation for land acquired by the Govt under the L. R. Act, when [illegible]
C 466, 27 M [illegible]

——a suit [illegible]
of rent collect [illegible]
508, 23 C 799, so a suit for contribution by a mortgagor 25 C. W. N 283 but a suit against co-mortgagee for money received by him comes under Art 62 (3 years) 32 C. 527 1 C. L J 107, 23 C W. N. 983, 30 C 440, 20 C. W. N. 983 *As to similar cases see Art 62*

——a suit for contribution against person enjoying benefit of non gratuitous act comes under this Art 25 C. W N 813

——suit for contribution is generally governed by Art 61 (3 years) but when the plff. has not voluntarily made the payment but the money was realised from him, by sequestration and sale of his property, such suit is governed by this Art 26 C 241

——suit by principal against agent for account papers, is governed by this Art. 1 C. L J. 147.

——suit by principal to recever money from the sons and grandsons of the agent on the ground of their pious liability is governed by this Art 31 A. 429

——suit against a son of a Mitakshara law to enforce fatner's debt on the ground of pious obligation is governed by this Art 23 A. 206, 42 C. 1068, F. B , 28 A 508, 27 M 243 F. B, 16 M 99

——suit for accounts against the manager of a Hindu family comes under this Art 25 C W N. 356 32 C L J 25

——a suit for an exclusive right to worship an idol, 4 C. 683, a suit to oust a shebait, 19 C. 776, 25 C. 354, a suit against a Munici-

Art. 120. (Suit for which no period is prescribed—6 years from right accruing)— *contd*

pality for declaration of right to establish a market, 4 A 339 F. B. suit against directors of mosque for compensation, 14 B 401, a suit for emoluments of hereditary office, 9 M. L. J. 163. 93 I. C. 923: 1926 Mad 245, a suit against alienation by mutwalli, 2 Pat 391: 74 I C 403, a suit against the alienation by a temple trustee, 1928 Mad 837 1928 M L N 415 112 I. C. 22, a suit by a defeated candidate to set aside the election of members of a Municipal Board, 35 A 308, comes under this Art.

——in case of hereditary office, a suit to oust a person holding the office of *Mutwali* falls under this Art. 31 C. W. N. 184: 44 C. L J. 339 99 I C 205 1927 Cal. 130

——suit to enforce personal right to mortgage trust property comes under this Art 6 A I P C

——suit by beneficiary for recovery of money misappropriated by the executor is governed by this Art 5 I. C 832

——suit against tenant to compel him to remove trees from agricultural land, is governed by this Art 9 C. 147.

——where in a proceeding under s. 145 Cr. P. C. a Magistrate attaches the property in dispute, a suit for possession of property is in truth and substance one for declaration of title and this Art. applies. The position of Magistrate is that of a stake-holder. 49 C. 544: 26 C W N 432, 20 A 120 26 M 410, 20 C W. N. 481, 17 C. 814, 32 C. 856, 5 A. 1, 30 M 12, 29 C 518, *Ref.* 50 C 475.

——the order of a Magistrate in a proceeding under s 145 directing the mode and exercise of possession as between the parties being without jurisdiction does not infringe the rights of a party giving rise to cause of action under this Art To apply this Art. an actual infringement of right is necessary. 30 C. W. N. 873: 1926 Cal. 1022 97 I C. 73

——a suit for declaration of title against an order under s 146, Cr P. C is governed by this Art. 26 M. 410, but the cause of action is recurring one. 22 C. L. J. 283.

——suit by mortgagee against co-mortgagee who has recovered the entire debt is governed by this Art. 3 Lah L J 111.

——suit against a deft for the value of goods misappropriated by his brother who was agent of the pltf. on the ground that the deft. being joint with his brother had enjoyed the benefit thereof, is governed by this Art. 10 C. 860 P. C.

——suit for enforcing a charge against moveable property pledged, is governed by this Art 22 C. 21, 17 A 284, 27 M. 518 F. B

——a suit to enforce an award comes under this Art 45 B 329.

——a suit for apportionment of rent after the *batwara* proceeding comes under this Art 11 C 284.

——a suit for *malikana* comes under this Art. 1929 P. C. 165 P. C.

——a suit for money lent on a usufructuary mortgage, the cause of action being *the failure of the mortgagor to secure the*

Art. 120. (Suit for which no period is prescribed—6 years from right accruing)—*contd.*

mortgagee in possession, falls either under Art 116 or this Art. 21 M. 242.

——suit by non-occupancy raiyat, who has been dispossessed from his holding otherwise than by execution of decree to recover possession of the holding falls under this Art. or Art. 142, 31 C. 647

——in a suit by a Mahamedan daughter claiming share by inheritance from her father's estate, which she and her brothers held jointly after the father's death, where it appears that she has ceased to be a member of the family by marriage, this Art. and not Art 127 (12 years) will apply. 7 C. W. N 155, 14 B 70 *Diss* (15 M. 186, 13 A. 212, 22 C. 954), 18 C 642 *Apprd* 32 I C. 83: 30 M L. J. 104, and the brother is not trustee for the sister 16 C 161.

——when the deft obtained possession of the property in execution of a decree which was afterwards set aside in appeal, the suit for mesne profits against him comes under this Art 3 C L J. 182 *Contra* 28 I. C. 85

——where the amount of debt is paid to the D. Hr. a suit by the claimant of the debt against the Dr. Hr., is governed by Art 62 or 120. 38 M. 972 F. B.

——a suit for the settlement of fair rent in the civil court is governed by this Art and limitation runs from the date of the order of the Revenue officer directing that the land is liable to payment of rent 20 I. C 910

——a suit by widow to recover moveable property left by the deceased, is governed by this Art but in case of immoveable property Art 144 applies 29 I C 275, 34 M 511, 21 I C 919, 63 I. C 685

——when the plff. is in possession of the property a suit for a declaration that the record of rights is wrong is governed by this Art and the suit can be brought within 6 years of the final publication 1923 Cal 307 68 I C 489 (c), 28 C W. N. 516, 72 I. C. 781, 23 C W N. 883, 1 Pat L. J. 73, but where the suit be for declaration of title and for possession causes of action arise from the date of dispossession 25 C W N. 1022.

Art. 123. (Suit by heir for his share, 12 years, when it becomes deliverable).

——suit by Mahamedan heirs against co-heirs is governed by Art 144, 45 B 519, 24 I C. 45 16 M 61 F. B , 31 Bom. L R. 199 · 1929 Bom. 141 1929 Lah. 549, *contra* Art 120 applies, 44 A. 244, 15 M. 60, 21 C 157 P. C.

[illegible] person whose legal duty is to [illegible] C 45, 34 M. 511, 12 M. 487, [illegible], so it does not apply to a suit [illegible] by law with the distribution.

——a suit for legacy is governed by this Art. 41 C 271, 19 M. 425, 36 B. 111, 13 W. R 354.

——Art 123 applies only to cases in which the property sought to be recovered is not only a legacy, but is also sought to be re-

Art. 123. (Suit by heir for his share, 12 years, when it, becomes deliverable)—contd.

covered as such from one who is bound by law to pay the legacy because he is either executor of the will or otherwise represents the estate of the testator 91 I C. 725 1926 Cal. 480.

——Art 123 applies to a suit for distribution of share of the estate left by an intestate. 4 Bur. L. J. 76: 88 I. C. 609: 1925 Rang 233.

——this Art. applies to every suit in which the plff. claims an undistributed share in the deceased's estate. 97 I C. 139: 1926 All. 748

——a suit against co-heirs for a share in the corpus of an inheritance falls under Art 123, 3 Rang. 77: 1925 Rang. 228: 92 I. C. 489

——this Art applies to a suit for accounts against an executor *de son tort* 95 I C 53: 1926 Mad. 681: 23 L. W. 548.

Art. 124 (Suit for possession of hereditary office, 12 years, from adverse possession).

——when the title to an office has been acquired by statutory operation whether under Art 120, 124 or 144 the title of the true owner is not recovered by re-entry. 32 C. L. J. 151.

——this Art applies to a suit for the appointment to the office of shebait if the appointment be by succession through inheritance and not by nomination 19 C. 776, 25 C 354, 97 I. C. 437: 1926 Mad 1012

——where the succession is by nomination by the holder in office of his successor it is not a hereditary succession which is succession by heir to the deceased under the law. 97 I C. 437: 1926 Mad. 1012; 51 M L. J. 258.

——suit for declaration by alleged *khadims* is governed by this Art 24 C 83

——a suit for the possession of the office of hereditary trustee of the temple is governed by the Art. 28 I. C. 956.

——to apply this Art. the plff. must state the office is now being held adversely to him by the defts. 109 I. C. 771; 1928 Mad 377.

——there is no distinction as regards limitations between a claim to an office and that to property of an endowment. 4 C. W. N 329 23 M 271 P. C., 39 M 456, 35 M. 92.

——if the office is hereditary claim to office and the lands attached thereto is governed by this Art. 26 M 113, 8 I. C. 388

——there can be no adverse possession so long as there is no lawful trustee 28 I. C 956, 10 I C. 95, 18 I. C. 373

——right to office can be acquired by adverse possession. 21 M 278 and even against co-managers by exclusive possession 27 M 192.

——appropriation of offerings on each occasion gives rise to a recurring cause of action. 42 C. 244 P. C. 39 C. 887 *reversed.*

——an alienation of an office of trustee by hereditary trustee is void and a suit to recover the estate from the alienee comes under this Art 39 M 456, *contra*, Art. 120 applies. 2 Pat. 391: 74 I. C. 603

——a suit by a person alleging himself to be the trustee of a choultry for recovery of possession of the building is governed by Art. 124, 46 M. 525, 14 I. C. 168 *Ref.*

Art. 125. (Suit by next reversioner against alienation by female, 12 years, from the date of alienation)

——this Art applies to every case where the female making the alienation is a Hindu or a Mahamedan and the immediate reversioner making the claim also professes the same facts 100 I C. 84. 1927 Lah 198 28 Punj L R 341: 8 Lah 215.

——suit by reversioner for declaration that an alienation by a limited owner will not affect his reversionary rights, brought more than 12 years after the alienation, is barred 86 I C. 1016. 1925 Mad. 941.

——only the next reversioner is entitled to sue. 22 A 23 F. B.

——a suit by remote reversioner is governed by Art 123 10 M L J 229, 18 I. C. 710, 37 A. 195, 22 A. 33 F. B, 18 I C 710. 37 A 195, 38 M 396

——a remote reversioner can sue when the nearer one is found to have colluded with the widow. 28 M 57, 6 A. 428, 32 C 62. But it has been held in 37 A 195 that the remote reversioner has the equal right

——a female reversioner also can sue 22 A 33 F. B

——a compromise by the widow in respect of the deceased husband's property amounts to alienation 1 I C 180, 22 C 354

——submitting to a redemption of mortgaged property by a person having no right to redeem the same amounts to an alienation within this Art. 111 I C 203 1928 Lah 932 29 Punj L R 584

——creation of occupancy right amounts to alienation 29 I. C. 789

——the reversioner can only get a declaration and cannot set aside the alienation 25 C 179 P C

——purchase from female heir, suit for possession, limitation 36 C L J 92

——suit by reversioner challenging validity of a gift, limitation. 1923 Lah 58 70 I C 838

——a similar interpretation must be given to the words "payable" and "deliverable" as used in Art 123. 48 M 312 29 C W. N 989 3 Pat L R. 202. 87 I C 324 1925 M W N 441 P. C

——a suit brought by reversioner for a declaration of sale in execution of decree on mortgage to be invalid is governed by this Art. and starting point of limitation is the date of mortgage 1925 Mad 567 86 I C 578 21 L. W 277.

Art. 126. (Suit to set aside father's alienation (Mitakshara), 12 years, when the alienee takes possession)

——this Art applies to suits to set aside a father's alienation and not to a mere declaratory suit. 1914 P R 70

——*it also applies to a suit when the alienation was made by* the father in conjunction with an uncle. 97 I C 591

——this Art. is based on the principle that possession of the alienee gives the son the knowledge of the fother's alienation. If the alienee never gets possession no limitation can arise 50 A 163: 106 I. C 377. 1927 All. 702: 25 A. L. J. 734, 41 M 650.

Art 132 Suit to enforce payment of money charged upon immovable property—12 years from due date)—contd

——a suit for unpaid purchase money which is a charge on the property sold in the hands of the vendee by the vendor, is governed by this Art 18 B 48, 22 B. 846, 21 A 451, 28 M. 305, 30 A. 172

——when the vendee is to pay the mortgage debt and time is fixed, presumption is that vendee should pay the debt immediately or at any rate within a reasonable time and a suit on the basis of such a contract is governed by this Art. and not Art. 115 or 116 107 I C 679 26 A L J 53

——a suit on a simple mortgage bond comes under this Art 11 C. W N. 1005 30 M. 426, 9 Bom L R 1104, 4 A. L. J. 625 P. C.

——a suit for money due on hypothecation bond though containing stipulation for payment by instalment, is governed by this Art 39 M 981

——when mortgaged property is sold for arrears of revenue, free from all incumbrances, the mortgagee is entitled to a charge on the surplus sale proceeds which is enforcible under this Art, the limitation running from the due date. 3 C L J. 52, 31 C. 745, 27 C. 180

——when a house is hypothecated to one person and then to another person who pulls it down, a suit by the mortgagee against the vendee falls under this sec as the house is immoveable property 91 I C. 754 1926 Mad. 343.

——this Art is wide enough to apply to all cases of charge created under the T. P. Act or otherwise. 67 I. C. 939.

——payment of revenue by the pltf. for the defts. does not create any charge 14 C 809 F B 15 C 542, 14 A. 273, 6 B 437. contra 25 M 686, F. B 28 M. 493

... in an instalment bond ... limitation runs from ... A. 400 ... whole sum due upon the default being made in payment of an instalment has been waived by subsequent payment of the overdue instalment on the one hand and receipt on the other than the penalty having been waived the parties are admitted to the same position as they would have been in, if no default would have occurred. 27 C. W. N. 823.

——waiver of default by the mortgagee, right of mortgagee. 1926 Mad 160.

——where a prior mortgagee gets a mortgage decree without making the subsequent mortgagee a party and purchases the property and the subsequent mortgagee gets a mortgage decree without making the prior mortgagee a party and purchases the property, a suit by subsequent mortgagee to enforce his right against the prior mortgagee purchaser falls under this Art and

Art. 132. (Suit to enforce payment of money charged upon immovable property—12 years from due date)—*contd*

limitation runs from the due date of his own mortgage. 14 C. W N. 439, 91 I C. 719, 1926 Cal. 560.

——where a puisne mortgagee deft. pays off the decretal amount of the prior motgagee and sues the mortgagor for the recovery of the amount limitation runs from the date when the payment is made. 8 N. L. J. 232, 84 I C 301, 1925 Mad. 76 47 M. L. J. 602, 50 A 569: 109 I. C. 38: 1928 All. 241: 26 A L. J. 298

——a puisne mortgagee can not redeem prior mortgagee beyond the period fixed by this Art. 1925 Mad. 150, 92 I C 118

——a subsequent mortgagee paying off a prior mortgage does not acquire a fresh charge save and except that of the prior mortgagee. 3 Pat. L. T 533. 68 I C 707.

——the second mortgagee in a suit for redemption does not seek to recover the money due to him upon his second mortgage and so Art. 132 does not apply but under Art 148 he has 60 years period. 7 Pat L T. 788 94 I C 284, 1926 Pat 337: 5 Pat. 513, (14 C W N. 439, 1925 Mad. 150) *Not fol.* (9 C. W. N. 728, 2 L. L. J. 419, 1923 All. 271). *Fol.*

——a right to be reimbursed is a different thing from a right to subrogation 3 Pat L T 533

——when a mortgagor redeems a mortgage the other co-mortgagor can bring a suit for redemption within 60 years, 20 A L J 611 1922 All. 410.

——when the interest is payable yearly and on default the [illegible] tation [illegible] L. J. [illegible] 249 [illegible] 302

94 I C 849, 1926 All 493

——where under the stipulation in the mortgage deed the mortgagor is allowed to pay off the debt at any time, the mortgagee is also equally at liberty to foreclose at any time, limitation in such cases commencing to run at once. 1926 Lah 225 92 I. C 656

——assignment of mortgage right does not extend the period of limitation 1922 Pat 331, 39 C 527 P. C., *fol.* 63 I C 604 *doubted*

——adverse possession of third person does not affect the mortgagee's right to bring the property to sale 36 A 567, F. B.

[illegible] immoveable property and [illegible] V N 151, 5 C 921, 96 I. C [illegible] not limited to *Malikana* 96 I C 188 1926 Pat 340.

Art 134.—(Suit for possession of immovable property conveyed by trustee, 12 years, from the date of transfer).

[illegible] to recover on behalf of a trust [illegible] 60 I C 689 (C).

[illegible] and 148, 47 A 803: 23 A. L. J. [illegible]

134. (Suit for possession of immovable property conveyed by trustee, 12 years, from the date of transfer) *—contd*

——this Art applies to *bona fide* purchaser and Art 148 applies to r purchasers 96 I. C. 886 · 1926 Lah 676, 1924 Lah 468 *fol*
——Art 134 applies where the

. . . that Art. 134 is not restricted to the

A1
——when mortgagee in possession deals with property as full er Art 144 and not this Art applies. 43 A. 164; 2 U. P. L R 61 I. C. 627, *contra* 24 Bom. L R. 319: 67 I. C. 308, 24 Bom 762 · 68 I C 487 *and see below.*
——this Art. does not apply to an auction purchaser in execution decree for sale obtained on the basis of a *simple mortgage* 102 891 · 1927 All 619
——a mortgagee will be presumed to have transferred the mort-

original mortgagor has been set up by the deed of . . 255 1927 All 689.
——this Art. contemplates a transfer by a mortgagee a larger est than that given by the mortgage or at any rate an interest cumbered by a mortgage. *33 C. W. N.* 761 : 1929 P. C. 155 · 27 A. 566 P. C.
——Art. 134 refers to cases of specific trust and relates to property conveyed on trust. 44 M 831; 2 Pat. L. T. 352, 67 I. C. 171
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Art 134. (Suit for possession of immovable property conveyed by trustee, 12 years, from the date of transfer) *—contd*

——this Art. does not apply to a suit for the recovery of temple property improperly alienated by a trustee. 50 M. L. J 589: 93 L. W. 657: 49 M. 543· 96 I. C. 371 1926 M 769

——Art 134 cannot be so read as to make it applicable only to mortgagees who have acquired possession in the first instance. The suits referred to in the article being suits for possession, it must be assured that when such a suit is brought, the deft. transferee is in possession. 47 A 803 23 A. L. J 691: 1925 All. 707.

——where a person takes a sale deed from a mortgagee but thereafter admits the title of the mortgagor, pays him rent, and constitutes himself mortgagee tenant, he cannot rely on this Art. 87 I. C 578. 1925 Mad 1127.

——where a transferor is a mortgagee and the transferee has notice of that fact a suit for redemption by the mortgagor is not governed by Art. 134 but by Art 148 89 I C. 189 27 Bom L. R. 661: 1925 *Bom. 417.*

——permanent lease of endowed property by the head of the *mutt*—suit by successor-limitation. Art 134 or 144 applies 26 C. W. N 537. 30 M. L T 66 24 Bom L. R 629 P. C.

——in the case of a lease of temple property the trustee having beneficial interest may be still called a trustee and Art. 132 will apply, and if it is a case of a mutt Art. 134 cannot apply and there will certainly be no adverse possession from the date of the lease. 1928 Mad 614. 110 I C. 894

——suit by reversioner, conflict between Arts. 135 and 141, 68 I. C 734.

——Art 134 does not apply to a wakf. 50 C 529 · 38 C. L. J 242; 28 C W N. 121 44 M. L J 624. 25 Bom. L. R 670 P. C

——a person in possession of trust property under an invalid

99 F R.

——the grant of permanent lease or putni lease of property belonging to an idol by the shebait is a transfer for valuable consideration whether any premium was paid or not, rent being the valuable consideration. 32 M. L. J. 24, 43 C. 34: 19 C. W N 108

——this Art does not apply where the transferee does not profess or intend to take an absolute interest. 2 C L J 546, 37 A. 660, 29 A. 471, F. B. 24 M. 471, 12 B 140, 6 M. L. J 260, 9 M. L. J. 94, 18 B 387, 9 A. 97.

——the onus lies on the purchaser. 29 M 501.

——transferee for valuable consideration is used in contradistinction to a mere volunteer. 2 C. L J. 546. 22 B 225, 26 M. L. J. 537: 24 I. C. 369.

Art. 134. (Suit for possession of immovable property conveyed by trustee, 12 years, from the date of transfer) *—contd*

——lessee's knowledge of the property being *debuttar* does not preclude him from being regarded as a purchaser for valuable considerations 33 C 511.

— [illegible] trust property [illegible] who may be [illegible] alienation by his predecessor is not governed by this Art. 48 M L. J. 144 86 I C 231 1925 Mad. 822, 49 M L. J. 640.

——where certain family trust properties were given on long leases to the defts. and on the death of the lessor, his successor instituted a suit for possession against the lessees and the lower appellate court dismissed the suit as time barred under Art 134 following 40 M 45, held that a permanent lease of the kind was not a transfer for consideration contemplated by the Art. and the suit could not be barred 1925 Mad. 796 : 21 L. W 256, (45 M 565. 44 M 831) *fol.*

——where the deed of transfer executed by a mortgagee is a sale deed and what was bargained by the transferee is also an absolute sale the fact that he knew that the transferor had only a mortgagee's interest in the property transferred does not prevent the application of this Art 1926 Mad. 81 : 49 M L J. 634 22 L W 885

——when a shebait of an endowment mortgaged the property and in execution of a decree the property was purchased by the defts [illegible] shebait for a declaration that [illegible] either from [illegible] death of the [illegible] I C. 641: previous shebait. 30 C. W N. 740 [illegible] 1926 Cal 913.

Art 135 (Suit by mortgagee for possession of mortgaged property, 12 years, when the mortgagor's right to possession determines.)

——a mortgagee by conditional sale when wrongfully dispossessed may sue for possession though his claim for foreclosure may be barred, 27 C. 185. But where the mortgagee is not entitled to [illegible] a mortgage by [illegible] in default of [illegible] bond this Art. applies [illegible] C. 379 [illegible] mortgagee by conditional sale was [illegible] mortgagee brought [illegible] of the period [illegible]

——when there is express provision that the mortgagee will get possession upon default by mortgagors limitation runs from the

Art. 136. (Suit for possession by purchaser at private sale when the vendor was out of possession, 12 years, when the vendor is first entitled to possession.)

date of default but where there is no such express provision limitation runs from the expiration of the year of grace 10 C 68

——limitation runs against the purchaser in the same way as against the vendor 15 B 261.

——when the vendor recovers possession or remains in possession suit against him is governed by Art. 144, 12 C. 197, 2 A. 718, 11 C. 229.

——the expression "vendor" means a vendor other than an auction-purchaser mentioned in Art 138, 31 C 681. F. B., 23 C 49 *overruled*.

——and the word 'purchaser" does not include the purchaser from the auction-purchaser. 31 C 681 F. B

——where there are successive vendors who have all been out of possession this Art refers to the first of the series 24 I C 216

——suit by purchaser from reversioner must be brought under this Art within 12 years from the date of the death of the widow. *8 C W N. 535, 9 I C. 495*

——in a suit by a purchaser from a member of a joint Hindu family who is alleged to have been out of possession at the date of sale Art 136 Applies and not Art 127 9 I. C 495

——property belonging to tenants in common possession of the tenant in common ouster. 64 I. C 552.

——the onus lies on the purchaser. 11 C 680, 23 A 442

Art. 137 (Suit by auction-purchaser when the Jt Dr was out of possession, 12 years, when the Jt. Dr. is first entitled to possession)

[illegible] le

[illegible] in

——this Art does not apply to a suit against the Jt Dr. 7 A. L J. 1184

[illegible] after auction sale a suit [illegible] 273

[illegible] or possession by a purchaser [illegible] decree 50 M. L J 183:

——limitation in suit for possession by an auction purchaser against usufructuary mortgagee pending attachment is 12 years from the date when the Jt. Dr. was entitled to possession 1926 Mad. 966; 97 I C. 718 51 M L. J 143

Art. 138. (Suit by auction purchaser when the Jt. Dr is in possession, 12 years when the sale becomes absolute).

——a suit by the auction purchaser against a person who has not acquired a title from the Jt. Dr is not governed by Art 138 36 C. L. J. 140. 27 C W N. 259.

——Art. 138, evidently refers to a case where the purchaser has not obtained delivery of possession. 26 C. W. N. 364, 24 C. 715, 9 C.

Art. 138. (Suit by auction purchaser when the Jt. Dr. is in possession, 12 years, when the sale becomes absolute) —*contd*

W N. 292. Symbolical possession is equivalent to actual possession against the Jt. Dr. 5 C. 584 F. B.

——this Art. only applies to a suit in which the auction purchaser is the plff. and the Jt. Dr. or some one through him is the deft. 35 A 432.

——this Art. applies also to a purchaser from auction purchaser 31 C. 681 F. B 23 C. 49 *overruled* 15 M. 331, 18 M. 244, 23 B. 246

——this Art does not cover the case of a decree-holder-auction-purchaser 50 M. 403 : 1927 M. W. N 8 : 1927 Mad. 288 - 99 I C. 677 38 M L T. 156.

——this Art does not override the provision of sec. 47 C P. C they should be read together. 31 A. 82 F. B.

Art. 139 (Suit by landlord to recover possession from tenant —12 years, from determination of tenancy).

——a tenant cannot claim adverse possession without giving up possession 14 C L. J 453

——no limitation so long as the tenancy continues. 29 C. L J 1, 10 C W N. 343, 13 C. 101, 9 C 367.

——non-payment of rent is not adverse possession 16 C W. N 202, 17 C. W N 627, 7 C. L. J. 202, 18 C. W. N. 52 n. 16 C. L. J 202, 7 B 34, 40, 9 B 419, 2 A. 517, 3 M. 11, 4 C. 661, but when the tenant pays rent to a third person the latter's possession becomes adverse. I C W. N. 246

——[illegible] the currency of a lease is not [illegible] 43, 29 A. [illegible] e land is [illegible] nger for [illegible] brought [illegible] 26 C 460.

——where after the expiry of a lease the tenant remains in possession for 12 years without payment of rent suit for possession will be barred. 26 C W. N. 722, P. C., 20 A. L. J. 696, 44 A. 583, 24 B. 504 *fol* 37 A. 567 *Dist*, 83 I C. 741 : 6 Pat. L. T. 315 : 1925 Pat 560, 85 I. C 550 : 1925 All. 698.

——a tenancy by sufferance would not of itself make the possession of the holder rightful, so as to prevent limitation from running. But that proposition is subject to one important qualification, namely that if the landlord does anything to indicate his assent to the continuance of the tenancy that would itself be sufficient to convert the tenancy by sufferance into a tenancy from year to year. 1923 Pat 54 ; 4 Pat. L. T. 123 : 71 I. C 570

——when a tenant holds over after the expiry of a lease, such holding over, is wrongful and time begins to run under this Art 31 A. 22 B. 893, 24 B. 504, 31 A. 318, 514, 7 C. L. J. 615, 31 M. 163, 7 M L. T. 283, 514 . 6 A L. J. 584 : 3 I. C. 566, 19 M. L. J. 732 : 7 M L. T. 550 - 1925 83 I. C. 741 : 4 Pat. L. T. 315 : 1925 Pat. 560, 85 I C. 550 .

Art. 139 (Suit by landlord to recover possession from tenant —12 years, from determination of tenancy)—*contd*

All. 698, 84 I. C 586 4 Pat, 139 : 6 P. L T. 12 . 1925 Pat. 216, 105 I. C. 859 : 29 Bom. L R 1332, 1927 All 821.

——the representative of a tenant holding over is not a tenant within this Art. and a suit against him comes under Art. 144, 31 M. 163, *contra below.*

——a suit against the representative of a tenant after the termination of the tenancy to recover the property leased is governed by Art. 139 and not by Art 144. 86 I C 938 1925 M. W N. 589, 1925 Mad. 446 : 48 M. L J 185, 33 M 260 *fol*

——the deft can raise the plea of tenancy and limitation at the same time. 7 C W. N 294, 7 B 96

——burden of proof of tenancy lies on the landlord when it is denied by the deft 29 A 40.

be barred, unless there is a fresh tenancy created between the parties 6 P. L T 361 : 88 I C 483 · 1925 Pat 499.

——where the plff's predecessor instituted a suit for possession and mesne profits against the deft in which decree was passed restraining eviction of the deft if he paid fair rent and the deft did [illegible] there was no relationship [illegible] did not apply to a suit in [illegible] I 327 27 A L J 246 114 I [illegible] 0 Pat L. T 301 P. C.

Art. 140. (Suit by a reversioner, 12 years).

——in a suit for possession by son's wife on the death of the limited owner here the mother-in-law Art 140 applies and not Art 142 or 144 as the cause of action arises on the death of the limited owner. Art 142 does not apply as the plff was never in fact dispossessed nor does Art. 144 does apply as the possession of a [illegible]

——whether a person claiming only an equity of redemption comes within the meaning of remainderman 32 C. W N 761 : 27 A. L J 566 1929 P C 158 P. C

——where a grant of immoveable property is made to a person for life, the period of limitation for a suit by the grantor's heir, the grantee being dead, is 12 years from the date of grant 11 C. 121 P. C.

——a suit by a devisee under a will must be brought within 12 years from the date of the testator's death. 14 C. 801 P. C. The estate falls into possession immediately on the date of the testator's

Art. 140 (Suit by a reversioner, 12 years)—*contd*

death although the property should be in the possession of the *manager until the* devisee attains a certain age. 17 C. 272

——*where a will* appoints a Hindu female as executrix and gives life estate, cause of action accrues on the death of her husband *83 I. C 812 1924 Pat.* 721.

——a person relying on possessory title cannot invoke the aid of this Art 1925 Pat 68 . 93 I. C. 454.

——*as between* a remainderman and a transferee *from* a mortgagee no question of adverse possession can arise until after 12 years *from the* date when the estate falls into possession. 47 A. 603 : *23 A L J. 691 1925 All.* 707.

Art. 141 (Suit by reversioner on the death of female 12 years)

——the starting point of limitation under this Art, is the date of the death of the surviving widow even if she had already given up her right in favour of another widow. 1921 M. W. N. 29 : 39 M. L. J. 567 , 28 M L. T 272 : 60 I. C. 135, 26 A L J. 1049 : 1928 All 561 F B (9 W. R 505, 22 C 445 P.C) *Dist* 14 A. 156 *affirmed* 23 B. 725 P C *fol.*, (20 A. 42, 28 M. 883 P. C. 9, M I A. 539 P. C.) *expl*

——limitation runs *from* the date of the death of the surviving daughter of a widow 1923 M. 168 : 69 I. C 389.

[illegible] immoveable property. 25 C. W. N [illegible] 951, 36 P. L [illegible] C 329 P C. [illegible] 61 F. B

——a suit by reversioner for the possession of the properties of *a widow* sold in excution of a decree against her husband is governed by this Art 48 C. L J. 368 : 114 I. C. 139 : 1929 Cal. 93

——where there is conflict between Arts. 131 and 141, Art 141 *will* apply 44 M. 951.

——where there has been no *decree* against the widow or any act of law in the widow's lifetime affecting the reversioner's right to possess after the death of the widow, a suit by reversioner is governed by this Art. 1929 P. C 166 P. C.

——once limitation begins to run it *does not stop* except in cases *specially* provided for by the L. Act 44 M. L. J. 87 , 72 I C. 415 . 16 L W 529, 1923 Bom. 364, 12 M. I. A. 244. 43 M. 815. 35 C. 213, *43 C 660 Dist*

——the fact that one of the reversioners happened to be a minor or that another entered with a compromise after litigation will not save limitation because once time has begun to run no subsequent disability stops it. 25 A. L. J. 861 : 50 A. 152 : 107 I C 45 1927 All. 818.

——when possession has once begun to be adverse against a male owner, it will not cease to be so by reason of subsequent interposition of female heir. 32 C 165.

Art. 141. (Suit by reversioner on the death of female, 12 years)—*contd*

——Art, 141 does not apply where a female had possession of an absolute estate 26 O. C. 133 75 I C 626

——a widow may make a valid alienation of her life estate without legal necessity and the possession of the alienee will not be adverse to the reversioner 23 C 60, 6 C L J. 490, 10 C L. R 337, 8 C. 442, 13 W R 52, *fol* 1925 Oudh 164

——this Art. does not apply to a case in which the reversioner comes after successive female heirs. 23 C 460, 11 C 791, 19 A 357.

——intervention of another woman does not suspend the period of limitation. 33 A. 31 6 A L J 723 *Contra*, 23 W R 125 27 A. 494, 18 B 216.

[illegible] uit brought [illegible] the death [illegible] 26 A. L. J. [illegible] B.

——it applies to female reversioner also 22 C. 85 p 89, but not when the female succeeds by survivorship 18 C W N 904, 27 I C. 83

——this Art does not apply if the female had not been in possession as heir. 9 C L J 236, 29 C 664 P C

——this Art does not apply to a suit by an heir-at-law of a female. 10 A. 343, 12 C 594

——time begins to run against the reversioner under this Art. [illegible] the H. W. R Act, as [illegible]

[illegible] Act does not help the [illegible] suit has been brought

Art. 142. (Suit for possession of immovable property when the plff has been dispossessed—12 years from dispossession)

——the starting point under this Art is the date of *dispossession* or *discontinuance* of possession but not the date when the plff. ceases to occupy the land. "Discontinuance" means an abandonment of possession followed by the actual possession of another person and "dispossession" means an ouster from possession followed by the possession of another. 5 Pat L J 592 1 Pat. L T. 505 : 57 I C 717, 2 Pat L T 133 . I C 78.

——this Art refers to dispossession or discontinuance of possession *Dispossession* implies the coming in of a person and his driving out another person Discontinuance of possession implies the going out of the person in possession being followed into possession by another 50 C. 49 36 C. L J 35, 87, I C. 356 : 1925 Mad. 831, 39 M. 617, 1922 P C 181 P. C.

——dispossession implies the coming in of a person and driving out another person from possession. 20 C W. N. 481, 22 C. L. J. 283, 32 C. W. N. 277 : 1929 Cal 297.

Art. 142. (Suit for possession of immovable property when the plff. has been dispossessed—12 years from dispossession)—*contd*

——the mere decision of *Tanazu* or passing of an order or an entry in the record of right or an order under s. 145 Cr. P. C do not necessarily amount to physical dispossession. 1928 Pat. 653 : 110 I C. 623.

——there must be termination of possession of rightful owner 27 C W. N. 340

9 Sp. R. Act, comes

——in suits for recovery of immoveable property the general rule of limitation is 12 years, the party claiming shorter period must prove the special case 16 C W. N 398.

——when the plff alleges that he had been *formerly in possession* and has been dispossessed by the defts. the suit comes under 39 B. 335, 31 I C. C. L. J. 121 · 97 er this Art the Art 144 be can . 724, 26 C. 473, P. C., 14 B 453, 7.

——Art. 144 is wider in scope than this Art the latter refers to suit for immovable property only while the former includes also interest therein 14 C. L J 572

——when the question of possession and dispossession is not raised and is not the basis of the suit Art. 144 applies and not this Art. 98 I. C. 878 · 1927 Lah 70

——in an ejectment suit the plff must prove possession within 12 years. 16 C 473 P. C, 10 C. W. N. 630, 19 C. W. N. 18 p. 23, 110 I. C. 623 : 1928 Pat 653

——plff must prove that the dispossession took place within tenant at will in the Revenue to a decree on the ground his J. 687, 97 I. C 257. dispossession could not have occured beyond twelve years of the institution of the suit. (923 Mad 160 ; 50 M. L J. 183.

——possession through tenants is sufficient but the plff must prove realisation of rent from tenant within 12 years 48 C L. J. 364 : 1928 Cal. 765

——possession goes with title, and also it is evidence of title 13 C. L. J. 625, L. T. 491 : 6 Pat. L. J. 478, 24 Bo and sues for

——but a W. N. 154, 21 C.

possession mus

244, 17 C. W. N.

——when evidence of possession is conflicting the presumption is that possession follows title. 27 C. W. N. 305, 36 C. L. J. 335.

Art. 142. (Suit for possession of immovable property when the plff. has been dispossessed—12 years from dispossession)—*contd.*

66 I. C 764 (B), 8 C. W. N 876, 12 C 38, so also when the evidence of possession is strong on both sides 27 C. 25, 6 Pat. L J. 478 : 2 Pat. L. T 481 62 I. C. 1.

——a mere trespass without claim of title as in the case of squatter, does not amount to an ouster of the true owner, 9 C. W N. 111

——when the transferee from co-sharer brings a suit for possession of share in a house alleged to have been sold to him more than 12 years after the sale and the other co-sharers deny the title of the transferor to any share, the suit is barred by limitation. 6 Lah L J 567 : 1924 Lah. 682

——a suit by a plff. for possession of land claiming under a purchase and alleging that the deft dispossessed his vendor, falls under Art 142 49 M L J 788.

[illegible] o dispossession is alleged [illegible] A. L J 244 1925 All. [illegible]

[illegible] f Art. 142 does not arise [illegible] dispossession could not have occurred beyond twelve years of the institution of the suit. 50 M. L J 183

——symbolical possession saves limitation under this Art. 1927 M. W N 670 · 105 I C 243 1927 Mad 849 : 53 M L. J. 339. but the possession of the Jt Dr after the delivery of symbolical possession becomes adverse to the auction purchaser who must bring his suit within 12 years 50 A 813 : 26 A L. J 573 1928 All 412

——a suit is barred against a deft who is impleaded after the period of limitation though the suit was brought within time. 54 C. 114 . 100 I C 293 1927 Cal. 216 44 C. L J. 467.

——when a grantor of a maintenance grant gets a decree for [illegible] more than 12 years a [illegible] 109 I. C 818 : 48 C. L. [illegible] 9 Pat L. T. 483 : 55 [illegible]

——If there be any interval between the possession of trespassers presumption will be that the plff (true owner) was in possession during the interval but if the possessions of the trespassers be continuous plff's suit will be barred by limitation even though it is brought within 12 years from the date of the last trespasser's (deft's) possession 9 C. W. N. 111, 45 M 370 but possession of one trespasser cannot be added to that of the other to complete title by adverse possession. 2 C. W N 315 and adverse possession must be of the deft himself. 17 C. W. N. 748.

——the case of *chur*, *jungle* vacant and submerged land is peculiar, the true owner must be held to be in constructive possession thereof. 9 C. W. N. 111, 36 C. L. J. 140, 69 I. C. 427, 88 I C. 567 : 1925 Cal. 1930, 31 C. W. N 806 : 105 I. C. 369 : 1928 Cal. 118.

Art 142. (Suit for possession of immovable property when the plff has been dispossessed—12 years from dispossession) —*contd*

——as long as reliable evidence of acts of ownership is forthcoming there is no difference between the proof of possession in the case of jungle or uncultivated lands and in the case of cultivated lands 27 C W. N. 340

——a suit for the possession of waste land is governed by Art 144 and not by this Art 100 I C 51 : 1927 Lah 230.

——in case of waste lands the defts must prove overt acts of adverse possession other than the entries in the record of rights in their favour 29 Punj L R. 381 : 1928 Lah 306 : 110 I. C. 857 · 10 Lah L J. 63

——in case of uncultivated lands possession is presumed to be with the landlord and actual possession need not be proved. 1929 Lah 596, 1916 P C. 21 P. C *fol*

——in case of submergent land possesssion is presumed to be with the owner and deft. is to prove dispossession 33 C. W. N 1016 1929 P C 225 P C.

——independent trespassers not claiming under one another cannot tack on their possession for the purpose of Art 142, 36 C L J 140 27 C W N. 259, but purchaser from trespasser can. 1 Rang 176 . 75 I C 31, 69 I. C. 427.

——when land becomes submerged it is constructively in the possession of lawful owner Consequently when a land at intervals of 4 or 5 years becomes submerged the trespasser's possession cannot be continuous and he cannot acquire title by adverse possession 1923 A 75 69 I. C 912 · 20 A. L. J 756, 36 C. L. J. 140, 88 I C 567 1925 Cal 1230, 44 C. L. J. 121 : 97 I. C. 1003 : 1926 Cal 1166

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and under Art. 144 he must prove his title and the deft. is to [illegible] adverse possession for 12 years 6 Pat. L. J. 478 : 2 Pat L. T. 481 · 62 I C 1, 26 C W N 724, 66 I. C. 914 (C) 1923 Cal. 286

——when rightful owner is dispossessed but succeeds in ousting the trespasser without recourse to law his possession will be possession within this Art. 33 C 821, 6 C. L. J 472 and if he be afterwards dispossessed by the trespasser under a decree under s. 9 Sp R Act the period of limitation for possession will run from the date of possession under the decree. 9 C. W. N. 1061, 6 C. L. J. 472, 2 C. L J 1

——suit by landlord against tenant for possession of lands encroached by the latter for his own benefit comes under this Art 40 C L. J. 160 : 1925 Cal. 193, 17 C. L. J. 277 · 17 C. W. N. 386, 2 C

Art 142. (Suit for possession of immovable property when the plff. has been dispossessed—12 years from dispossession)—*contd.*

L J 125, 8 C. L J 557, 31 C. 397, 870, 22 C. L J 129, 39 C. 458, 19 C. W. N. 634.

——adverse possession of the limited interest is good only to the extent of that interest and not of the entire interest 2 C L. J. 105, 35 C 470.

——there can be no constructive possession of a trespasser 1925 Cal. 270, 25 C L J 487 P C.

——when trespasser is in possession for more than 12 years but pays rent as the *marfatdar* of the tenant no limitation runs 17 C. W. N 459 (2 C. L J 125, 8 C L. J 557) *Dist*

——dispossession or discontinuance of possession mentioned in [illegible] the property is submeged by [illegible] of actual possession 2 Pat. 660 P. C 42 C 858 : 21 C. [illegible] Pat L. J. 724 2 Pat L. T. 55,

——when property is attached under s 146, Cr P C possession remains with the true owner and he is not dispossessed by the attachment 22 C L J. 283, 20 C W. N 481, 26 M 410, 38 M 32, *Dist* [illegible] possession then [illegible] C W. N 1070 [illegible] n a proceeding [illegible] Art. 120 and not

——a suit against a sale under the Public Demands Recovery Act without notice under s 10 is governed by this Art 36 C L J 208

——in a suit by auction-purchaser for possession against third person he must prove possession within 12 years 22 C, W. N 319,

——a person who has been in adverse possession of a revenue paying estate sold for arrears of revenue, is a defaulter and his interest passes by the sale, the purchaser can sue him for recovery of possession within 12 years from the date of symbolical possession 44 C 412 : 21 C. W. N 537

— original dispossession is the starting point, plff's. subsequent possession under the decree of lower court cannot help him. 28 M 338

——subsequent regaining of possession followed by dispossession 1925 Cal 270.

——as against the judgment debtor delivery of symbolical possession is enough to interrupt his adverse possession. 36 C. L. J. 140 27 C W. N 259.

——the suit being time-barred the title of the plff is extinguished 18 C L J. 601.

— —a suit by non-occupancy raiyat dispossessed otherwise than in execution of decree comes under this Art. or Art. 120, 31 C. 647 F. B.

Art. 142. (Suit for possession of immovable property when the plff. has been dispossessed—12 years from dispossession)—*contd.*

——this Art. and not Art 91 governs a suit to recover property by setting aside a document, which does not require to be set aside on the ground of its being a nullity. 30 C. 433, (23 C 400 12 C 69) *Ref.*

——where the lands form a part of the emoluments of an office in a temple and the alience remains in adverse possession for over 12 years a suit by successor to the office is barred. 41 M L J. 450 · 1921 M. W N. 696 . 14 L. W 376 : 70 I. C. 477.

——an adverse decision by a Supdt. of Survey amounts to dispossession under this Art. 2 Pat. L T. 133

Art 143. (Like suit in case of forfeiture of breach of condition—12 years therefrom)

——a suit by the lessor to eject the lessee on breach of condition is governed by this Art and not by Art. 139, 11 C. W N. 661.

——a suit for possession on the ground of forfeiture or repudiation of the title of the plff. is governed by Art. 44 and not by this Art. 18 C. L. J 533.

——where in violation of a covenant against alienation a lessee alienates the property the lessor must bring the suit for recovery of possession within 12 years from the date of alienation and not from the date of surrender of possession by lessee. 24 C. W. N 1064

——the starting point of limitation is the forfeiture itself. There is nothing in the Art. as to the knowledge of the lessor 1922 M 29 · 15 L. W 164.

Art. 144. (Suit for possession of immovable property or any interest therein—12 years from adverse claim)

——Art. 144 is wider in scope than Art 142, the latter refers to suit in immoveable property only, while the former includes also interest therein 14 C L. J. 572.

——when the plff. does not set up dispossession Art 144 is applicable and not Art. 142. 97 I. C. 135.

...of possession is
...: 94 I C. 342
dispossession

gives rise to
928 Pat 353

——under this Art. unlike under Art. 142, the plff can rest content with the proof of title only. 16 C. 473, P C , 17 C 137: P. C., 20 C 560, P. C. 9 C. 744, F. B , 10 C. W. N. 630 P. C , 12 C. W N 273, 14 B 458, 12 A. 193, 6 Pat. L J. 478 · 2 Pat. L. T 481 · 62 I C 1, 97 I. C. 135.

...which neither in term
...ary, by reason
87 I. C. 386·

...Mad. 634.

Art. 144. (Suit for possession of immovable property or any interest therein—12 years from adverse claim—*contd.*

——where the possession of the deft. is originally permissive but subsequently becomes adverse this Art. will apply. 21 M. 153, 1928 Cal 582, 6 C. 311.

——when the successors of *stimirari mokarari* grant for life assert the title of permanent *mokuraridars* it is adverse possession within this Art 93 I. C 300 1926 Pat 241 7 Pat. L. T. 425.

——where the plff obtained a decree for possession of a house but did not execute it as the deft admitted his title and paid cost of the suit, the plff's subsequent suit for possession was not time-barred as the deft's possession could not be adverse 20 A. L. J. 619 : 77 I C. 107.

——in a suit by the successor to recover trust property from the purchaser in execution sale time runs from the date of such sale and possession and Art 134 or 144 applies. 40 C. L. J. 20 P. C., (38 C. 526 : 14 C. L J. 238 P. C., 44 M. 431 P. C. *Dist*) 43 C L. J. 394 : 30 C. W N. 740 . 95 I. C. 641 : 1926 Cal. 913

——in a suit by a successor of a *mohunt* to recover property from the purchaser when the predecessor sold the property without necessity limitation runs from the date of sale or the death of the previous *mohunt* 93 I. C 303 5 Pat. 341 ; 1926 Pat 239 : 7 Pat. L. T. 453

——a suit to recover the trust property is governed by Art. 144 if the property has been under an execution sale and possession retained throughout by the purchaser 46 M. 751 . 25 Bom L. R. 1275 . 74 I. C 492 P. C

——the rule that where a trustee takes possession of any property under a trust which is not valid his possession is as much adverse to the lawful title as the possession of any other trespasser does not apply to the case of a *mutwalli* as he has no legal estate in the property 55 C. 448 1228 Cal. 130 : 105 I. C. 647 . 32 C W N. 248

——there can be adverse possession against an idol's property. 48 A. 348 24 A L. J. 351 1926 All 392 : 93 I C. 652

——a suit by co-sharer for common passage is governed by this Art. 1923 Cal. 356.

——an exclusive right of fishery is an interest in immovable property and can be acquired by adverse possession 1 Pat. L R. 34 : 1923 P. 58 , 3 Pat L. T 477.

——delivery of symbolical possession does not in any way affect the possession to give a start to a fresh period against a person who is not a party to execution proceeding, 1923 Cal. 82 but it gives fresh starting point against the Jt. Dr 96 I. C. 591 : 1926 All. 691

ssession of the whole to the Jt Dr posse- : 1926 All. 692.

from Govt. against a person who pleads adverse possession for over 12 years a portion of

Art. 144. (Suit for possession of immovable property or any interest therein—12 years from adverse claim) –contd

which was against the Govt Art 141 (12 years) and not *Art. 149* (60 years) will apply. 28 C. W. N. 66

——the possession of the zeminder to chaukidary chakran lands may become adverse to the patnidar in a variety of ways 50 C. 577 28 C W N 114

——if the tenant is in adverse possession of the absolute interest for more than 12 years the landlord's right is extinguished But a person cannot alter his possession by pretending that he has no title 43 C L. J. 387 : 1926 Cal. 883 95 I. C. 622.

——where a transaction is inoperative and a mere paper transaction, a suit to recover possession ignoring the transaction is governed by Art 144, 25 Bom L. R. 1207.

——where property is a juridical person and it is transferred by a person who is only representative or manager, adverse possession commences from the date of the alienation but in case of transfer by shebait or *mohant*, adverse possession runs from his death 1 Pat 473 2 Pat. L T 352 : 67 I C. 401.

——the proprietor of a piece of land over which the members of the public exercise a right of easement does not lose his right to the land as proprietor on account of the occasional user by the public for the purpose of exercising the right of easement. In the case of land covered with water, the possession of parties will really be determi[illegible] 180 · 94 I C. 5

—— [illegible] a declaration that a certai[illegible] nobody is entitled to obstruct[illegible]

——where a partition had been effected with the consent of all the brothers and the property of a deceased brother was also divided a subsequent suit by one of the brothers for a share in the properties of the deceased brother more than 12 years after the partition is barred 27 Punj L R. 82 . 97 I. C. 819 : 1926 Lah 444

——where some reversioners take possession of the widow's properties by virtue of some arrangement, the possession was not adverse to the other reversioners so long as the widow was alive. 27 Punj L R. 27.

——where Art 144 applies no deduction of time under s 16 L Act can be allowed either in law or under the general principles of equity 26 C. W N. 364

——slight act of possession by true owner gives a fresh start 109 I C. 296 1928 Cal. 563

——under Art 144 it is not necessary for the defts to prove the exact date when the plff. became aware that he had been excluded from a right to share in the joint family properties. 42 M. L J. 364 1922 M. 369, 23 B. 137, 37 B. 84 *fol* 25 I C 573 *Doubted*

——an overt act of adverse possession may be nullified by subsequent admission of title of the owner. 1928 Lah. 317: 106 I. C. 814.

Art. 144. (Suit for possession of immovable property or any interest therein—12 years from adverse claim)—*contd.*

title of the mortgagor and set I. C. 830, 97 I C. 348 : 1926 8 L L. J. 277. 1926 Lah

——but there may be cases where a mortgagee can by a clear and unequivocal overt act bring the statute of limitation into operation 95 I. C 9 27 Punj L. R. 402 1926 Lah. 549 8 L. L. J. 277 27 Punj L. R. 235 93 I. C 934 : 8 L L J 152, 109 I C 795

——a simple mortgagee is not affected by the adverse possession [illegible] which commences after [illegible] aining a decree for sale [illegible] Mad 160, (44 C. 425, 39 M.

[illegible] who redeems the mortgage property is not adverse. 63 I. C 282 1923 P 98

——when mortgage property is redeemed by one co-mortgagor other's suit for recovery of possession or payment of his share comes under this Art. 41 M. L J 501 26 B. 500. 41 M 650 34 M. L J 528. 46 C 111 : 14 A 1 63 I. C 282.

——a suit by an heir against another person claiming as heir is governed by this Art 45 B 570.

——the persons alleging adverse possession must prove it, 35 C. L J 192 and under this Art the onus of proving adverse possession is on the deft 36 C L J 472 1923 Cal 82 6 P. L J. 478, 41 A. 660. 1923 A 399 71 I. C 265 68 I C. 230.

——adverse possession to be a bar to a suit for possession must be adequate in continuity, in publicity and extent. 44 M. 883 41 M. L J. 650 P C, 1923 Cal 82

——right of the true owner is lost by adverse possession and it is not revived by re-entry 32 C. L J 151 · 18 C W. N. 904

——right to take water from another's well is not immoveable property and cannot be lost by 12 year's adverse possession. 45 B 80.

——a claim for the possession of trees is an interest in immoveable property and is not a right of easement. 2 Pat. L T. 622 · 63 I C 264

——co-sharer's claim in ancestral property is barred after 12 years when it has been recovered by another co-sharer from a trespasser 3 Lah L J. 441.

——when the right of co-trustee to his right of management is denied the suit is governed by this Art. 105 I. C. 194 : 1927 Mad. 948 : 39 M L T. 214.

——in a suit for possession by co-sharer when the plea of adverse possession is taken Art 144 applies 47 A 389 : 85 I. C 578 : 1925 All 454

——possession of one co-owner is the possession of all the co-owners unless ouster to the knowledge of the other co-owner is

Art. 144. (Suit for possession of immoveable property or any interest therein—12 years from adverse claim)—contd

proved 32 C W. N 46, 29 Punj. L. R. 131 : 106 I. C 483 · 1927 Lah 886 107 I. C 211

——every co-owner is a tenant-in-common and possession of a tenant-in-common is not adverse to his co tenant. But a person cannot be a tenant-in-common with a person whom he never recognised as a co-tenant and probably had no knowledge of his existence. 1923 Cal. 396 107 I C 741

——if the separate occupation of a co-owner is with the tacit or express assent of his co-sharers and the co-sharers are dissatisfied with the manners in which the joint land is being held by their co-owner their remedy is to bring a suit for partition *But if the separate* possession is continued after objection from any of his co-owners and in defiance of their claim to be in joint possession then the co-sharers who are excluded and ousted from joint possession are entitled to bring a suit to obtain joint possession of the *ejmali* land. 55 C 653. 1928 Cal. 535 · 111 I. C. 74.

——mere non participation of a Mahamedan coparcener in the rents and profits for a period of 17 years was insufficient to establish adverse title when it was not openly asserted 31 Bom. L R 199 1929 Bom. 141, 1929 Lah 464, 1929 Lah. 195 *Ref.*

——where same *Tasildar* collected rent from the tenants and mutual dues were adjusted among the co-sharers and there was nothing to show that there was interruption of rent there was no adverse possession. 33 C. W. N. 553 : 49 C. L. J. 298 : 1929 Cal 337

——lease by some co-owner does not necessarily constitute the lessee's possession adverse to other co-owners 33 C. W. N. 277 : 1929 Cal. 297.

——knowledge or want of knowledge on the part of the land lord is immaterial with regard to the acquisition of limited interest by tenant by adverse claims. 105 I. C. 85.

——suit against a licensee of a tenant for possession must be brought within 12 years from the date of assertion of hostile title by the licensee 98 I. C 94.

——*overt act is necessary to* make possession of equity of redemption adverse, and paying mortgage debt and taking possession of mortgaged property may be such act. 84 I C. 374. 1925 Bom. 9.

——a more substantial user than mere throwing of rubbish and house-sweeping on the land is regarded to constitute adverse possession. 96 I. C. 452 : 1926 P. H. C. C. 246

——tying up cattle and storing heaps of dung on a vacant land does not constitute adverse possession. 8 Lah. L J. 535 : 27 Punj. L. R. 762, 16 B. 333.

——Art 139 and not Art. 144 applies to suits brought against the representatives of the original tenant after the determination of the tenancy to recover the property *leased.* 86 I. C. 933 : 1925 M. W. N. 589 : 48 M. L. J. 185 : 1925 Mad. 446.

Art. 144. (Suit for possession of immovable property or any interest therein—12 years from adverse claim)—*contd.*

——possession during attachment under s. 145 cl (4) Cr P. C. must be taken to be the possession of the party whom the M. finally declares to be entitled to possession. 30 C W. N. 541 : 95 I. C. 117 : 1926 Cal. 782.

——the possession of the receiver is the possession of the person who is found to be the true owner and consequently his possession cannot be tacked on to that of the trespasser. 1927 Mad. 61 97 I. C. 783, 7 Pat. 319 108 I. C. 89 · 1928 Pat 260

As to what are immovable properties, see, 'Property.'
As to the cases of adverse possession see 'Adverse possession'

——the head of a family cannot acquire any to family property by virtue of adverse possession 17 C L. J. 333 . 1927 P. C. 270 : 54 M. L J. 394 . 107 I. C 344 P. C

Art. 145. (Suit against depository or pawnee—30 years from the deposit or pawn).

——this Art. applies even though the property is not recoverable in *specie* 20 C W N 232, 6 C L J 535

——this Art, is a special article where the depositor seeks to recover from the depository *moveable property* deposited and time runs from the date of deposit, whereas Art. 49 is a general article for the recovery of specific moveable property or for compensation for wrongly detaining the same and time runs from the date of possession becoming unlawful

——all actions for the recovery of moveable properties come within Art 145 and no exception is made where demand and refusal make the continuance of possession unlawful 26 C. W. N. 772, 1928 Rang 309 6 R 547

——suit against the heirs of original depository is governed by Art 145 26 C W N 772 33 M. 56, 60, *Ref*

——moveable properties under this Art include money, 6 C. L. J. 535, *contra* 37 M. 175, and also includes Govt securities 7 C. W. N 476, 326, 519, 8 C W N 500

——when gold is deposited with the goldsmith for making into ornaments, a suit to recover it, comes under this Art 23 C L. J. 145 20 C W. N 232, 107 I. C. 473 : 1929 Cal. 193

——according to the Madras High Court, there cannot be a '*deposit*' unless the thing deposited was to be returned in its original condition 24 M. L J. 184

——limitation runs from the date of deposit and not from the date of demand and refusal. 20 C W. N 232; 23 C L J 145, 33 M 56.

——meaning of deposit. 44 M. L. J. 431. 72 I C 842

Art 146. Suit before a court established by Royal charter by a mortgagee to recover possession, 30 years, when any part of the debt was paid.

——when no part of the principal or interest has been paid this Art will not apply. 4 C. 283.

Art 146-A. Suit by local authority for the possession of any road or street, 30 years, from the date of dispossession

——to apply this Art. the local authority need not be the owner of the street or road 25 M. 635.

——the word "road" is not limited to the portion of the land actually used by the passersby but includes such adjacent portion as might be necessary to make a public thoroughfare. 32 C. W. N. 396 1928 Cal 485 : 113 I. C. 24.

Art. 147. Suit by a mortgagee for foreclosure or sale, 60 years from when the money becomes due.

——this Art applies to one class of mortgage in which alone a suit can be and always is brought for "foreclosure or sale", i.e. to English mortgage 11 C W. N. 1005 : 30 M 426 : 4 A. L. J 625 9 Bom L R 1104: 6 C. L J. 255, P. C., 95 I. C 100 · 1926 All 551 48 A 302 : 24 A. L. J 295 : 94 I. C. 849 : 1926 All 493.

——this Art. applies also to a suit on an equitable mortgage by deposit of title deed the mortgagee of which has the right to sue for "foreclosure or sale" 14 B. 269.

Art 148. (Suit for redemption, 60 years, when right to redeem accrues.)

——a claim for recovery of surplus profits received by the mortgagee is a relief which forms a part of the suit for redemption itself and comes under this Art. 26 C. W N. 123 · 64 I. C 75

——limitation does not make any distinction between a charge and a mortgage 63 I. C. 282, 6 Pat. L. J 680.

——a suit by co-mortgagor against redeeming mortgagor, is a suit for redemption and Art. 148 applies 20 A. L. J. 611 1922 A. 410, *contra* such a suit is not for redemption but is for possession and Art 144 applies, 1923 P. 98, such redeeming mortgagor is simply a charge-holder. 1923 L 311 · 71 I. C. 847, 69 I C. 1004

——a second mortgagee in a suit for redemption does not seek to recover his dues, so Art 132 does not apply but his suit comes under this Art 5 Pat 513 : 94 I. C. 284, 1926 Pat. 337, (14 C. W N 439, 1925 Mad. 150) *not fol.*, (9 C. W. N. 728, 2 Lah L. J 419, 1923 All 271) *fol*

——the period for resumption is 60 years only if the deft has no better title than that of a mortgagee 1925 Lah. 53

——where the acknowledgment is made after 60 years it will not avail the plff suing for redemption 87 I. C 699 · 27 Bom L R. 467 : 1925 Bom. 339, 27 C. 1004 *fol*

——"prescribed period" really means a period of 60 years from the date of the mortgage and a right to sue cannot be revived by a subsequent enactment. 87 I. C. 699. 27 Bom L R 467 1925 Bom. 339.

——where a mortgage deed provided for redemption after 10 years, and gave possession to the mortgagee and the usufruct was to be enjoyed in a particular manner and more than 60 years after the expiry of the date fixed for redemption the mortgagor sued for redemption, the suit was barred 1925 Cal 862 : 86 I. C 353

Art. 148. (Suit for redemption, 60 years, when right to redeem accrues)—*contd.*

——where a usufructuary mortgage provides that the mortgagor can redeem on payment of the money after the mortgagee gets possession, time runs under Art. 148 only after possession is given to the mortgagee. 90 I. C. 763 (C).

——a suit by a mortgagor to recover possession of the mortgaged property from an alienee of the mortgagee who had even constructive notice of the mortgage is governed by this Art and not by 134 27 Bom L. R 661 89 I. C. 189 1925 Bom 417

——this Art. applies to the mortgage of *lekha mukhi* class, time running from the date of mortgage 101 I. C. 549; 28 Punj L. R. 123: 9 Lah L J. 63.

Art. 149. (Any suit by or on behalf of the Secretary of State, 60 years, as in the case of suit by private person)

[illegible]

22 L W 546 1926 Mad 125.

——a suit for possession by the Secretary of State under s 9 Specific R. Act, or otherwise is governed by Art. 149 and not by Art. 3, 87 I C 1002, 1925 Sind 275

[illegible] t emerged out of [illegible] he has to prove [illegible] 617 20 C W N [illegible] C [illegible] ess an individual [illegible] ccupied property [illegible] ors for embezzle- [illegible] s is governed by [illegible]

——when in a suit by the purchaser from Govt. the deft. pleaded adverse possession of 12 years held that the plff was not entitled to claim to be in the position of the Govt as against which under this Art a title by adverse possession would be acquired by only 60 years adverse possession 28 C W N 66. Similarly in case of suit by grantee from Govt, 12 years' limitation will apply 97 I. C. 253 · 1926 Mad 1155.

——title by prescription can be acquired against the Govt only by the adverse possession for 60 years 7 Lah 210 96 I C, 457 1925 Lah. 437

Art. 156. Appeal under C. P. C. to the H. C. except in cases provided in Arts 151 and 153, 90 days from the date of decree or order

——90 days runs from the date of decree and not the date of signing it. 94 I. C. 121.

Art. 158. (Application to set aside an award, 10 days when the award is submitted.)

——the period of limitation for filing objections to an award is to be reckoned from the date of notice of filing. 19 A. L. J. 404.

——decree on award passed before the expiry of 10 days after filing is invalid. 1921 M. W N. 793, 24 O. C. 234.

——the court cannot pass a decree in term of the award within 10 days. 1922 Mad. 179: 71 I. C. 266, 9 M. L. T. 391, 1922 M W. N. 1232

——when special case is stated limitation runs after the court expresses opinion. 48 B. 663: 84 I. C. 378: 1925 Bom. 22.

Art. 163. (Application to set aside a dismissal for default of appearance etc, 30 days from the date of the dismissal.)

——the period of 30 days cannot be extended by adding the time for obtaining copy of the order. 93 I. C. 1023.

Art 164 Application by deft. to set aside exparte decree, 30 days from the date of decree or its knowledge.

——as the provsions of Or 9 R 13 C. P. C. does not apply to proceedings on the Original Side of the H. C. so an application to set aside an exparte decree filed there is not governed by this Art 32 C W N. 411, 1928 Cal 864.

——the deft. in this Art includes his legal representatives. 38 M. 442

——knowledge of the *particular decree* is necessary, there must be a clear conception of decree, brother's knowledge is not sufficient. 38 C 394, 12 Bom. L. R. 462

——the term "knowledge" means a certain and clear perception of a fact, the fact being the decree in the suit, the expression knowledge of the decree means knowledge not of a decree but of the particular decree sought to be set aside. 13 C L. J. 221

——knowledge of the particular decree against particular person in particular court of particular amount is necessary. 47 B. 485, 92 I. C. 295, 99 I. C 621, 1927 Mad 381.

——but when the deft was served by registered post and wired to the court for an adjournment which was refused, limitation ran from the date of decree and not from the knowledge of it 27 Bom L. R 690 · 89 I C 223 · 1925 Bom 444

——there is no distinction between non appearance at the first hearing or at an adjourned hearing 23 C 738 F. B, 21 C. 269, *overruled* 2 C. W. N. 693, 31 M. 505, 20 B. 380.

——s 5 does not apply to such an application. 1922 Lah 266: 66 I C. 270.

——no time can be extended under s. 151 C. P C. 1922 Pat. 61: 65 I. C. 341, 43 M 94 F. B.

——substituted service is justified under Or. 5 R 17, only when it is shown that proper efforts were made to find out the deft. 13 C L J. 221.

——when the substituted service is found to be false it cannot be taken as duly served and application from the date of knowledge

Art. 164. (Application by deft. to set aside exparte decree, 30 days, from the date of decree or its knowledge)—*contd.*

of the decree lies 69 I. C. 467, 1923 Nag. 13 : 69 I. C. 549, 7 Lah. L. J. 448 · 1925 Lah 637.

——in case of substituted service the starting point is the date of the exparte decree 7 Lah L J 448 : 26 Punj L. R 704 1925 Lah. 639 . 92 I C 272, 101 I C 651 1927 Mad 487, 52 M L J 512

——*the word "duly" is not equivalent to personally.* 102 I. C. 243 : 1927 Mad 507 · 52 M L J 477, 1928 M 655 108 I C 889 54 M L J 448

—— [illegible]

Mad. 6[illegible]

Judge, [illegible]

that su[illegible]

personal service and must be deemed to be due service within this Art and time for setting aside an *exparte* decree runs from the date of such service 51 M 860 110 I C 490 1928 Mad, 815 . 55 M L. J. 565 . 1928 M W N 49, (1927 Mad 507 . 102 I. C 243 52 M L J. 477) *applied.*

Art. 166 Application to set aside sale in execution, 30 days, from the date of sale.)

——Art 166 applies to all applications to set aside sale on what ever grounds and not only to application under Or 21, r 90, 6 Pat. L. J. 319 : 2 Pat. L T 401, 45 B 174

——Art 166 and not Art 181 applies to an application to set aside an execution sale on the ground of illegality or irregularity under s 47 C P C or Or 21 r 90 C P. C, 1922 M W N 176 1922 Mad 95, 43 M L J 184 . 31 M. L T 135 1922 Mad 417, 3 Pat. L. T. 501 : 1922 Pat. 209, 45 M L J. 829

——an application to set aside a sale on the ground that notice under Or 21 R 22 C P C was not served on the Jt Dr is governed by this Art 46 C L J 579 105 I C 65

——application to set aside sale on the ground that properties should have been sold in a certain order in which they were not sold comes under this Art 1928 Mad 140 106 I C. 242

——the present Art is comprehensive enough to cover all applications under C P C for setting aside sales on any ground. 18 C. W N 1266, 27 M L J 605

——fraud subsequent to sale need not be proved to apply s 18 L. Act 16 C W N 894

——this Art. does not apply where the execution sale is a nullity 26 M L J. 267 23 I. C 251, 38 M 1076

——"date of the sale" is the date on which the sale is held and not the date of its confirmation. 95 I C 549 . 1926 Bom. 335 28 Bom. L. R 510

——a minor applicant is not entitled to the benefit of s. 6 L. Act 15 C W. N 845.

——the court can extend time to deposit money under Or. 21, r. 83 with the consent of parties 2 P. L J. 164.

Art 166 (Application to set aside sale in execution, 30 days, from the date of sale)—*contd.*

——when the execution sale is fraudulent and collusive Art 181 (3 years) will apply. 74 I. C 202.

——the Art. governs an application under s. 173 B T Act 1925 Cal 351

——the period of 30 days cannot be extended by the provision of s. 5 92 I. C 839.

Art 173 Application for review of judgment 90 days from the date of decree or order

——application for review must be made within 90 days, it is no matter that the Jt. Dr had no knowledge of the order, he may apply under s 5 L. Act for an extension of the period on the ground of want of such knowledge. 1919 All 485 *but see below.*

[illegible] view from the [illegible] be knowledge [illegible] by this Act

Art. 174. (Application to certify payment of adjustment, 90 days, when the payment or adjustment is made)

——this Art. is applicable only to a case under Or 21. r 2 (2)' that is, when the Jt Dr seeks to inform the court of payment out of court. This period does not govern an application by the D Hr himself which is 3 years. 26 C. W. N. 529 · 35 C. L. J. 71.

——payment of mortgage decree must be certified under this Art 12 C L. J 65, 28 M. 473 F. B, 30 A. 248

——fraud on the part of the D. Hr. extends the period 30 C L J 248, 40 B 333, 34 B. 575 *Contra*, fraud does not affect the law. 16 C W. N. 923, 24 C. L J. 462, 36 M. 357

——a plea of adjustment by relinquishment cannot be set up after the period of limitation had expired for the satisfaction of such an adjustment. 26 Punj. L. R. 250 : 87 I. C. 635 : 1925 Lah. 566

For other cases, see "C P C. Or 21 r. 2."

Art. 175. (Application for payment of the amount of a decree by instalment, 6 months, from the date of the decree)

——the date of a decree is not a *terminus a quo* of an execution application if there is an agreement between the parties altering the date 1923 Lah. 381 : 73 I. C. 671

——where a decree was passed on 23-3-06 which was sought to be executed by an application filed on 21-5-18, and an adjustment had been effected between the parties on 27-1-12 by which the balance was made payable in instalments and this had been recognised by an order in a previous execution proceedings, s. 41 C. P. C. barred the application in spite of the adjustment. Even if the order was one under Or 21, r. 11, the application was clearly barred under Art 175 L Act. 2 P L. T. 80.

Art. 176. Application by legal representative of deceased plff. or appellant, 90 days from death.

——if the appellant died before amending Act 26 of 1920 came into force on 1-1-1921 the period would be 6 months 36 C. L. J. 263 · 70 I C 370 · 1922 Lah 491

——where on the death of a sole plff. before trial the court dismisses the suit for default of appearances, the order is unsustainable and it is open to the legal representative of the deceased plff. to apply within the time prescribed by Art 176 to be made a party. 17 C W. N. 829 18 C. L J 9 : 35 A 331 11 A L. J 625 1923 M W. N. 566 : 19 I C. 526 P. C

——ordinary period of limitation can be extended where the applicant is the legal representative of the deceased plff living in a different province and had no knowledge of the death. 1929 All 634.

Art. 177. (substitution of deft. or respondent, 3 months)

——the Amending Act 26 of 1920 (3 months) applies to this Art. also by s 2 of that Act. 50 C 549 . 75 I. C. 81 , 24 Cal 74, 1923 Bom.

Art so the period
69 I C 748, 4 Lah.
3 , 1926 Mad. 65 . 92

——the time allowed after Act XXVI of 1920 but prior to to the Act XI of 1923 was 6 months and not 3 months 92 I C. 330 : 1925 All. 77

——when a person is not party to a suit or appeal but on his death his legal representative is sought to be made party Art. 181, 3 years applies and not Art. 177, 73 I. C 387

——mistake of legal interpretation is sufficient cause within the provision of s. 5 L Act to excuse delay in substituting the respondent. 29 C W. N. 472

——this Art is not applicable to execution proceedings. 99 P. W R. 1911 10 I C. 405 . 174 P L R 1911 *contra*, 62 I. C 52

Art 178. (Filing of award, 6 months, from the date of award).

——it is not merely the particular date inserted in the award
'he time when it is given to
and is handed to them, so
9 C 575, 21 W. R 248.
beyond 6 months after the
date of its being given, is barred under Art 178 and in the circumstances of the case ss 5 and 12 did not save limitation. 38 A 85 · 31 I C 899 13 A L. J 1115

——the time for an application to file an award begins on the date the award is delivered to the parties and not the date of signature by the arbitrators 48 I. C. 711

Art. 179. Application for leave to appeal to Privy Council, 6 months from the date of decree

——time required to obtain the copies of the decree and judgment cannot be excluded 15 M. 169 . 19 B. 301 , 3 A L J. 165 : 28 A 391 : 1 A. 644, *contra*, 1 P. 429 : 3 P. L. T 289 . 1922 Pat. 193.

Art. 179. (Application for leave to appeal to Privy Council, 6 months from the date of decree)—*contd.*

——*time occupied in settling and drawing up the decree cannot be allowed* 19 B 301.

——*minority has no privilege to extend time.* 18 M. 184

Art. 180. (By a purchaser in execution of a decree for delivery of possession, 3 years, when the sale becomes absolute.)

——*when the auction was confirmed before the enactment of this Art but the application for possession was made after the coming into force of the Act of 1908, the application is governed by this Art* 27 I. C. 420.

——an appl

ate when the sale becomes

M. L. J. 311 · 17 I. C. 242 : 1912 M. W. N 1136.

——where an application to set aside a sale made after the *statutory* period after the confirmation of sale was partly admitted and *partly* disallowed, *held* in an application for delivery of *possession by the D Hr.,* time is to be computed from the date when the application under Or. 21 R. 90 was disallowed and not *from the* date of the confirmation in the first instance 43 M. 185 : *26 M L. T. 459 54 I. C 66* 38 M L. J. 1 F B.

——in computing the period of limitation under this Art the time during which application under Or. 21 R. 90 for setting aside the *sale is* pending will be excluded but not the period of any regular *suit* 96 *I* C. 657 · 1926 Mad 857 : 51 *M.* L. J. 126 : 1926 M. W. N 563.

——an application made out of time but held to be in continuation of previous application made in time is not barred 43 I C *155 1918 M W N* 214 · 7 L. W. 16.

——an application for delivery of possession of *immoveable* property purchased by a person in execution of a decree falls under *this Art.* and must be made within 3 years of the date when the sale

it period an order *for*

as not effected owing

91 *I. C.* 485 : 50 *M. L*

Art 181. (Application for which no period is provided, 3 years, when the right accrues).

——where the right to apply for final decree is suspended by any order of the

barred by limitation even if

minary decree. *25 C. W.*

I. C. 175, *contra.* 18 *N.*

——amended application for a final decree is in continuation of *the existing* application and saves limitation. 20 A. L. *J.* 580 : 68 I. C. 175, *contra.* 20 A. L *J.* 640.

Art. 181. (Application for which no period is provided 3 years, when the right accrues)—*contd*

——a mortgagee-decree-holder must apply for to final decree within 3 years against the non-appealing defts hagainst whm separate amount has been decreed. 43 A 320

[illegible]

[illegible] decree final in a mort, [illegible] L R 459 73 I C 187, 39 A. 641, 38 A. 21, 178,

——an application for the preparation of a final decree is not an application for the execution of the decree but is an application to be governed by this Art 1929 All 677

[illegible]

——an application for a personal decree under Or 34 r, 6 C. P. C. is governed by Art 181, 52 C. 828 20 C W. N 678 89 I. C 1 1925 Cal. 834 F. B, 42 C 294 *overruled*, 42 M 52

——when a sale is set aside and order is made for the refund of the [illegible] gainst the mortgagor or [illegible] properties is governed [illegible] 591 9 A. L J. 569, [illegible]

——Art. 181 and 182 apply to an application for a final decree for purchase after a consent decree which is a preliminary decree in a suit for foreclosure. 37 I. C. 802 (C)

——when a mortgage decree provides for the payment of the prior mortgage as condition precedent without specifying the time such payment must be made within six months. 43 A. 320.

——a decree not executed for 3 years is a dead decree which cannot be revived by an application for amendment. 59 I. C. 186 (*See contra.*) 34 C. L J 397.

——the right of the decree holder to apply accrues as soon as he *receives payment and he has to apply to the execution court within* three years to record the payment. 26 C. W. N 529 : 35 C. L. J. 71, 45 C. 630 : 23 C W. N. 320 *Ref.*

Art. 181. (Application for which no period is provided, 3 years, when the right accrues)—*contd.*

——when the Jt. Dr. applies for the recovery of property not covered by decree it is governed by Art. 181. and not Art. 165 24 Bom L R. 771 68 I. C 349.

...cution sale on the ground ...overned by this Art. 97 I. C.

... e rigidly construed 18 N L R 58 68 I C 919.

——this Art. does not apply to application for probate, letters of ... 6 C. 707, 17 M. 373, 7 B. ... I C. 130.

... execution is a revival or ... 36 M. 553, 27 A. 334, P. C. ... when it is new one Art.

... different e g. ... of the Jt ... or revival ... 698

——essentials of cotinuation of prior application 1926 Pat 129

——striking off execution application does not affect 8 C 51 P. C. 5 A 243

... stayed by injunction or prohibi... is a revival, 42 A 564, 56 ... 397, 1924 Mad 210: 45 M ... 328, 3 P. L. J. 103, 7 I. C 886, 17 A 425, 49 A 276 · 25 A. L J 201 : 100 I. C 692 : 1927 All. 16 F B. so also in case of suspended execution. 20 C. W N. 686, 26 M. 780, 30 C 407 36 M 553 : 14 I. C 264 but not so when the execution case is not suspended even if a claim is preferred. 1926 M. W N. 317.

——there is essential difference between an application for the execution of a decree and an application to revive a previous application for execution. S 15 applies to the former and not to the latter class. 49 A 276. 100 I. C. 692 : 1927 All 16 F B.

... fresh application or ...on of fact to be ... case 49 A

——where an execution application is restrained by injunction after the obstacle is removed, the parties must apply for reinstatement 89 I C 992

——an application under Or. 21 r. 91. to set aside a sale of a tenure which has already been sold for arrears of rent is governed by this Art 14 C. W. N 1096.

...n under s 144 C P. C. is gover... W. N. 564 : 24 C. L. J. 467, 42 M. ... 1924 Pat 33, 38 A. 339, 30 I. C 650, 5 ... 8 Bur L T. 165, ... 451, 21 C. W. N. 564, 16 I. C.

Art. 181. (Application for which no period is provided. 3 years, when the right accrues)—*contd.*

238, 54 I. C. 664, 46 I C. 328, 2 P L. J 206 39 I C. 653 96 I. C. 804: 1926 Lah. 685, 44 I. C 301, *Contra*. Art. 182 applies, 45 B 1137: 19 Bom L. R 632, 1917 M. W N 643. 2 Pat 277 72 I C 912, 3 P. L. J. 367 *Dist.*

——when a decree reversing that of the trial Court is affirmed in second appeal limitation for restitution runs from the date of the decree in second appeal 92 I C. 960. 1926 Cal. 981, but it has been held by the Special Bench of the same H. C. that limitation for restitution runs from first appelate decree which gives the party right of restitution. 32 C W N. 971. 1928 Cal 646 Sp. B

——an application under s. 47 C P C is governed by this Art. 1927 Cal 57: 97 I C 697

——Or case Whether Art 181 applies to application for leave
ion of H. C in

ition to enforce
limitation for

——when a person is not a party to a suit or appeal but on his death his legal representative is sought to be impleaded Art. 181 applies, 73 I C 387

——when a decree is to be executed unless it is paid within 6 months, application for execution is governed by Art. 181, 21 A L. J. 861.

——an application for transposition of parties in a suit relating to trust property falls under this Art 40 M L J 208 1921 M W. N 108 62 I. C 360

——to apply limitation to the execution of a decree the decree must be capable of execution 25 C W N 337: 33 C L J. 109 40 M L J. 1 6 Pat L. J 132: 23 Bom L R 721 P C

——a certificate by the decree holder of a payment made to him under Or. 21 R 2 (1) is not an application under this Art 33 C. W N 267 27 A L J 33 31 Bom L R, 389 1929 P. C. 19. 114 I C 581 P C.

——to apply limitation the decree must be in existence, if the decree holder ... ng the decree there is no
rt L T. 770
ler ss. 36 and 37 of the
151 P. R. 1919. 60 I C.
123 12 L. W 535 1924 Lah 331. *contra*. It has no application to proceedings in insolvency. 29 I C 168; 17 M, L. T 347

——an application under s. 36 of the Provincial Insolvency Act is not governed by Art 181 L Act 1925 Mad 172.

——an application for ascertainment of mesne profits under Or 21 r 12 is not one for execution and Art 181 applies to it 37 M. 186: 13 M. L T 79 1913 M W. N. 114: 18 I. C 586.

——an application for delivery of possession by an auction purchaser must be made within 3 years from the time the right to apply accrued which is the date when the sale was confirmed. 1926 M. W N. 317.

Art. 182. (Execution of decree or order of civil court not provided for by Art. 183 or s. 48 C.P.C 3 years).

——a minor obtaining a decree may either apply through his guardian for execution, or may wait until attaining majority. 9 C 181, 23 C. 714.

——when the original decree is incapable of execution time runs from the date when a proper decree capable of execution is drawn up. 34 C L J 397, 17 A 39, 25 C W N. 337 : 33 C L. J. 109 : 40 M L. J 1 23 Bom L R 721 P C.

——application for ascertainment of mesne profits awarded by decree comes under this Art. as it is a proceeding in execution 45 B 819 61 I C. 448, 3 Pat. L. R. 33 : 4 Pat. 57 : 84 I. C. 272 : 1924 Pat 781.

——an application for the ascertainment of mesne profits awarded by a decree prior as well as subsequent to its date, is not a proceeding in the suit but a proceeding in execution and so comes under Art 182 25 Bom. L. R. 810 · 73 I C. 233.

——decision in a criminal court holding the D Hr. auction purchaser as trespasser does not extend limitation on the ground that Jt Dr had no saleable interest. 40 C. L. J. 246.

——an application for execution can be considered as a continua- ... ilar in scope and ... : 71 I C. 963, 26

——when an execution sale is set aside at the instance of the Jt Dr or an execution case is stayed, the subsequent application for execution is treated as one for continuation of earlier application. 64 I. C. 849 : 35 C. L. J. 135, 1923 All 471 : 71 I C 963, 74 I. C 279 (C), 1926 Pat 143.

——if the first application for execution is *ab initio* a bad ... Dr. a subsequent application ... Dr. cannot be an application ... C 638. ... delay on the part of the Dr ... for execution to the record ... inuation. 1922 All 433 : 65 I C. 78

——filing of supplementary list of properry may be a continua- ... I. C. 911 (C), 22 C. W. N. 540 · 27

... ecution has been dismissed for ... not be construed as one in con- ... 22 C. W. N. 766 : 45 I C. 712.

——but where the execution proceeding is struck off for no fault of the D. Hr. the court can revive the proceeding. 1926 All. 331 24 A L J. 437 : 94 I. C 613.

——an application in execution can be construed to be a continuation of a prior one, only if its scope is the same as that of the prior one. 99 I C 886.

Art. 182. (Execution of decree or order of civil court not provided for by Art. 183 or S. 48 C. P. C. 3 years)—*contd.*

— —where a sale is set aside under Or 21 R 90 C. P. C. and ... n in execution for the same relief ... is only one in continuation of ... made within three years of the setting aside of the sale, it would be in time. 90 I. C. 799 (Pat)

—*an application for execution may be treated as one in* continuation or revival of a prior one similar in scope and character the continuation of which has been ... of objections subsequently proved ... reason of an injunction or like ... C. L. J 84 : 87 I. C 561 · 1925 Ca 295 : 71 I. C 332.

—when an application for execution is suspended by injunc- ... bar imposed at the instance of ... a continuous one. 18 C W. N- ... 13 I. C 149 (C), 14 C. L. J.

—where the order of stay of execution of a decree contained the wards "until the decisions" of regular suit, it did not include the pendency of an appeal from the decision of that suit. 94 I C. 1005. 1926 All. 409.

... the decree holder to sell mortgage ... ected but the contention is up- ... or execution is a continuation of ... Pat. 114 : 99 I C 865.

—disposal order directing consignment of the papers to the record room is not a final decision of an execution petition. 49 A. 509 : 104 I. C 116 1927 All. 165 25 A L J 249, F B 1927 All 16 · 49 A 276 : 100 I. C. 692 25 C L J 201 F. B. *fol.*

... y be deemed to be one to ... ceeding when the latter was ... which the D. Hr. had no

—an application for assessing mesne profits does not keep the decree alive against surety 47 B 778.

—application for execution for securing management of trust property by turns within three years of the end of the turn is within time 1925 Mad 218.

—under Art. 182 an execution application against some of several Jt Drs must be deemed to be one against all of them and notice under Or. 21 R. 22 is not necessary 88 I C. 1039 (C).

—*where the case is not one of execution proceedings being* obstructed or delayed by suits being brought to elucidate the rights of the objector or for other matters asked and the case is ... e-holder was not by reason ... once, but on the footing ... e application for execution ... that the decree is wholly

Art. 182. (Execution of decree or order of civil court not provided for by Art. 183 or S. 48 C. P. C. 3 years)—*contd.*

unsatisfied is governed by Art. 182 and not by Art. 181. 40 C L J. 246 : 1925 Cal 207

——where a decree holder purchases property in execution of ... separate ... the re ... ust be ... 50 A.

——if an instalment decree provides that the decree holder will be entitled to sue for or to take out execution for the entire amount on default of any one instalment the entire amount becomes due on such default and time begins to run from such date. The mere fact of the decree-holder not enforcing the right under the bond by attempting to realise the entire amount which falls due on default of one instalment does not in itself amount to a waiver for all time to come. Payment and acceptance of an overdue instalment is not tantamount to giving up the rights of the parties under the decree, or a modification of the decree. 85 I. C 784

——where a final decree for partition directs one set of defendants to pay the costs of another set of defendants, but the decree is appealed against by the plaintiff and the different sets of the defendants are made parties to the appeal and the appeal is dismissed limitation for the recovery of the costs awarded to one of the sets of defendants against another starts from the dismissal of the appeal. 1926 All. 145.

——application by one of the transferor of a decree if saves limitation as regards all. 45 M. 35.

——where an execution petition is allowed without any objection of its being barred the Jt Dr. cannot subsequently reagitate the question 2 Pat. 159 74 I. C 130.

... substance an application ... C. may not apply. ... 2 Pat 277 : 1 Pat. ... 23 Bom. L R. 480 ... age decree for sale ... Art. 181. 102 I C

Cl 1, date of the decree—

——'date of decree' is the date of judgment and not the date on which payment of court-fee is made to validate the decree I C W N 959 : 19 I C. 410.

——a timebarred decree cannot be revived by amendment 59 I. C 186 (C).

——3 if the decree is incapable of execution time runs from amendment 18 C W. N. 266 : 21 I. C 615.

——Cl. 1) contemplates only a decree or order capable of being enforced in execution, if a further application is necessary to make

Cl. 1, date of decree—*contd.*

the decree executable the Art. 181 applies. 40 M. L. J 1 · 25 C. W. N. 337 · 6 P L. J. 132 33 C L. J. 109 · 192 M. W N 21 **P. C.** 42 I. C. 666 : 1917 Pat 253 *overruled.*

——'date of decree' is the date on which judgment is pronounced and not the date on which the decree is actually prepared and signed by the court. 1 C. W. N. 93, 25 C 109, 10 C L. J. 457, 5 Pat L J. 490 : 57 I. C. 531 1 Pat L. T 394 20 C. W N 950 : 1 Pat L. J 359, 23 B. 442, 6 I. C. 43, 13 C 104, **F. B** *Dist.*

——in partition case delay in furnishing stamp paper does not extend the time. 72 I C. 646 (C), 1924 Cal 351

nst an order of dismissal
ed, time for execution of
the date of the appellate

——in executing an *ex-parte* decree time taken by the deft in appeal to set aside the decree, is not to be deducted 18 N. L. R 190 . 68 I C 728.

——a person who pending an appeal stands surety for the Jt Dr and thereby enables him to obtain a stay of execution, is not a joint Jt Dr within Cl 1. An application for execution against him will not save limitation as against Jt Dr 85 I C. 657.

——the period of 3 years runs from the date of the decree and not from the date of the order to dismiss the appeal for want of prosecution 30 M L. T 96 26 C W N 858 49 C 203 24 Bom. L R 659 **P. C.**

——where an *ex-parte* decree having been passed against three defts. it was set aside and another decree was passed in favour of one of them, limitation for execution against the other two defts runs from the date of the first decree 46 C 25 50 I C 15

——a mortgage decree was passed against several defts but *ex-parte* against one deft on whose application the decree was set
passed, held an application
s governed by Art 182 but
ie date of the later decree
R 467 9 I C. 975 2 M.
W. N. 177 P. C.

——in a partition suit execution application by the deft gives a fresh starting point in favour of the plff 43 M L J 379 1922 M. W N 518 1922 Mad. 456

——where a portion only of the amount decree is left to be ascertained in future, limitation for execution of the whole decree runs from the date of ascertainment 36 M. 104 10 I. C 552 . 1911 M. W. N. 93.

Cl 2, of appeal.

——'appeal' includes an appeal to the Privy council and 'appellate court' *includes the Judicial Committee of the Privy Council,* 7 C. 620 9 C. L. R. 402, 2 A. 763, 4 A. 137.

Cl. 2, of appeal—*contd.*

——it includes an appeal against an order passed in review of the original judgment. 4 A. 274, *Contra.* 18 N. L. R. 190 : 68 I. C. 728.

——application for execution made three years after the decree is not time-barred, if made within three years from the date of the order or appeal confirming the dismissal of the application by the deft to set aside the *ex-parte* decree. 8 C. 248 ; 10 C. L. R. 141. 16 B 123, *Diss.*

. . . for costs and the . the decree . e decree but . wal will not

——if an order in appeal against an order passed in execution be in the nature of a decree and capable of execution, time runs from that order 5 A. 236.

——a revisional order of the High Court is not an order on appeal 36 M. 135

. . . th respect to part, it saves the . 19 C. 750, 22 B. 500, 26 M 91 . P. 712 : 1924 Pat 160 15 C W. . C.

——even if appeal is preferred against a portion of the decree the decree of the appellate court supersedes the decree of the first court and there is then only one decree to be executed and time runs from the decree of the appellate court. 53 C. 901 31 C W N 262 : 1927 Cal. 89 97 I C. 838, 25 C. 594 F. B. *fol.* 2 C L. R 471, 14 C 26, 19 C. W. N 287, 20 C W. N. 686 *Diss from.*

——in case of joint decree, if appeal is preferred by some, it will save the time against others. 25 C. 594, 20 C. W. N 178. 4 Pat. 844. 1925 Pat. 585, 33 B 39 *fol.* (5 P. L. J. 731, 36 A. 350 35 A 284 *Dist*) 6 P L J. 27 *Ref.*, but where the decree is not joint the non-appealing party will not get any benefit. 13 A 1. F. B. and the court is to see whether the original decree was joint or several . . . imperilled the whole decree . adras and Bombay d the final decree is

——t . . . of the instalments under an instalmer . ellate court should be compu . of the decree 49 B 305 : 27 B).

——the meaning of the words "where there has been appeal" in Art. 182 (2) is where there has been an appeal against the decree or orde for the execution of which the application is made So unde he circumstances of the case an appeal by one deft did not prev t limitation for an application for execution running against o ers. 19 C. W. N. 287 : 22 I C. 685.

Cl. 2, of appeal—*contd.*

——an order of the Registrar of the Privy Council dismissing an appeal for want of prosecution does not come within this clause 36 A. 284 : 18 C. W. N. 740 : 19 C. L. J. 574 . 16 Bom. L. R. 360 : 23 I. C 644 P C, also an order of the Privy Council dismissing an appeal for want of prosecution does not extend the period 36 A. 350 P. C, 34 A. 154. *Reversed.*

——where a compromise petition to the appellate court prayed to strike off the appeal and the court dismissed the appeal by a separate order the original decree could not be held to be superseded by a fresh decree or set aside by the compromise 21 I C 639, 14 M. L T. 574 ; 25 M L J. 586

——but when appeal is dismissed, time is extended under the clause. 9 C 100, 16 C. 250, 6 A 438, 7 A 887, 30 A 385.

——time runs from the order of the appellate court even where that order is not capable of execution 6 Pat. L. J 27 2 Pat L T. 28 : 59 I C 896, 16 I. C 370 (C)

——but where appeal abates by operation of law for non-substitution of any of the parties there is no order of the appellate court. 5 Pat L. J. 731 · 2 Pat L. T 49, but see 4 Pat 844 1925 Pat. 585.

[illegible] appeal is not a decree [illegible] rom subsequent final [illegible] C L. J. 111 104 I. C. [illegible]

——when appeal abates the time is not extended 20 A 124, but it is extended in case of compromise 4 Pat 844 1925 Pat 585, 33 B 844 : 22 C. L J 333 20 C. W. N 178 . 31 I C 426.

——the order directing the return of a memorandum of appeal is an order of "the appellate court" within this clause 43 M. 835.

——the word "appeal" in Art. 182 (2) does not mean *bona-fide* appeal. Limitation runs from the date of dismissal of an appeal dismissed for non-payment of court fees 74 I C 679, 1924 Cal 349.

——an appeal against order of review being incompetent in law cannot save limitation 1923 Cal 288

——an order directing the return of the memo, of appeal for presenting to the proper court is not a "final order" nor is the court an "Appellate Court" within Art. 182 (c) and time for execution of the decree does not run from the date of such order. 43 M. 835 . 1920 M W N. 587 60 I. C. 267 . 39 M. L J. 431

——where the decree was sought to be reviewed and on the [illegible] ch an [illegible] s not [illegible] 8 [illegible] elimi- [illegible] al is

Cl 2, of appeal—*contd.*

——an application to set aside an *ex-parte* decree does not keep the decree open because an appellate decree is a decree on appeal [illegible] is not to be regarded as an [illegible] 54 C. 1052 1927 Cal. 904 [illegible] J. 119, 16 B. 123) *Fol.* 8 C [illegible] *Dist.*

if an appeal in any way imperils the decree sought to be executed the date of final disposal of the appeal will be the date from which time will run, it is not necessary that the appeal should be against the decree sought to be executed. 8 Pat. L. T. 379 : 1927 Pat 215 · 103 I C 688. 6 Pat 780, 110 I. C. 483 : 1928 Pat. 581.

Cl 3 review of judgment.
Cl 4. amendment of decree. }

——further time is to be allowed only when the application for review is heard and fresh decision pronounced. 44 I. C. 575. 3 Pat. L J 119.

——under the old law 'review of judgment' included amendment of decree 25 C 258 : 2 C. W. N. 219, 9 C. W. N. 605.

——execution is not suspended by reason of the pending of the appeal against the order of review. 68 I. C. 727.

——where the decree is modified in revision by the H C limitation runs from the date of the order passed by the H C in revision 22 C. W N. 158 : 44 I. C. 141, 36 M. 135 : 12 I. C. 38. 1911 M. W N. 198.

——but the date of rejection of a revision petition does not give a fresh starting point for the execution 153 P. W. R. 1913 · 20 I. C. 563.

——when the decree is not capable of execution time begins to run from the date of amendment though it is made subsequent to the time prescribed 34 C. L. J. 397 : 64 I. C. 622.

——where a decree capable of execution becomes barred its amendment cannot extend the period of limitation 5 Lab L J 398 73 I C 461, 59 I C. 186 (c), 32 I. C. 744 (c).

——date of amendment of a decree is the date of passing the order of amendment and not the date of actual amendment. 35 I. C. 583 3 Pat. L. W. 447.

——when a new decree is passed on the basis of an arbitration time runs from the date of that decree. 16 C. W. N. 34 . 11 I. C 457

——the amendment of a rent decree as regards the rate only and not the amount, does not give a fresh start of limitation 2 Pat L J. 236 39 I C. 624 : 3 Pat. L. W. 435.

——the words "date of amendment" in cl (4) refer to the date of court's order directing the amendment and not the date on which the decree is actually altered or corrected 49 M 807. 95 I C 196 · 1926 Mad. 747, 50 M. L. J. 554 : 23 L W. 692, 36 I. C 533 *Fol*

Cl. 5. date of application or step in aid of execution.

——the consent of the D Hr. to the postponement of sale, upon the application of the Jt Dr is not an 'application' within this clause. 28 M 40.

——even if the application for execution, duly made, is dismissed, it will save limitation 11 B 467

——the application' need not be in writing, an oral application is sufficient. 38 M. 695, 20 B 179, 22 B 722, 3 A. 139.

——the date of application is the date when it is made, 1 C. W. N 160, 13 C L J 26, 30 C. 761 8 C W. N 251, 22 A 558: 22 B. 722.

——the application should not be materially defective. 2 C. W. N 556 : 25 C 594, F B

——an unstamped execution petition is not necessarily invalid, if action be taken on it, it saves limitation 1928 Mad 142 106 I C 485

——an insufficiently stamped application for execution may keep the decree alive. 6 M 181, so also an application in which the name of the deceased Jt Dr is inserted by mistake 17 M 76 *Contra* 19 A 337

——an application for execution made by a *benamdar* is not an 'application in accordance with law.' 16 C. 355, 9 C 633

——if the D Hr himself resides within the local limits of the jurisdiction of the court, an application by a person holding a general power of attorney is not in accordance with law 23 A 499, 26 A 19

——application for execution by a guardian of the D Hr who is described as a minor but is found to be major at the time, is not in accordance with law 28 M. 396.

——an application could not be said not to be not in accordance with law when (1) the dates of the previous execution petition were not noted (2) execution costs were not noted (3) date and place of verification were not noted (4) copy of the decree was not filed as those were not material defects 112 I. C 36 1928 Mad 440, 142, 1926 Cal 1146 *Rel*

——'proper conduct' in the clause, in case a decree is transferred, is in the court to which the decree is transferred 39 M. 640, 21 C. W N. 162 P C

time but proceedings in execu- provides new starting points.

made to a court having no jurisdiction to entertain it is not an application in accordance with law and cannot save limitation. 93 I C 292, 1926 All 345.

——mere mistake in calculating more interest than was due did not make the application one not in accordance with law. 43 A. 550 63 I. C 362

——where an application omitted to mention the amount of interest and costs there was no bar to the court levying execution for lesser sum and the application cannot be said not to be one in

Cl. 5, date of application or step in aid of execution—*contd.*

accordance with law. 53 C. 664 30 C. W. N. 918 : 1926 Cal. 1077. 98 I C 166.

——the expression "in accordance with law" means that the application though defective in some particulars is such that the execution can proceed. 53 C. 664 : 30 C. W. N. 918 : 1926 Cal. 1077 : 98 I. C. 166

——if an execution application fulfils all the requirements of Or 21, Rr 11 to 14 of the C. P. C. it is one in accordance with law The fact that it was dismissed because it was not signed by all the D Hrs. does not matter. 90 I. C. 847 : 1925 P. H. C. C. 315, 100 I. C. 475, 1927 Lah 106 9 Lah. L J 76.

——the provisions of Cl. (5) is not restricted in its application by Cl. (1) of the same Art where a decree is passed in favour of [illegible] in parts, an execution [illegible] to the benefit of the [illegible] portion. 45 M. 35 : 41

——where a decree passed by one Court was transferred to another Court for purposes of execution and an assignee of the [illegible] issue of a notice to the [illegible] cedure Code, and asked [illegible] Court which passed the [illegible] decree, stating in his [illegible] rred to him by assignment, the application was a step in aid of execution, as his claim as assignee could be recognised only by the Court which passed the decree and for that purpose it was necessary to send back the records to that Court. 50 M. L. J. 116.

——where rights of a plff is assigned to another pending suit [illegible] and assignee applies for [illegible] neither Or 21 R. 16 C. [illegible] 96 I. C. 833 : 1926 Bom.

[illegible] judgment debtors will [illegible] *bonafide* believed [illegible] 0 M. L. J. 153 :

——the D Hrs. are entitled to regard any step taken by them to remove the obstacle thrown by the Jt. Dr. in their way to the realisation of their decree as a step in execution. 4 Pat. 202 : 6 P. L T 777 : 83 I. C. 807 : 1925 Pat 459.

——the mere appearance of a decree holder in a proceeding under Or 21 R. 90 which was dismissed for default does not amount to a step in aid of execution. 1927 Pat 113 : 6 Pat 280 : 99 I. C. 869.

——an application for final decree is a step in aid of execution 106 I C 395 · 1928 Mad. 38.

——an application to substitute some names in the decree is a step in aid of execution. 50 A. 621 : 1928 All. 299 : 109 I. C. 412.

Cl. 5, date of application or step in aid of execution—*contd.*

——application to correct mistake of court as regards the inclusion of interest granted by the decree is a step in aid of execution 114 I. C. 55, 1929 Lah 103, (55 I. A. 159 · 52 M. L J. 565) *Dist* 155 P. R. 1912 *Ref.*

——an application which is rejected by the court as incorrect is not one in accordance with law. 17 N L R. 179 · 63 I. C 971.

——an application for execution taken out against a discharged insolvent Jr. Dr is not one in accordance with law and as such is not a step in aid of execution 25 Bom. L R. 1237.

——an application to transfer a decree for execution is a step in aid of execution. 3 Pat L T. 422 67 I C 538.

——where a decree is transferred for execution to another court an application to the parent court to retransfer the decree to a third court is a step in aid of execution. 110 I. C 829, 1928 Mad. 493, 1916 P. C 16 P. C, 37 M 231 Expl. 1926 Bom 217 *Ref.*

——application by D. Hr. auction-purchaser to be put in possession is a 'step-in-aid of execution,' (*per Newbold, J.*), it is not so (*per Cuming J*) 23 C. W. N. 926. 30 C L J 135.

——application for summons to witnesses to resist claimants' objection is a step 19 A L. J. 843, 103 I C 712 1927 Lah 653, 1922 All. 432, 22 C. W N 1027, 1927 Mad. 288 *fol*, 1925 Pat. 459, 26 C. L J. 115, 28 I. C 540 *Ref.*

——effect of an application for execution of a decree against some Jt Dr against whom it is suspended is to keep alive the decree against the rest. 29 M L. T 57 : 1921 M. W N. 188 61 I C 901

——when a decree is transferred to several persons in parts an application for execution by one transferee saves the whole decree. 41 M. L. J. 312

——application by D Hr. controverting the objection of the Jt. Dr. that the decree was satisfied, is a step 19 A. L J 641

——second appeal to H C is not a step in aid of execution 74 I C. 279 (C).

[illegible] 45

[illegible]

made to him out of court is a step. [illegible] C 899.

[illegible] lway charges for [illegible] money for his [illegible]. 15 L. W 14.

[illegible] maintaining the [illegible] record is not a [illegible] 691, 23 C 196, 22 C. 827 *Rel. on*

——an application for execution against two Jt. Drs one of whom is dead saves limitation against the living Jt. Dr. and the legal representatives of the deceased. 1922 Nag. 112 : 66 I. C. 176.

Cl. 5, date of application or step in aid of execution—Contd

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24 Bom ... 95 I. C. 506

——when a *decree* was not shown to have been transferred under ss. 38 and 39 and Or. 21 R 6 to another court at a time when ... court, such application was ... 308 : 32 C. W. N. 193 : 1927 Cal.

——an uncertified payment does not save limitation as it is not a *step in aid* of execution. 44 C L. J. 248 : 1927 Cal. 29

... for the payment to him of money ... his account in execution of the ... court to take a step-in-aid of ... 228 : 1925 Bom 443 : 27 Bom.

——an application filed by the decree-holder praying for the *dismissal* of the petition of the Jt Dr ordering the court to record satisfaction is not a step in and of *execution*. 93 I. C. 156 : 1925 Mad 1178 : 51 M. L. J. 480.

——an appl... sentative ... 26 Punj ... against ... execu ... original

——filing of an *hazira* in the application under Or 21 R 90 was held to be a step in aid of execution. 9 Pat L T. 817 : *1928 Pat.* *612* *7 Pat* *708*

——filing of an affidavit of service of notice on the Jt Dr is a step in aid of execution. 47 C. L. J. 362 : 1928 Cal. 302 : *108 I. C* 588.

——but when the executing court ordered the decree holder to file ... writt... *filed* ... 6 Pat

——payment of process-fee for an attachment of property in execution of a decree is not a *step* in aid of execution. 87 I C. 745 : 1925 All 646.

——an application for execution without indicating the mode in which the D Hr. wanted the assistance of the court to execute the decree is not one according to law and is not a step 41 C. L. J. 607 : 1925 Cal. 1135 : 93 I. C 364

——an application by decree holder during execution proceedings for time to ascertain the address of the Jt. Dr. is a step. 50 I. C. 278.

Cl 5, date of application or step in aid of execution—*contd.*

——the mere fact that the applicant failed to produce the succession certificate is no ground for holding that the application is not a step in aid of execution 8 Pat L. T. 671 1927 Pat. 324 , 104 I. C. 218.

——application by D. Hr. under Or 21 r. 95 C. P. is a step in aid of execution 41 A. 479 : 50 I. C. 143 17 A. L. J 496

——an application for execution filed by one of the D. Hrs to execute the whole decree is in accordance with law 1926 Pat. 160

——an application which does not contain particulars as to the amount of the decree and cost is not in accordance with law. 65 I. C. 120 23 C. 217 18 C L J 538 *Fol.*

——where an application was not amended according to the court's order it cannot be said that the application was never properly presented in accordance with law 2 Pat 809 74 I. C 174

——such application although not returned after amendment [illegible] F B 1925 Lah 535, 4 L.

[illegible] tion was returned by the [illegible] were not correted and [illegible] was a bogus, application [illegible] 1926 All 876

——an application for execution in which by *bona fide* mistake the minor Jt Dr. was described under the guardianship of a dead person is a step 4 Pat L T 54 72 I C 1003 (17 M 76, 35 C. 1047) *Fol*, 31 A 572 P C *Dist*

——an application made against a wrong person under a *bona fide* mistake that that person was the legal representative of the deceased Jt Dr is a step in aid of execution 1926 P H C C 342 : 99 I C 501 · 1927 Pat 92 8 Pat L T. 217, (20 C 338, 35 C 1047, 9 C L J 443) *fol.*

——the question whether an application is or is not a step-in-aid of execution must depend upon the circumstances of the case. 27 C W N 505 37 C L. J. 292.

——order of fresh step is not a step in aid of execution 1923 M W N 871 75 I C 489

——mere order by the court to take some step in the absence of application by the decree holder is not a step in aid of execution. 103 I. C. 37 · 1927 Pat. 323 8 Pat L T 670

——an application for stay is not a step in aid of execution. 1923 Bom 212

——to constitute a step in aid of execution an application must pray for some relief which can be granted by the court. 35 C. L. J 82

——an application for bringing the legal representative of the Jt Dr on the record and for issue of notice under Or. 21 r. 22 C. P. C is a step in aid 35 C. L J. 82.

——an application for the revival of the previous proceedings for execution is a step in aid. 64 I. C. 727 (c) 27 C. 285 *Ref.*

Cl. 5, date of application or step in aid of execution—contd.

——application *for certificate* of transfer is a step in aid. 3 Pat L. T. 298 : 65 I. C 332.

——execution *of the* decree against surety is a step to save the decree against Jt Dr. also. 43 A. 152.

——an *application* for a copy of the decree is not a step in aid 39 M. L J. 572 1920 *M. W. N. 700 60 I. C.* 117.

——an *application* by a mortgagor for the extension of time of redemption *extends* the period. 41 M. L. J. 374 : 1921 M W. N. 391.

[illegible] obtain necessary [illegible] by the court [illegible] 98 I C. 763 [illegible] 2, 53 M. L. J.

——an application for time to enable the D. *Hr.* to ascertain the share *of the Jt Dr.* in the property advertised for sale is a step 23 Bom L R 107 . 60 I. C. 916

——when a *decree* is transmitted for execution application for the issue of notice to the Jt. Dr. made in the original court is no [illegible] 2 Pat 247 ; 74 I C. 608

[illegible] decree final is not a [illegible] L. R 1013

[illegible] Hr. in answer to an application by the *Jt Dr.* to enter up satisfaction of the decree is not a step-in aid. 45 M. 466 98 I. C. 156 · 1926 Mad. 1178 : 51 M. L. J 480.

[illegible] of sale is not an application [illegible] property is not [illegible] 938. [illegible] execution case is not an application for execution in accordance with law or a step-in-aid *of* execution. *47 B 783*

——compromise petition filed by both parties is not a step in-aid *of execution.* 25 Bom. L R. *490 : 73 I. C 1011*

As to the other cases of 'step-in-aid of execution, see *C. P. C. Execution' p 149*

Cl. 6. Date of issue of notice.

——'date of issue of notice' means the date when the notice is actually issued and not the date when the court passes the order *for* issuing the notice 24 C. W. N. 55 . 30 C L. J. 518, 10 I C. *411 (c)* [illegible] J. 285 ; 45 I C 203, 18 C W. [illegible] W. N. 303 : 4 C. L. J 539 [illegible] 559, *contra,* 28 B 416, 27 B [illegible] 35 : 45 I. C. 203, 40 A 630 :

[illegible] he date of the *order of the* court *directing* that notice should go and not the date on which the notice is signed or actually leaves the court 40 A. 630 : *16 A. L. J.* 633 : 46 I. C. 584 *F. B.*

Cl 7, date of payment.

lefault of one begins to run C. 97, 7 C. 56, ı. 7 A 327, 2 A. A. 230, 38 I. C. C. 916 13 C.

——but it has been held by a Full Bench of the Allahabad H. C. ment of instalments on such" date being the due maining unpaid balance 182 but is governed by default 112 I C. 73 :

——in the case of instalment decrees, default in payment of one instalment can be waived and time begins to run from the date of actual default 86 I C 1051 1925 Cal. 1012.

——where the decree described payment of annuity and in default delivery of property each instalment as it 'became due was a claim originating under the decree from the date when such claim arose 46 C L. J. 123 29 Bom L R 1014 32 C W N 1, 101 I. C. 736 · 53 M. L J 22 1927 M W. N 442 P. C

——when payments towards decretal amount are not certified to the executing court limitation runs against the D. Hr from the day on which the first instalment was due 38 A 204, 32 I. C. 590

——when a decree is made in a suit for arrears of rent for 3 tenancies there are practically for the purpose of limitation 3 separate decrees 22 C W N 192 26 C. L J. 118 · 36 I C 398

——execution application against missing person saves limitation 36 A 482 24 I C 473 12 A L. J 830.

——"incapable of execution" what it means 19 A. L. J. 26 : 1921 M. W N 21 1 Pat L T 731 59 I C 636 P C, 1 Pat. L T 73, *reversed*

——default in instalment decree, what amounts to waiver. 1926 Cal 212.

As to cases of 'waiver' see *'Instalment'*

Expl 1. Separate right and liabilities

——when single suit for rent for three separate tenancies is passed in a composite decree, execution of one of such decree cannot save others from being barred 22 C. W. N. 192.

——where in one matter a decree is jointly passed against all the defts. and with respect to another matter severally against

Expl. 1. Separate right and liabilities—*contd.*

different defts ... nation applies to to the decree passed 1926 All. 440. y deft. gives fresh 9 : 1922 M. W. N. 1922, Mad. 327.

Art 183. (Enforcing judgment, decree, order of Court established by Royal Charter, 12 years.)

——an application for an order absolute for sale made by the H. C. ...

... 1923 All 239.

——a notice under Or. 21 r 16 C. P. C. does not operate as a revivor to extend the period of limitation under Art. 183, 39 C. L J 590, 43 C. 903 : 23 C. L. J. 645 : 11 I. C. 216. 97 P. R 1917. 93 P. W. R. 1917 ; 40 I C. 618, 40 M. 1127 : 40 I. C. 608 . 33 M. L. J 533, 32 I C. 1003 38 M 1102.

——an application ... er Or. 34 R. 6 C. P. C. ... nt or decree within ... such an application. ... 834 F. B ... runs from the time ... mortgagee does not ...

... from the H C ... as it is a ... 589 52 M ... P. C. 43 C ... Art 182 ... in Art. ... and must ... rce and t ... 36. I. C. 633.

——a decision in a suit by a judgment debtor to declare that he was not bound by the decree does not operate as revivor of the decree. 55 C. 578 : 32 C W. N. 336 : 1928 Cal. 686 : 110 I C 404

——a tabular statement under Or. 21 R 11 C. P. C. filed before the Master ... within this Art. 55 C. 1341 : 1929 ...

1929 M. W. N

Miscellaneous cases.

——the provision of the L Act. must be construed strictly, and when set up as defence, must not be extended to cases which are [illegible] t exceptions from its opera- 496 2 C W N 269, F. B. complete Code in itself, the apply to a suit falling under *Fol.*, (18 M 99, 17 C 263), *Ref*, 10 C. 265, *Discussed.*

——the law of limitation applicable to a suit or proceeding is the law in force at the date of the institution of the suit or proceeding unless there is a distinct provision to the contrary 17 C. L. J. 488, P.C

——statutes of limitation, like all others, ought to receive such a construction as the language in its plain meaning imports 14 C. W. N 1, 31 C 519 8 C. W. N. 500.

——an article of Limitation Act which fully applies to a particular case should not be thrown aside because it might create hardship in other cases 6 C. L. J 535.

——when there are two periods, one longer and the other shorter and applicable to special circumstance, the longer period is applicable unless the special circumstance exists 14 C L J 598

——parties cannot contract [illegible] rent decree cannot be made to be decree is passed by way of compro of decree and not default 17 [illegible] F. B

——exception to the Limitation Act, must be clearly stated. 17 C W N 667, 16 C W N. 1015

——when the deft continues to possess after the plff. has taken symbolical possession, time begins to run from the date of symbolical possession and the deft. may set up the original defence 9 C. W N. 292

——when the limitation period is very narrow, burden of proof is on the plff. 10 C. W N. 630, P. C

——when time begins to run from the knowledge of something the burden of proof of the knowledge of the plff, is on the deft. 13 C. L J. 226.

——when execution of decree is deferred by the deft it is not time-barred 20 C W. N. 76 n.

——when in a redemption suit the Judge directs accounts to be taken, but the officer delays, that cannot extend limitation period. 20 C. W. N 951, 25 C. 10 *Fol.*

——when the minor dies on attaining majority, his representative can sue like him (*i. e.* within 3 years). 40 B. 564.

(1) Acknowledge—contd

——the doctrine of acknowledgment is not applicable to a case in which the paternity of the child is known. 23 C. 130, 10 A. 289 *Fol.* 27 C. 801, 40 C. 28.

——acknowledgment by a man of a woman's child as his legitimate son raises a *presumption of* marriage and legitimacy 23 C. W. N 50 P. C, 33 C. W N. 645; 1929 P. C. 135: 27 A. L J. 465 and it is rebutted by positive proof that there was no marriage between parents at the time of the birth of the child. 110 I C 258 · 9 Lah 581 29 Punj L R. 529.

——acknowledgment cannot establish the legitimacy of a child ... uncertain whether ... that acknowle... W. N. 81, 33 C ... L. R. 636 P C ... 52, 10 A. 289 15 ... 8 M. I. A 136, 8... , 21 C. W. N. 13...

——when the claimant once establishes an acknowledgment the onus is on the other side who denies a marriage to negative fact 33 C W. N 645: 27 A L J. 465: 1929 P. C 135 P. C.

——an acknowledgment once made and proved cannot be rebutted It cannot even be repudiated by the man who made it 110 I C 428 1928 Pat. 539.

——the presumption of paternity arising from acknowledgment ... the part of the person ... age as would render th... or (3) by proof that th... other person. 1928 Pat ...

——a child whose illegitimacy is proved beyond doubt, cannot be made legitimate by acknowledgment 1928 Lab. 432: 112 I. C 89 9 Lah. 224.

——the Mahomedan law *does not recognise adoption* as a mode of filiation 10 A 289, 340, 35 B. 264.

(2) Authority of Jurists

——when there is difference of opinion among the jurists the point in dispute cannot be decided by courts sitting so many centuries afterwards by the examination of traditions only. Reliance must be placed on the opinion of recognised jurists who alone could have undertaken the task of sifting the tradition and in case of divergence, on their comparative superiority. 47 A. 823: 23 A L J. 768: 89 I C. 690 1925 All. 720

——Indian courts always accept the authority of *Sharya-ul-Islam* in preference to opinion of other writers 89 I. C. 690: 47 A. 823: 23 A. L J 768: 1925 All 720.

——when Mahomedan jurists of authority express dissenting opinion on any question as a general rule, the court can adopt

(2) Authority of Jurists—*contd.*

that view which is most in accordance with justice in particular circumstances of the case. 92 I. C 840 · 1926 All. 327.

——in Agra the authority of Imam Mahamed is preferred to the authority of Iman Abu Yusouf. 49 A. 391 : 1227 All. 255 : 99 I. C. 1052.

——the Courts cannot introduce a sudden and drastic change in what has been accepted laws of the parties. The terms "Mahomedan Law" in Act XII of 1887 is wider than the word "the law of the *Koran*" in Reg 11 of 1872, 1929 Pat. 81 · 115 I. C. 546 : 10 Pat. L T. 109 F. B.

(3) Debt.

——debts of the deceased are first charge against the estate and the heirs can divide amongst themselves what remains after payment of debts When part of the estate is sold by some heirs or the payment of debt others cannot dispute 61 I. C. 947 . 42 A. 97 : 18 A. L J. 613, 1917 M W N 98 . 37 I C. 879

——an administration suit may be brought by a Mahomedan eir though it is not compulsory 45 B. 75 22 Bom. L. R. 117

——funeral ceremonies should be performed in a suitable manner ccording to the position in life of the deceased and his social osition 40 I C 374 : 92 P. R. 1917

——when funeral expenses are paid out of the estate by the eir in possession he is not entitled to contribution from other heirs or a proportionate share 6 N. L. J. 161 73 I C. 959

——there is no principle in Mahomedan Law as in Hindu Law y which the acts of one heir in possession will be binding on the ther heirs. 50 C. 978, 39 C. L J. 90 But it has been held by the Allahabad H C. that the heirs of a deceased Mahomedan who are [illegible] the property for the [illegible] he interest of those [illegible] le for the mortgage

——payment to one of the heirs of a deceased mortgage cannot operate as a valid discharge of the mortgage debt 115 I C. 646 . 1929 All. 250 : 27 A. L. J. 355 (25 A. 155, 27 Bom. 292, 32 A 164) *Rel. on.*

For 'dower' see "Dower and Dower deed"

(4) Dower and dower-deed (Kabinnama)

——the amount of dower may be fixed either before or at the [illegible] husband [illegible] le parties

——pregnancy of wife before marriage does not disentitle her to get the contracted dower. 45 B 151 : 59 I C. 433

——the father has the power to make a contract for dower on behalf of his minor son. It may be made after the marriage. 13 C. W. N. 153 · 4 I. C. 462.

(4) Dower and dower-deed (Kabinnama)—*contd.*

——majors under the Personal Law though not under the *Majority Act can fix the* amount and nature of dower, *1925 Cal* 3??

——when the boy's father contracted with *the girl's father to* pay to the *girl Rs. 500* a month as *karach-i-pandan* and made it a charge on certain immoveable property the girl was entitled to recover the amount from his father-in-law even if she ceased to

· personal allowance
· heirs. 13 C. W. N.

——*karach-i-pandan* which mean betel expences is a personal

——father is liable for the dower money if he makes ...
liable by contract. 13 C. W. N. 153: 4 I. C. 462, 32 A 411, 29 I C 587

——father does not automatically *become a surety for the* payment of the dower debt due to the wife of his minor son by simply giving his consent to the *marriage.* 49 A. 557: 100 I C 636: 1927 All. 364: 25 A. L. J. 466.

——dower debt may be relinquished at any time without consideration. 31 C. L. J. 14: 24 C. W. N. 335

... ceremony of the

labour had commenced. 71 I. C. 296.

——amount of dower cannot be less than 10 *dirams which* is equivalent to three or *four rupees. 32 A.* 167.

——where the plff. sets up a contract to pay a particular amount but *fails* to prove it, he cannot afterwards claim customary amount *i. e.* one according to the history and position of the family but is entitled only to the amount *admitted by* the deft. 94 I C 959, 1926 Lah. 458.

——the amount of dower may be subsequently increased by the husband. 55 I. C. 236.

... at the time of marriage whether the
to Shia Law the
ccording to Sunni
483, 506, 1929 Pat.
being regulated by

custom or, in the *absence of custom by* the status of the parties and the court has power to award whole amount as prompt 35 B 386, 41 A. 562, 33 A. 483.

——non-payment of prompt dower is a defence in a suit for conjugal right so long as the marriage is not consummated, and the decree will be passed *conditional upon* payment down 35 B. 386, 6 Bom. L. R. 611, 30 B. 122.

(4) Dower and dower-deed (Kabinnama)—*contd.*

future
basis of
oes not

——unless the marriage of a Hanafi Mahomedan is proved as irregular dower is payable on the death of the wife even if the marriage was not consummated. 1929 All. 369 : 115 I C 132.

——where a Mahamedan widow obtains possession of her husband's estate peaceably and without force or fraud, she is entitled to retain possession till her dower debt is paid It is not a contracted right like that of mortgage but a right recognised by the Mahomedan Law 47 A. 250 23 A. L. J. 115 : 27 Bom L. R. 796 48 M. L J 667 P. C. 25 A. L J 806 1927 All 534 . 103 I. C. 363, it need not be proved that she entered into possession on the express assertion of her dower claim 50 A. 423 1927 All 850 26 A. L. J 110 , 107 I C 581, 32 A 551, 32 A. 563 *Rel on*

——when a widow succeeds, without any objection by the husband's collaterals to property which has been settled upon her in lieu of dower, she holds it exactly as it was her self-acquisition over which she has complete control and which she can dispose of as she pleases. 8 Lah. L. J 55 · 26 Punj. L R 165.

——a Mahomedan widow has for her dower all the rights of an ordinary creditor and may be given possession of the property for the satisfaction of the debt with the consent express or implied of the husband or his heirs. 40 C L J 171, 38 All. 581 25 C L. J. 517 , 21 C. W. N 1. P C , 17 W R. 113 P. C , 45 A. 384, 27 C. W N 1013, 24 O C 374 66 I C 24

——a Mahomedan widow has right to retain possession of the property of her husband against other heirs until her dower debt is paid 30 C W N 673 1925 P C 63 P. C. 35 C 120 12 C W. N. 16 ; 8 C. L J 245, (6 M I A 211 10 B L R 45 P. C 17 A 77, 93) *Ref.* 14 M. I A 377 P C 71 I C 820 38 A 581, 17 A 93, 32 A. 563 and also against partition, 43 M 214 but she must account other heirs for rents and profits *received* by her. *14 M. I. A. 377* and in that case she is entitled to interest on dower money. 38 C 475, 33 A 182, but she has no such lien during the husband's lifetime. 41 M. L J. 557 : 14 L W 524 ; 45 M. 103

——she is not liable to account if the profits do not exceed the amount of interest or arrears of dower. 51 I. C 623 (C).

——widow in possession is entitled to enjoy the usufruct but she is to render account. The right of the widow is heritable and assignable and the transferee would be entitled to possession until the dower is liquidated. 2 Pat 75 . 17 Pat L T 267, 68 I. C. 601, 14 M. I A. 317 P C 7 A 353 6 A. 50, 20 A. 262 29 A 64, 32 A. 551, 40 B 34 43 M 215 14 W R [illegible]

(4) Dower and dower-deed (Kabinnama)—*contd.*

——if the wife is in possession of property to satisfy herself out of the proceeds of the property for arrears of dower her position is that of usufructuary mortgagee and her possession cannot affect equity of redemption. 2 Pat. L. T. 207: 59 I C. 865.

——purchaser from widow in possession of husband's estate in lieu of dower debt can retain possession during her lifetime or until the dower debt is satisfied, 43 A. 127, 58 I C. 833, 32 A 531, 43 M 214, 2 Pat. 84: 70 I. C. 312. But where she sells the property alleging that her husband had given her the whole property the purchaser cannot dispute the rights of the legal heir nor the widow can afterwards claim possession of the property in lieu of her dower debt. 19 A. L. J. 706: 63 I. C. 344, 2 Pat, 84. 4 Pat L T 272: 70 I. C 312.

——a dower debt does not create a charge on the properties of the husband, the mere passing of a decree that an alienation by husband was void because it was entered to defeat the dower rights does not create a charge. 7 Pat. L. T. 664: 1926 Pat. 404: 95 I. C 367. 1926 P. H. C. C. 178.

[illegible] debt and the widow cannot [illegible] from recover-

[illegible] the widow can retain possession of property she is entitled to interest also since the death of her husband 21 C. W. N. 1: 25 C L J. 517, 25 C W N. 866, **P. C**, 38 A. 531, 38 C 475.

——for dower bebt the widow and her heir can claim possession [illegible] it is a substantial right. [illegible] A 262.

[illegible] succession certificate [illegible] J. 116: 61 I C 6 [illegible]

——interest at 6 p c p a. was allowed 25 C W. N 866 **P C**

——but interest is not always allowable; when dower debt is a very big sum in consideration of the property of the husband no interest is to be allowed. 48 A. 803: 24 A. L. J. 910; 1927 All. 39 (38 A. 581 **P. C**, 47 A 250 **P. C.**, 3 C. L J 541) *Rel*

——where a M. executed a *hibanama* in lieu of dower of property of which he acquired title after the execution of the *hibanama*, the widow acquired title to the whole property. 1923 Cal 535 (C)

——the property is preferentially liable for dower debt including the widow's share 19 C. W. N. 502.

——the widow being in possession of the property may also sue for dower money, 23 A. 432, but if she be in possession of any property for her dower debt, then she must bring administrative suit. 19 C. W. N 502.

——the provision of *marz-ul-maut* gift does not apply to gift in lieu of dower which is really a sale. 19 C. W. N. 325.

——the condition in a dower deed that the wife should be at liberty to reside in her parents' house is void 18 C. W. N. 693.

(4) Dower and dower-deed (Kabinnama)—*contd.*

ain contingencies

ce her husband in C. W. N 88 n.

——conditions entered into at the time of marriage and contained in a *kabinnama* are enforcible although the *kabinnama* is executed susequent to the marriage 30 C L. J 510 52 I. C. 322.

——it is legal to delegate by *kabinnama* power of divore to wife under certain conditions and a husband's marrying a second time is such a condition. 19 C. W. N. 1226. 12 C. W. N 907. 30 C. 23 *Ref.*

——agreement in the *kabinnama* that in case of ill-treatment the wife will leave her husband is valid. 23 C. W N. 124 n.

——an agreement providing certain maintenance to be given to wife in case of separation is void as being opposed to public policy

C W N. 1118. C, 24 C W. N

——civil court of superior jurisdiction is vested with the power of kazi 3 C W. N. 158, 36 C 21 *Contra* 37 C. 179 14 C W. N. 535, 37 C 870, 24 C W N. 339, 690.

For limitation in dower suit see "*L. Act Arts 103, 104 116*".

ENDOWMENT see WAKF

(5) Gift.
(5A) Simple Gift
(5A) Hiba-bil-ewaz
(5-C) Marz-ul-mout Gift.

(5-A) Simple Gift.

——the doctrine relating to invalidity of gift is unadapted to a progressive state of society and will be confined within the strictest limit. 25 C W. N 761.

——a verbal gift is valid 3 A 267, P. C.

——essentials of the gift are (1) a declaration of gift by the donor, (2) an acceptance, either exprees or implied by the donee (3) of the subject matter registered 44 C L. J. on, 33 C. W. N. 753: 195 43 M L. J 453 *Rel. on.*

——delivery of possession is absolutely necessary even if the deed of gift be registered. 19 C. W. N 1311 p. 1317, 6 B, 650, 23 B 682, 13 B 159, 28 C L. J 306, 17 C. L J. 173

——what is usually called possession in this country is not actual the rents and profits.

gift can be valid unless donor relates to cases

(5A) Simple Gift—*contd.*

where the donor professes to give away the *possessory* r the land itself and not merely a *reversionary right in it* 1C

——gift of property not susceptible of physical posses be completed by any appropriate method of transferrin control but gift of tangible property must be made by de possession. 25 C. W. N. 310, 45 B. 1296 : 23 Bom L. R I C 21, 49 C. 68

——where a donor declared his intention to part possession of the gifted property and his intention was m by actual transfer of the property *in the name* of the donee Municipal and Govt. Land Record and he asked the to atorn to the donee, there was proper transfer of posse validate a deed of gift 27 Bom. L. R. 184 : 86 I 1925 Bom 305.

jointly
effect.

——for the completion of a gift abandonment *even for* time by the donor is necessary but no formal entry or ...ssary 4 Pat. L. T. 397 · 71 I C 897 ...ossession as the sul ... validate a gift under N. 706 · 33 I. A. 68 322 · 90 I. C. 640 possession is negati ...ssly postponed Whe ...it to live in the prope possession of the sa ...id void for want of d of possession 98 I C 285 · 1926 Bom 59 · 28 Bom L R.109

——Malikana right may be the subject of gift, so also Government notes and other choses in action, 16 C. 111 equity of redemption in an usufructuary mortgage may be th ject of gift 27 Punj L. R. 433

——the doctrine that a gift of undivided share *in any pr* is invalid because of *moosha* (confusion), applies *only* to p properties and does not apply to reversionary interest *of* Mal or other choses in action 10 C 1112, 49 C 68, or to *property* is incapable of division or is of such a nature that some *kind of* fit or advantage can be derived from it only so long as it *is* n ded which cannot be derived from it after division. 30 Punj 288 : 1929 Lah 309, 11 A. 460 P. C., 35 C. 1 P. C. *Rel on*

——gift of an undivided share by one co-sharer to anothe sharer *is not invalid* 1929 All. 312 : 115 I. C 129

——there cannot be a gift of undivided share *in property* ...able of possession. 24 I. C 10, 10 C 1112.

...ift of *moosha* tran ...olly unadapted to a ...fined within the stric

(5A) Simple Gift—*contd.*

rules. 11 A. 460 P C., 6 Bom. L. R. 1043, 35 C. 1 : 34 I. A. 167 : 11 C W. N. 973 . 6 C L. J. 695 : 9 Bom L R. 872 : 4 A. L J. 572 : 17 M. L. J. 408 P C 49 A. 503 · 1927 All 345 . 100 I. C 614
[illegible] the doctrine prevails.

[illegible] oned on the ground that [illegible] but divisible property [illegible] possession of donee, 17

——a joint gift to two persons without the specification of [illegible]

407. [illegible] t of. [illegible] the [illegible] the [illegible] in-
tention to confer the property on the donee 27 Punj L R 13 : 8 Lah L. J 1 93 I. C 334

——one of two sharers may give his share to the other before division 15 C 684 : 15 I A. 81 P C

——making a gift of the life interest of the donor in usufruct of part is valid. Distinction between *hiba* and *wasiat* pointed out. 37 C L. J. 1 44 A 301 43 M L J 453 27 C W N. 53 24 Bom L. R. 1268 P. C.

——Tr of P Act does not apply to gift made by a Mahomedan. 44 A 633.

[illegible] e gift is void. If [illegible] derogating from [illegible] C 75 [illegible] from transferring [illegible]

——the ordinary rules applicable to gifts apply to the Mahomedan Law like any other system of law. 22 C. W. N 512, 24 M. 513 . 11 M L J. 227.

——[illegible] A 1. 8 [illegible] out of p[illegible] complet[illegible] 407.

——when land is in the occupation of tenants or raiyats a request to them to attorn to the donee is sufficient delivery. 16 M. 43, 97 I. C 154 1927 Pat 20.

——any right to property may be the subject of gift where the donor is not in possession of the corpus of the property 21 A 165

——delivery of possession so far as it is capable of delivery sufficient. 30 M. 519 : 17 M. L. J 562, 21 A. 165

(5A) Simple Gift—*contd*

——*the task of* discovering and applying the rules of Mahomedan Law to the circumstances of this country is often one of great *difficulty*, and *in choosing* between conflicting authorities, the principles of justice, *equity* and good conscience must be regarded. 17 M. L. J 362; 30 M. 519.

——gift *to some of* minor children and wives under pressure of the sense of *imminence of death is invalid.* 33 C 1; 35 I A. 167; 11 C. W N 973; 6 C. L. J. 695; 9 Bom. L. R. 572. 4 A. L. J 572 17 M L J. 408, **P. C.**

——where a *Mahomedan* trader in Rangoon made a gift of certain shares and *other valuable freehold properties*, in favour of his wife and minor children, the gift was not invalid, see the above case

——a deed creating a life estate with remainder over is void under the *Mahamedan Law.* Similarly a gift to unborn person is void 39 *C* 431, 9 *B.* 158.

——a registered deed of gift is not valid if it is not perfected ... possession. ... it and profits

——when the husband makes a gift of immovable property to his *wife* and gets her name mutated in the public records husband's subsequent acts with reference to the property are ... his wife's behalf. 54 I. A. 23; 1927 *M. W.* *L. J.* 69; 100 I. C 32; 352 and 1 Bom *H. C.* *C* 110.

... ame house the subject of gift, intention on the part of the *donor to make gift* is sufficient. 9 *B.* 146, 29 *B.* 468

——no change of possession is necessary for the validity of a *gift by* a father to his minor child or by a guardian to his *ward*, or by a person standing in *loco parentis* to another 20 A 147, 154, 29 B 468, 9 Lah. 567: 108 I. C. 741.

——a donor may give to an adult and a minor and the adult *may* possess on behalf of both. 25 C. L. J. 286

——but in case the property is in the possession of the *tenants* unless the gift is completed by the tenants being asked *to attorn* to the donee delivery of possession is not complete. 9 Lah 567, 108 I. C. 741, so also in the case *of a* gift by grandfather to grandsons *the* gift was held not to be complete. 52 B. 316; 32 C *W. N* 733; 47 C. L. J. 517: 109 I C 31: 26 A. L. J. 157: 1928 P. C. 108 · 30 Bom. L. R. 766 **P. C.**

——a gift may be revoked except when (1) the gift is *made by husband* to his wife or by wife to her husband (2) when the *donee* is related to the donor within the prohibited degrees, (3) when *the gift* is a sadaka, *made* with the *object of acquiring* merit in the sight *of God. e. g.* alms to the poor. 13 Bom. L. R. 717.

(5A) Simple Gift—*contd.*

——gift made by a Mahomedan is not revocable after delivery of possession takes place, if the conditions of the gift have not been broken. 92 I C. 264.

——partition of the subject matter of gift is no alteration in substance so as to bar revocation. 24 I. C. 34.

——A gift deed by a Mahomedan father in favour of his minor son is valid without possession being transferred So far as the donor is concerned, by executing the deed he does all that he need do, for registration can be effected even without his co-operation. 92 I. C 479.

(5 B) Hiba-bil-ewaz.

——the transaction which goes by the name of *hiba-bil ewaz* in India is not a proper *hiba-bil-ewaz* at all but a sale 13 C. W. N. 160 : 4 I. C 466.

——a transfer by a Mahomedan lady in consideration of his receiving a fixed maintenance allowance is not hiba but is sale. 31 C W. N. 1068 54 C. 754 : 1927 Cal 808 . 105 I C. 67

——s. 129 of the Tr P. Act lays down that nothing in the Chapter of the Act which relates to gifts, shall affect any rule of Mahomedan Law That Chapter refers only to gifts without consideration 13 C W. N 160 4 I C 466

——a copy of the Koran is a valid consideration for *hiba bil-ewaz.* 13 C. W. N. 160 4 I C 466.

——the consideration for a *hiba-bil-ewaz* does not rest merely on the pecuniary value of the subject matter of the gift and of the return but there is also a personal element when the gift is made in favour of wife or near relative. Dower debt may form the consideration 92 I. C. 265 1926 Oudh 186 ; 3 O. W. N 105

——passing of consideration of *hiba-bil-ewaz* must be proved. 23 C L J 363 **P. C.**, 17 C. L J. 173, 25 C L J 280, 10 C. W N. 706, 28 A 439 ; 4 C L J. 295 . 8 Bom L. R 387 . 1 M. L. T. 106, **P. C** , 24 C W N 920, 44 A 580

——a Hiba-bil-ewaz executed in favour of a predeceased son's minor daughter if fails for want of evidence of passing of consideration it may be treated as hiba (simple gift) and the child living under the guardianship of the donor, no evidence of delivery of possession is necessary 49 C 161 25 C. W N 833, 11 A 1, 17 C. L J 173, 10 C W N 570 **P C.**, 15 C W N 521 **P C** , 24 C W. N. 926 *Ref*

——in case of *hiba-bil-ewaz* no delivery of possession is necessary, 23 M 70, 29 B. 428, but a *bona fide* intention of the donor to *divest himself in presenti of the property* and to *confer it* on the donee must be proved. 10 C. W. N 706 28 A 439 4 C. L J. 295 ; 8 Bom L R. 387 . 1 M. L. T. 106 **P C.**

——the ordinary rules applicable to gifts apply to the Mahomedan Law like any other system of law and a gift under a *hiba-bil-ewaz* is not invalidated by an invalid condition bein attached to it. 22 C W. N 512.

(5B) Hiba-bil-ewaz—*contd.*

——the doctrine relating to invalidity of gift is unadapted to a progressive state of society and will be confined within the strictest limit. 25 C. W N. 761.

(5-C) Marz-ul-maut-gift.

——the law relating to marz-ul-maut-gift is not the same among all the schools In order to determine whether a donation of a person suffering from a mortal illness comes within this doctrine the questions to be considered are (1) was the donor suffering from a disease which was the immediate cause of his death, (2) was the disease of such a nature as to induce, in the person suffering, the belief that death would be caused thereby, or to engender in him the apprehension of death (3) was the illness such as to

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the deed his condition did not put him in apprehension of ... death within the meaning of marz-ul-maut. 35 C 1: 11 C W N. 973 : 6 C L J. 695 · 9 Bom. L. R 872 : 4 A. L. J 572 · 17 M L J. 408 P. C , 34 C. L J 444.

——what is death illness. 49 C. 477 ; 26 C. W. N. 749.

——where a Mahomedan was attacked with paralysis in the month of February and was confined to his bed and could not perform the ordinary duties without assistance and could not leave his bed for religious exercises till November when he died after executing a *wukf* in March, held that the wakf was executed during marz-ul-maut and could not take effect except to the extent of a third of the properties. The crucial test is whether there was an immediate apprehension of death in the mind of the donor at the time of the *wakfnamah* The fact that he lingered for seven or eight months did not matter 30 C. W. N. 129 : 90 I C. 218. ... 1926 Cal 401.

his right under a deed of
assed on the compromise
nsaction by invoking the
I. C. 573 : 1928 All. 494.

(6) Guardian and Minor.

the mother is entitled to the custody of the male child until puberty and her right 36, 32 C 444, 97 I. C. 15 S. L R. 175 : 66 I. C. [illegible].

——as regards the guardianship of the person of a minor Mahomedan girl, in the absence of mother, mother's mother is the lawful guardian until the girl has attained puberty. 37 C. L. J 329 : 27 C. W N. 531.

——the mother is entitled only to the custody of the minor child up to certain age and not the natural guardian. The father alone 97 I C 621, (C),

guardian of her minor child and she has no larger powers to deal with her minor child's property than any outsider. 23 C. W. N 50 P. C. 45 C. 878 : 28 C. L J 409, 26 C W N. 246, 24 C. W. N 64 n. 290, 473, 6 C. W. N 607, 11 C .W. N. 417 *contra*. 11 C W. N. 71, 26 A. 22, 17 W. R. 239

——the mother cannot refer a matter to arbitration 26 C. W. N. 245.

——the mother has no power as *de facto* guardian to alienate, but the decree for possession must be conditional to the payment of ancestral debts 25 C W. N. 258, 33 C. L J 256, 15 C L. J. 270 : 39 I A. 49 : 34 A 213, 26 Punj. L R. 271, 85 I C 772. 1925 Lah. 509 P. C, *contra*. 11 C W N. 160, 11 C. W. N 71 4 C. L. J. 485, 26 A. 22, 17 W. R. 329

——the paternal uncle has no legal right under the Mahomedan Law to the guardianship to the property of the minor any more than the mother. 29 A 10.

——under the Mahomedan Law no male, unless he be *Maharam*, that is within the prohibited decree, can be guardian of a minor girl; a maternal uncle can be a guardian, mother loses her right by marrying a stranger but if she marry a *Maharam* then she is competent. a sister's husband cannot be guardian 18 C. W. N. 853, 11 C. L J. 633

——the husband is not the guardian of either the person or the property of his infant wife. 35 C L J. 192, 27 C W N 531 : 37 C. L J. 329

——under the Mahomedan Law the brother is not the legal guardian of the minor. 27 A. L. J 355 . 115 I. C 646 . 1929 All. 250, 113 I C. 227 : 1929 Lah. 143.

——the marriage of girl under a guardian appointed by the court should be performed with the consent of the court, 19 C. W. N. 290.

(6) Guardian and Minor—contd.

——it is not obligatory upon the guardian of the person, nor even upon the guardian for marriage to provide marriage for the ward 19 C. W. N. 290.

right may divest himself of the other e minor and can appoint any , 286.

——a girl under the Mahomedan Law attains majority either at the age of fifteen or some earlier age 21 C. W. N. 345, P. C. 68 I. C. 727.

——unauthorised persons who happen to have charge of a child, have no power to pledge or sell immovable property. They are permitted to deal with other forms of properties on emergencies 33 C. W. N. 50 P. C.

——when a minor is in possession of the mortgaged property under a usufructuary mortgage the defacto guardian cannot release the property at a time when the minor is not competent to signify his assent to that 1929 All. 250. 27 A. L. J. 355; 115 I. C. 646, 45 I. A. 73 35 M. L. J. 422 P. C. Ref.

——as de facto guardian cannot bind the estate of the minor or affect his interest by statement or admissions Such statements however are admissible in evidence 1922 Cal 287; 65 I. C. 253, 1926 Cal. 82

——a transfer of the minor's property by de facto guardian is void and the transferee cannot eject a trespasser. 30 C. L. J. 190. 1923 Lah 601, 1925 All. 36, 1925 Nag. 134.

on hi minor cannot contract basis sued for rent on the 89 I. C. 373 (c).

——the idea of joint family system being unknown to the Mahomedans the managing partner cannot bind the other members without of Dist se avoi y Cal 000 104 I. C. 833.

——the maternal grand father of a minor is not a guardian of property under the Mahomedan Law and cannot give a discharge for a mortgage and make it binding on the minor. 85 I. C. 632: 1925 Lah. 511.

(7) Jointness

——under the Mahomedan Law there is no representation of the family as under the Hindu Law 39 C. L. J. 90, 50 C. 978 Ref. 1926 Cal. 343

m family live in com- se e acquisition of the 3 se family. 33 C. L. 19 1925 M. W. N. 543:

(7) Jointness—*contd.*

——when one member acquires a property there is no presumption of its being acquired out of joint family fund. 24 C. W. N. 321 P. C, 1923 Cal 369.

——any partnership business between Mahomedan brothers must be regulated by the contract between them and there is no presumption that on the death of a partner the partnership will continue to exist instead of coming to an end. A managing partner cannot bind the other partners without their consent as the joint family business is unknown to the Mahomedans. 54 C. 687 1927 Cal. 836 104 I C 833.

——when uncle and nephew live together and land is purchased in the name of the uncle the presumption is that the purchase was made by him exclusively. 1923 Cal 369

——purchasing member is presumed to be the owner. 19 C. L. J. 539, 12 C. W. N 143 n., 33 C. L J 369, 38 M. 1099.

——the heirs of a Mahomedan hold as tenants-in-common and suit by an heir to recover possession is governed by Art. 144 and not by Art 123 45 B 519, 111 I C 809 51 A. 101 26 A. L. J. 1041 : 1928 All 467 F B, 1926 All 748 *reversed*

——the possession of one Mahomedan co-heir is not adverse to the other They are all tenants in-common and the principle that applies is that in the absence of ouster or acts amounting to it possession of one is not adverse to the other. 83 I. C 763 1925 Cal 1176, 91 I C 725 1926 Cal 480

——for a debt incurred by a Mahomedan he alone is personally liable and not any of the members of his family There is no presumption of jointness as under the Hindu Law 87 I C 660

——as between a Mahomedan father and son there is no presumption of jointness of estate 88 I C 254 ; 1925 Nag 376.

——when a Mahomedan dies leaving sevaral heirs and a rent suit is instituted against some only, there is no proper representation of the tenancy 49 C L J. 83 , 1929 Cal. 28 115 I C. 180.

(8) Marriage

r the court
W N 290.
erson, not
;e for the
ward. 19 C W. N. 290

——a girl under the M. Law attains majority either at the age of fifteen or at some earlier age. 21 C W. N. 345 P. C, 68 I C. 727 73 I. C 896

btained by fraud or force,
31 A. 343.
e marriage will be solem-
Marriage Act, otherwise

——in order to constitute a legal marriage, the woman must be what is called a fitting subject or *mahal*. A woman whose marriage

(8) Marriage—*contd*

——an agreement for future separation is void 25 O. C. 157, 7 Bom. L. R. 602 *Ref*

——death or divorce dissolves the tie between the husband and wife, 20 A L. J 56 : 64 I. C. 943,

——the duration of *iddat* period is 4 months and 10 days or until delivery whichever is longest. The period fixed is not curtailed if delivery takes place even before. 4 Lah 192, 73 I C 500.

——remarriage after iddat but before delivery is only irregular but not void, 34 B. 111, a marriage *is not invalid for* concealing pregnancy. 45 B 151.

——marriage is dissolved by apostacy. 71 I. C. 830, 132 P R 1884, 61 P. R 1899, 35 A. 90, 39 C 409.

[illegible] marriage fixed by agreement [illegible] o right of inheritance on the [illegible] this union are legitimate A [illegible] religious ceremonies [illegible] with right of [illegible] arriage and it is [illegible] to the term. [illegible] by agreement during the [illegible] here is co-habitation after [illegible] s a presumption in favour [illegible] W. N. 225 . 16 M. L T 517.

—— *Muta* is a very vague and unsatisfactory form of marriage, its terms must be definite and dower must be fixed, 1929 Rang 35

(9) Mosque.

——the question whether a particular building is a public mosque or not is a question of fact and while the existence of a *mihrab* and *mimber* may be evidence to be considered along with the *other* facts it is not possible to lay down that as a matter of *law the* [illegible] nce of such structures *as* [illegible] that the building in *question* [illegible] mosque. 1923 Bom 42

——every Mahomedan having a right to use a mosque *for* devotion is entitled to exercise such right without hindrance and is competent to maintain a suit against any one interfering *there* with Such suit need not be brought under Or. 1, r. 8 C. *P.* C. 35 A 197 : 18 I. C 797 : 11 A. L J. 233.

——the worshippers in the vicinity of a mosque have right to it over and above those possessed by the Mahomedan public *and* have a more direct interest in its maintenance and in *the proper* [illegible] endowed for its *benefit.* 23 C. W [illegible]

[illegible] brings a suit on *behalf* of [illegible] the *right of the mosque* [illegible] 96 I. C. 823 : 1926 Mad. [illegible] 213, *Dist.*

(7) Jointness—*contd.*

——when one member acquires a property there is no presumption of its being acquired out of joint family fund. 24 C. W. N. 321 P. C., 1923 Cal. 369.

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——as between a Mahomedan father and son there is no [illegible] I. C 254 1925 Nag 376.

[illegible] several heirs and a rent [illegible] is no proper representation [illegible] 25 113 I C. 180.

(8) Marriage

——the marriage of gir[illegible] under a guardian appointed by the court should be performed with the consent of the court 19 C W N 29[illegible]

——it is not obligator[illegible] upon the guardian of the person, not even upon the guardian f[illegible] marriage to provide marriage for the ward 19 C W N 290

——a girl under the [illegible] Law attains majority either at the age of fifteen or at some ear[illegible] age. 21 C. W N 845 P. C. 6[illegible] I. C. 727 · 73 I C 896

[illegible] btained by fraud or force. 51 A. 848

[illegible] e marriage will be solem- [illegible] Marriage Act, otherwise

[illegible] arriage, the woman must be [illegible] A woman whose marriage,

(9) Mosque—*contd.*

——unless the mutwalli is displaced from his position as such, no one has any right to interfere with the management of the mosque. The mutwalli has the right to appoint a servant of the mosque. 26 C. W. N 204.

——where a mosque and Idga were founded by the common ancestors of the plff. and deft. and continued in the possession of their family ever since, the appointment of the deft. as *Kazi* by the Govt does not give him an exclusive right to the possession of the institution and their endowments 1922 M. W N 439, 66 I C. 237 ; 15 L. W. 430.

——the right of worship of each worshipper in a Mohamedan mosque or religious endowment is an independent right wholly irrespective of the right of the other worshippers and therefore, [illegible] 29 C P. C. does not [illegible] 1, 8 C. 82, 7 A 178,

[illegible] L. J, 108 37 I. C

[illegible] rship of god and is open to any Mahomedan to whatever sect he may belong who choses to pray in it. If persons deliberately come late to prayer they cannot claim to have a second service for themselves 2 P L J. 108 . 1 Pat L. W 284 : 1917 Pat 73

——whether a particular building is a public mosque or not is a question of fact. 1923 Bom. 42 . 70 I C 850.

——a mosque becomes consentrated for public worship either by delivery to a matwalli or on the declaration of the wakir that he has constituted it into a musjit, or on the performance of prayer therein. The prayer of one individual is sufficient to constitute it a public mosque, so long as it is accompanied by the *Azans* (calls to prayers) &c. 1 C. W. N 76.

[illegible] f the Mahomedan Law is that [illegible] on the property belonging to [illegible] d permission 6 Pat L T. 857 ;

——a wakf for the expenses of a mosque and for maintenance of the members of the dedicator's family is valid as to the former only. 19 C W N 76

(10) Pre-emption.

——the law of pre emption is derived from three sources (i) Mahomedan law (ii) the necessities of the existence of the [illegible] communities, (iii) public and private convenience 73 I. C 855.

——by a liberal construction the rule of the Mahomedan Law as to pre-emption is a religious usage or institution within the meaning of s 24 Bengal Civil Courts Act and as such is binding on the courts, 17 A. 575 F. B

——in matters of pre-emption although the courts are [illegible] to decide cases strictly according to the Mahomedan Law [illegible]

(10) Pre-emption—*Contd.*

the rules laid down by the Mahomedan jurists are not contrary to the principles of justice, equity and good conscience, they should be given effect to, 44 C. L J. 194: 31 C. W N. 14: 1926 Cal. 1153: 98 I. C 220

——the right of pre-emption may be enforced against the purchaser from the person pre-empted. 15 A. 385.

——it is not right of re-purchase either from the vendor or from vendee involving any new contract of sale. 7 A. 375 F. B

——when possession is not given and the price is not paid till registration the right accures upon registration and not before even if the pre-emptor was aware of the sale beforehand even if offer was made to him before. 18 C. W. N. 890 : 19 C. L. J. 601, 35 B. 575 p. 599, 16 A. 344 F. B.

——the right arises when there has been an oral agreement to sell followed by payment of price and delivery of possession 46 B. 302, 23 Bom L. R. 1079, 21 A. L J. 908.

——law of pre-emption is applicable to zemindary property, 41 A. 428.

——the owner of homestead land is entitled to the right of pre-emption on the ground of vicinage 7 Pat. L. T 604 : 1926 Pat 542: 97 I. C. 618.

——when the right of pre-emption is conferred by the *Wazib-ul-arz* which is however silent as to when and how the right is to be enforced the general principle applies to the case 93: I. C 399.

——unless the contrary is shown a provision in a wajib-ul-arz should be presumed to be a record of a custom. 49 A. 367 · 101 I C. 368 : 1927 P. C. 113 : 1927 M W. N. 441, 25 A. L. J. 671 · 33 M. L. T 166 : 31 C. W. N. 853 P. C (37 A. 129 : 28 M. L. J. 556 P C.) *approved*, (45 A 413 P. C., 32 A. 363 P. C.,) *Ref.*

——the right of pre-emption reserved in a partition deed is valid as between the co owners themselves. 14 C. W. N 295.

——the purchaser cannot be required to submit to partial pre-emption nor he can demand it. 33 C. W. N. 318 · 1929 P. C. 59 · 1929 M W. N. 220 : 114 I. C 601 : 27 A. L. J. 85 . 49 C. L J. 141 · 29 L. W. 423 P. C.

——agreement by a mortgagor to give mortgagee a preference of pre-emption in case of sale is enforcible. 2 C. W. N 475, 22 A 238

——transfer reserving the right of re-purchase by way of pre-emption is opposed to the rule against perpetuity and the condition cannot be enforced, 25 C. W. N. 901. (5 C. W. N 343, 24 W. R 321) *Fol* 2 C. W. N. 575, 14 C. W. N. 295 : 10 C. L. J. 626, 16 C. 71 : 15 I. A 159 P C. *Ref*

——in the absence of proof that the pre-emptor was given an opportunity to purchase the property at the price *offered* by the stranger or that he had sanctioned the sale to the *vendee* at that price, the mere fact that subsequently he himself was negotiating to purchase at a higher price did not constitute waiver. 18 C. W. N. 890 : 19 C. L. J. 601, 27 A. 670.

(10) **Pre-emption**—*contd.*

——the right of pre-emption does not arise until after cessation of vendor's title 18 C W N. 890 19 C L. J. 601

——the statutory provision of sale has superseded the Mahomedan Law, so that right of pre-emption does not accrue until the ... ary). 18 C. W. N 890 19 C. L.
Contra 21 A. L J. 908.
... xist not only at the date of the ... tion of suit and finally up to and at the date of the decree of the trial court. 20 C. W N. 1099. 24 C. L. J 140, 21 A. 374.

——the pre-emptor should perform the Talab-i-mwasi-bat (immediate claim) and Talab-i-ishtished (affirmation with witnesses): for the due performance of the latter it is not essential that the witnesses should be invoked to bear testimony to the fact of the ceremony having been so performed but it is necessary and sufficient, if the witnesses are invoked to bear testimony to this fact of declaration that the Talab-i-mwasibat have been already performed. 6 C L. J 40, 17 C 543 *Expld*

——the second demand also must be made without unreasonable delay 27 A L J 531 1929 All 459

——the second demand must call the attention of the witnesses present to the first demand 45 A. 290.

——where the pre emptor took two witnesses at the time of making the demand and subsequently made the demand in their presence the omission on his part to invoke the witnesses is not fatal. 49 A. 385 · 1927 All 289 100 I C. 39 25 A L. J 312

——the witness need not be examined in court 1923 All. 229

——the right must be exercised with utmost promptitude, any unreasonable or unnecessary delay is to be construed as an election not to proceed 35 C 402 P. C, 25 C W N 901

——the Mahomedan Law requires that on the receipt of information as to the sales the plff must perform the ceremony of *talabi-mewasibat* immediately without any loss of time Even a short delay will not be excused But where a plff receives an ... he doubts or has reason to doubt, ... gets an authentic information ... ing of the law. 29 C W. N. 400:

——the mere fact of a previous notice to the plff. that the property was going to be sold on a particular date cannot operate as an estoppel to claim pre-emption after the sale actually took place. 49 A 716 105 I C 771 · 1921 All 548 25 A L. J. 473.

——on general principles unless the purchase price is known to the person entitled to pre-emption he has not all the facts before him to enable him to decide whether he will exercise his right. 90 I. C 806 1925 Pat. 743 · 1925 P H C C. 265.

——for the performance of the talab-i-mwasibat only demand in explicit term is necessary and no mention of price is necessary, so, if owing to mistaken information, the claimant understated the

(10) Pre-emption—*contd.*

price that did not affect the ceremony otherwise well performed 20 C. W N. 1099 : 24 C. L. J. 140.

——when a person has performed talab-i-mwasibat in presence of witnesses, but not in presence of seller to purchaser or on the premises, it is necessary that when performing the tolab-i-ishtisbad

——the second demand should be made either in the presence of the vendor or vendee on the property. If the demand is made in presence of vendee alone it should be made in presence of all vendees 45 A. 449.

——the performance of the two formalities *talab-i-mwasibat* and ... essential that the latter ... ving been duly made 20 ... A. 482 : 16 A 354 35 C ... 55 C. 1181 : 32 C W. N ... 5 A. 290.

... ssity of second demand the first demand must be accompanied by the formality that is prescribed under the Mahamedan Law for the invocation of witnesses. 48 C L. J 548 1929 Cal. 136 : 114 I. C 155

——pre-emption cannot be enforced against the heir of the deceased 38 M 114, nor does the right to sue for pre-emption survive to the heir of the pre-emptor under the *Sunni* Law 20 A 89

——in a suit for pre-emption the pre-emptor may base his claim alternatively on contract. 36 A. 456.

——in a case where the vendor was *Shia* Mahamedan and the pre-emptor was a *Sunni*, while the vendee was Hindu, the Mahomedan Law applicable to the case was that of the vendor 36 A. 481. (22 A. 102, 12 A 229, 7 A 775 ; *Ref.* 32 C. 982) *not Fol.*

... applies by cus- ... T. 556 : 67 I. C. ... domiciled in the ... Pat L. T 556.

——when Mahomedan law of pre-emption is followed by the Hindus, the claimant must comply with all the requirements of Mahomedan Law. 25 C. W. N. 901. (35 I. A. 60 . 25 C. 402 12 C. W N. 419 P. C. 4 B L. R. 203 . 13 W. R. 299) *Ref.*

... does not apply when ... are Mahom- ... 12 : 1926 Cal.

——the Mahomedan Law relating to pre-emption applies also ... 1925 P. H. C C. 265 ... t that the property ... 96 I C 553 : 192

A. 675.

(10) Pre-emption—*contd.*

——where the whole of the mahal comes to be owned by a single proprietor the custom of pre-emption is extinguished. 96 I. C. 640, 39 A 480 *fol.* 1924 All. 425 *Dist*

——the rule that where the whole mahal comes into the hand of a single proprietor the customary right of pre-emption is extinguished does not apply to the case where the property comes to be held by single joint family consisting of several members. 96 I. C. 544 24 A. L. J. 703, 15 A L J. 423 *Dist.* 1924 All. 371 *fol*

——instances of the right of pre-emption in the neighbouring mohal do not prove the existence of a custom in the locality in which the property in the suit is situate, 92 I C. 651 : 1926 Lah. 108 · 27 Punj L. R 43.

[illegible] of pre-emption
[illegible] 129 **P. C** *fol*

[illegible] rtgagee in the

——where the house of pre-emptor discharged water on the property sold and the house of the vendee discharged water on a lane intervening between the house and the property sold, both the pre-emptor and the vendee were sharers in the immunities and appendages and therefore none had the preferential right. 31 A 519.

——the Mahomedan Law does not prescribe any period which would give a person the right to enjoy an immunity such as that of discharging water or a right of way 31 A. 510.

——when a mahal has been perfectly partitioned, no right of pre-emption subsists in favour of owner of one of the new mahals in respect of the other new mahal or any portion of it on the ground of vicinage 33 A. 28 (11 W R 169 6 B. L R. 41, 15 A. 104), *Ref* 21 A 441.

——pre-emptor, though out of possession of his own share at the date of suit, is entitled to pre-empt, if he was in law entitled to share on the date. 10 A 472.

——one coparcener has a right of pre-emption against another coparcener being based on the principle that the rights of all are equal The doctrine of shaffa as it is at present accepted does not appear to be based entirely on the ground of preventing disagreeable strangers from coming in but it is on a conjunction with the land sold that the right is grounded, 31 C W N. 14 98 I C 220 44 C. L. J. 194 1926 Cal 1153 **Sp. B.** 4 C. 831 **F. B.** *overruled* (19 A 466, 44 B. 887 **F. B**) *approved*

——where a Mahomedan husband makes a transfer of his [illegible] tion
[illegible] 33.
[illegible] or
[illegible] non
enjoyment of a road it is necessary that such road should be a private road and not a thoroughfare 10 A. 247

(10) Pre-emption—*contd.*

——a person cannot claim to be a *shafi khalit* because the branches of his trees spread over the neighbouring land 1927 All 504 103 I C 897 19 A 420 *Ref*

——where a co-proprietor does not part with his entire interest in land by an absolute sale, but *merely grants a lease of it*, even though it *be a mokrashi* lease, the doctrine of pre-emption will not apply. 15 C 184.

——a perpetual mukararidar is a leesee and not a proprietor and cannot claim pre-emption against a co-sharer. 8 Pat. 251, 5 P. L. J. 740 *fol*

——no right of pre-emption arises upon a share which according to Mahomedan Law, is invalid 22 A. 343 : 16 A 344 F. B

——the pre-emptor can pre-empt a share of one of the several vendees leaving out the rest. So a demand to one of the several vendees operates only as regards his proportionate share. 49 A 716 103 I C 771 1927 All. 548 25 A L J 473.

——when the vendee and the pre-emptor stand in the same relation as regards the property the latter can get a decree as regards half 45 A. 457 1923 A 520 . 19 A L J. 869 : 44 A. 83.

——right of co-sharers in same mahal, same class of pre-emptors, nearness of decree, 44 A 114.

——persons who are 8 degrees removed cannot be called near relations, for the purpose of pre-emption. 95 I. C. 268 : 1926 All 473, 58 I C 87 *Fol*

——although there is a public path through the plot to be pre-empted, for the purposes of pre-emption the whole plot remains a compact one 1927 All. 504 : 103 I C. 897.

——right of pre-emption against the heir of a mortgagee by conditional sale accrues on the expiration of the time of grace 24 A 17

——in a suit for pre-emption the plff. can prove by evidence and circumstances that the real transaction is one of a sale and not mortgage 1927 All 204 : 98 I C. 989.

——where two sale transactions are in fact one transaction of exchange there is no right of pre-emption 1927 All 686 : 25 A. L. J. 723 · 103 I. C 399

——where both the vendors and the vendees were Sunni a Shia Mahomedan could not maintain a claim for pre-emption based on the ground of vicinage. 22 A. 102.

——under the *Shia* Law no right of pre-emption exists in the case of property owned by more than two co sharers 11 A. 229

——the right of pre-emption under the Shia Law is of a much more restricted character than that allowed under the Hanafi Law The right to pre-empt can only be claimed under that law by a person who is a partner of a share in the joint and undivided property 88 I. C. 972 , 23 A. L J. 617 : 1926 All. 559

——where the pre-emptor and vendor are Mahomedans and the vendee a non-Mahomedan, the Mahomedan Law is to be applied to the matter. 7 A. 775, F. B

(10) Pre-emption—*contd*

——right to sell property by Mahomedan to Hindu-Law applicable. 26 C. W. N. 221 : 3 Pat. L. T. 86 · 24 Bom L R. 595 P. C., 1922 P. 601

——in a pre-emption suit, the pliff was required to pay the purchase money within two months of the decree of the court becoming final but the payment was made within three months from the date of the decree, no appeal having been filed, held the payment was within time. A decree becomes final only on the expiry of the period of limitation prescribed for filing an appeal. 47 A. 533 : 23 A L. J 215 : 86 I C. 957

——where the subject matter of the suit for pre-emption is land of which the revenue payable is recorded in the Collector's register, the value for the purposes of jurisdiction is 30 times of such revenue. 8 Lah L. J. 60 : 92 I. C 986 : 27 Punj L R. 172 : 1926 Lah 346

——the Court has jurisdiction to entertain a suit for pre-emption, the value of which assessed under the Suits Valuation Act is within its pecuniary jurisdiction But not when the money to be paid in the suit exceeds the limits of the pecuniary jurisdiction. 8 Lah. L J. 58 94 I C. 125 : 27 Punj L R 228.

——a decree in pre-emption suit becomes final on the expiration of the appealable period, such a decree may be transferred before the payment of purchase money 7 A. 107

——a person having a right of pre-emption does not lose it by refusing to purchase property at the price at which it is offered to him, because he believes in good faith that such price is in excess of the real price 3 A 236

——where the vendee takes the property of the vendor for a decretal amount the pre-emptor cannot get the property without paying that amount although the property may not be worth the amount 1927 All 540 101 I C 518

——refusal to purchase at a price which is fraudulently inflated does not estop a person to claim pre emption as such refusal amounts to refusal to purchase at that inflated price 1926 All 722 97 I. C 340

——in a case where one of the items of consideration for a sale deed is found to be fictitious and the evidence as regards the market value of the land is not satisfactory, the sum actually paid may be taken to be the proper price. 7 Lah L J. 559 26 Punj L R. 835.

——by entering into a compromise with the vendee the pre-emptor relinquishes his right, 8 A 275, but the offer to purchase at the sale price, with a view to avoid litigation does not amount to acquiescence 16 A 300.

——a person entitled to a right of pre-emption is not bound to claim pre-emption in respect of all the sales which may be executed in regard to the property, although every suit for pre-emption must include the whole of the property subject to pre-emption conv... by one transfer. 19 A. 466, 6 A. 370 *Ref.* 8 A 462

(10) Pre-emption—*contd.*

——when during the pendency of the pre-emption suit the vendee acquires new property under a sale deed which is still liable to pre emption the suit cannot be dismissed on the ground of [illegible] 749 1925 All. 361 *Dist.* 16 A. L. J 627

[illegible] ude the whole of the [illegible] pre-emption conveyed by one bargain of sale to one stranger 6 A. 423, 1923 Lah. 147, 73 I. C. 679, 67 I C. 872, but if any part is left by mistake the plaint may be amended 67 I. C 872

——the pre-emptor stands on the shoes of the vendee and is bound by all the conditions and obligations. 72 I. C 484.

——the result of the suit dismissed for default does not affect the other suits where numerous suits are filed for numerous sales. 45 A 561

——acceptance of mortgage money from the vendee does not amount to waiver or acquiescence 69 I. C. 648, 35 C 402 *fol.*

——no right of pre-emption arises in respect of property leased in perpetuity. 1923 Pat. 22 : 71 I. C 318, 25 W. R. 43, 5 P. L. J. 740 *fol*

——pre-emption applies to a sale by receiver 45 A. 185, and to sale in auction under Or. 21 r. 88 C. P. C. 45 A. 186.

——pre emption is a substitution of one vendee for another so the rights of the pre-emptor take back to the date of the sale from which date he would be entitled to the profits. 98 I. C. 803 · 1927 All 202

——when two persons who have equal rights to preemt bring separate suits and one of them purchases the vendees right the other can make him deft and continue his suit and is entitled to preempt on half of the property. 49 A. 516 · 100 I. C. 666 . 1927 All 336 : 25 A. L. J. 479

——where the pre-emption suit fails in consequence *of the fact* of the deft—vendee's acquisition of a share in the village, the plff should be awarded the cost of the first instance. 1927 *All* 697 : 103 I. C. 376

——transfer of property by the vendee pending pre-emption suit is effected by *lis pendens.* 67 I. C. 304

——after partitions of mahal co-sharer cannot exercise the right of pre-emption. 20 A L J. 956, 22 A 1 *fol.*

——if for the purpose of inflating the price or *otherwise* fraudulently to defeat pre-emption the vendor insert property in the sale deed to which he has no title the plff is entitled to challenge the title to such property. 1927 All. 374 : 100 I. C. 456

——if a purchaser having an equal right with that *of the pre*-emptor joins with a person of inferior right in the purchase, *he can*not resist the pre-emptor 66 I. C. 466.

——a Mahomedan minor's suit for pre-emption cannot be defeated by the fact that a person who is not in law his guardian purported to consent the sale on his behalf. 47 A. 635 : 83 I C 234 · 1925 All 424.

Pre-emption—*contd.*

——it is fatal for the plff. in a suit for pre-emption to associate him in that suit any person who is not entitled to pre-emption. 450 : *23 A. L J 198 : 87 I C 53 · 1925 All 355.*

——if a person who has the right of pre-emption associates with self persons who have no such right his suit will fail 48 A. 810 : C. 1007 : 1927 All. 168 24 A. L. J 1021 (5 A 197, 19 A. 324, 34 A, 21 A. L J. 148) *Rel on*

——two or more co-sharers may sue a stranger purchasee for emption without asking for an adjudication on their res-

58, 114 I C 601 · 49 C. L J. 141 **P. C.**

——where a person claims pre-emption against a co-sharer, the ts of both ought to be given effect to. 47 A 324 · 23 A. L. J 138: C 589.

——where the plff in a pre-emption suit omitted to implead as deft within the period of limitation, held that the suit being ed against him must be dismissed as against all defts 7 Lah . 76 : 26 Punj L R 447 : 88 I C 555.

——a pre-emption *suit is not vitiated even if the guardian for* of the vendees who is a minor is appointed after the expiry of tation for the suit. 25 A L. J 655 · 102 I. C. 624, 30 A 35 *fol*

——if the plff has a legal right to pre-empt it is unnecessary the court to consider from what source he is going to procure pre-emption money 47 A. 470 · 23 A L J. 283 · 87 I C. 298.

——where property is sold for the old debts pre-emption money he market value and not the actual amount of the debts. 1925 ;. 194.

——woman succeeding to life estate as heir can pre-empt 84 '. 484 , 1925 Lah 83

Restitution of conjugal right

——a condition that a Mahomedan wife may leave her hus d's house on ill treatments is not opposed to Mahomedan Law C. W N 888

——the wife may under an agreement insist on her husband's jugal rights being exercised in her parent's residence 25 C. W. 888, 23 C. W. N 124 n.

——cause of action arises where the husband resides 54 I C (A)

——decree may be passed conditional on payment of prompt ver. *100 P. W. R 1918 · 46 I. C. 893.*

——non-payment of prompt dower is no bar to the restitution conjugal right. 19 A. L J. 880 : 64 I. C. 117 *contra* 32 I. C. 707 . 35 B. 386, 30 B. 122.

(11) Restitution of conjugal right—*contd.*

——husband neglecting the wife for a long time and even for two years after she has attained puberty is not entitled to restitution of conjugal right. 73 I. C. 896

——restitution of conjugal right by detention of the wife in prison is discretionary with the court 44 B. 972 : 59 I. C. 361

a claim for maintenance. 73 I C. 716.

——form of decree and how it can be executed. 51 I. C. 58 (C), 23 I. C. 828 (M), 59 I. C. 887 (Pat)

——grounds for refusing a decree 46 P. R. 1916 : 34 I. C. 533, 67 P W R 1918 : 46 I. C 112, 21 B. 610.

——valid marriage must be proved. 21 C. W. N 345 P. C.

——the husband must provide a suitable house. 46 I. C 491 (C)

——restitution may be refused on ground of minority 23 P R 1919 · 42 I C. 698

——in the case of Mahomedans a suit for restitution of conjugal rights is in the nature of a suit for specific performance being founded on a contract of marriage which the Mahomedan Law regards as a civil one. Even therefore if the validity of the marriage be established, the relief of restitution of conjugal rights may be refused on such grounds as that its enforcement would be prejudicial and dangerous to the health, happiness or *life of the* wife 92 I. C. 913 : 9 N. L. J. 11.

——property of husband is no ground for refusing *him* a decree for [illegible] speaking of a wife that she [illegible] is in fact doing so, can not [illegible] title him to such relief. 54 [illegible] I. C. 760, 11 M. I. A. 551 P. C.

(12) Succession.

——succession is governed by the law of the sect (*Sunni or Shia*) to which the deceased belongs. 12 A. 290, P. C. 17 I. A. 73 P C

——the rule of propinquity applies among *the members* of the same class and not of several classes. 54 C. 754 : 105 I. C 67. 31 C W. N 1068 1927 Cal 808.

——in the case of the Hindu convert to *Mahomedanism* the presumption is that they follow the Mahomedan *Law*, the onus to prove otherwise is on the person setting up that plea. 45 M. 305 : 26 C. W. N. 793 : 36 C. L. J. 64 : 24 Bom. L. R 944 P C.

——where a Hindu wife becomes a Moslem the *mere fact of* change of religion even though *bonafide* does not *ipso facto* dissolve the marriage, though she must be governed by the Mahomedan Law thereafter. Under that Law, it is only when the convers on takes place in a country where the Mahomedan Law is not adminis-

(12) Succession—*contd.*

——a decree obtained by the widow against the heir of th[e] deceased has priority over the decree obtained against the hei[r] personally. 26 A. 27, 19 A. 504, *Dist.*, 4 C 402: 5 I. C. 211 **P. C.** *Ref.*

——a decree against some heir as representing the property binds others. 8 C 370, (4 C 142 **F. B** 402, **P. C.**) *Ref.* 12 B 101, 26 M. 735, 20 B. 338, *contra*, 23 A. 263, 10 A. 239, 7 A 716, 882 I A. 57.

——under the Mahomedan Law the estate of a deceased person must be applied to the payment of his funeral expenses and debts before the heirs can make partition. In this respect it is analogous to and even stricter than the Hindu Law. 26 M. 735

[illegible] liability [illegible] mes [illegible] ate

the decree holder can only prove in insolvency and in taking [illegible] tion the official receiver should be made party. 1929 M. W. N 168 1929 Mad. 609.

——the chance of an heir-apparent succeeding to an estate is under Mahomedan Law neither transferable nor releasable 31 B. 165.

——the shares are determined on the occasion of each death 3 Lah 80 · 67 I. C 154

——in the Presidency of Bombay a suit for partition of an inheritance by Mahomedans is hardly distinguishable from a partition suit by Hindus 23 B. 188

——illegitimacy is no bar to a person inheriting from his mother and his maternal relations. 30 C. 983, 11 C. 14. *Fol.*

——a default of other shares by blood and distant kindred, prop[illegible] returns to the widow or to the husb[and] [illegible] [illegible] the last heir is the Ima[m] [illegible] 539. 94 I. C 433

——the daughters of a deceased brother excludes the descen[illegible] time of the *deceased*. [illegible] there is no *presump*[tion] [illegible] [fam]ily fund. 24 C W N 321 **P. C.**

——the rule against partial partition does not apply in the case of Mahomedans as rigidly as it does to the Hindus. 14 L W. 502

——under the Shiah Law daughter's children and descendants are not excluded. 45 M L J. 359: 1923 M. W. N. 793; 71 I. C. 621

——a childless widow of a Shiah is not entitled to a share in the value of any land including the sites of building of her husband but she is entitled to a share in the sale proceeds of the building 48 A. 557: 95 I C. 19; 1926 All. 522, in the same case it has been held that usufructuary mortgages do not constitute immovable property in the sense of land so as to disentitle the widow to any share in such property

(13) Talak (*Divorce*)—contd

——a *Kabinnama* was executed by a husband to his wife giving her power to divorce him on certain condition and the wife alleged that on the happening of one of those conditions she served a notice upon her husband threatening to exercise her power of divorce unless certain conditions set out by her were complied with by him within a certain time, and, as the husband did not so comply with it, she divorced him and it was found that the alleged notice was not served upon the husband, *held* that the wife had, on the happening of the condition specified in the *Kabinnama*, an absolute right to exercise her power of divorce and the fact that she purported to have given the notice which was not served cannot be said to operate in any manner as a waiver on her part 43 C. L. J 176

——where a *kabinnama* was executed by a Mahomedan husband who was a minor agreeing not to remarry during the wife's life time and not to illtreat her further providing that on violation of any of the condition the wife would be entitled to divorce herself from her husband, held that a Mahomedan minor husband could enter into such an agreement and s 2 of the Majority Act did not affect such a contract and it was enforcible. 47 C. L. J. 372: 110 I C 52 : 1928 Cal 303

——in a suit for dissolution of marriage on the ground of the husband's impotency a decree cannot be given unless the wife proves that the deft was impotent at the time of the marriage 26 Punj. L R 747

——form of relief in such suit. 47 A. 243 : 83 I. C. 27 : 1925 All 24

——according to the *Hanafi* school a pronouncement of divorce is effectual although made under coercion. A written divorce contained in a compromise deed, registered and addressed by the husband to the wife is not only an acknowledgment but a document which actually effects the divorce. 30 C W. N 178. 90 I C 633

——according to the Hanafi Law *Talak-ul-biddat* is a valid and binding form of divorce and it becomes irrevocable after it has been pronounced thrice 115 I. C. 546 . 10 Pat. L. T. 109 : 1929 Pat 81 F. B , 30 Punj L. R 7 : 1929 Lah. 6 : 114 I. C 74.

——a deed of divorce is not defective merely because it is not signed in the presence of the wife. 88 I. C 408 . 1925 All 550

——when the language of the deed of divorce is clear to indicate that the intention is to make an irrevocable divorce it is not necessary that the triple form should be used 88 I C. 408 1925 All 550

——wife's right to divorce is not absolute, but subject to certain conditions 83 I. C. 27 : 47 All. 243 : 1925 All. 24.

——an acknowledgment of a divorce, as distinct from the pronouncement of the divorce itself, obtained under compulsion is wholly ineffective if it is proved that it was in fact untrue. 88 I C 408 : 1925 All. 550.

(14) Wakf—*contd.*

24 C. W. N 18 (17 C. 498 ; 17 I A. 28 **P. C.**, 22 C. 619 · 22 I A 76 **P. C**, 23 A. 223 · 5 C. W N 177 : 28 I. A. 15 **P. C.**, 27 A. 320 ; 9 C W N 625 . 23 I A 86 **P. C.**, 21 C. W. N 521 ; 25 C L J. 224 · 40 M 116 **P C.**, 30 C. L J. 102, 23 C. W. N. 549 **P. C.**, 27 M L J 694) *Ref.* 24 C. W N. 494 **P. C.** 690.

——a settlement in favour of the *wakif's* family and in the event of a failure of descendants in favour of the poor does not create a valid *wakf* there being no substantial dedication for religious or charitable purposes. 20 C. 116 **P C.**, 17 C. 498 **P. C.** *Relied on* 19 C 412 *Overruled.*

——a deed purporting to create by gift a perpetual succession of interests for the aggrandisement of the family of the donors is invalid and is not validated by using the word "wakf" or by inserting a remote trust for the poor. 49 C 820 : 27 C W. N. 101 · 43 M L J 385 24 Bom. L R. 1257 **P. C.**

——the use of the word wakf does not override all other terms ... rily imply a dedication to ... C. 343.

... "wakf" need not be used.

——conditional grants constitute wakf, but it is doubtful when the grantor is a Hindu though he uses the word "*wakf*". 21 N L R 1 1924 P. C 109 **P. C.**

——under the Mahomedan Law a gift for charity may take two forms, viz, either by way of wakf which signifies an endowment or by way of *sadakah* which signifies a donation 84 I. C 759

——an endowment created in favour of a takia which means the resting place of a *fakir*, is a valid *wakf.* 88 I. C 816. 6 Lah. 140 1925 Lah 420

——when in a case equity of redemption was dedicated as a wakf, the dedication was valid, 32 C L. J. 471, 42 A. 609 ; 30 M L J 263 1 P W. R 1921, **P. C.**, 33 C. L. J. 437 **P. C.**, 31 C L J 444

... a *wakfnama*, expressly purporting ... perpetuity on the family of the ... the benefit of the poor, only to ... descendants of the family, *held*, ... ory and so it did not establish a ...

... re declaration of wakf does not ... l until the founder divests him- ... of possession 7 Pat 464 : 1928 Pat.

... has been appcls ... L 150 : 112 I C

623

——under the Hanafi Law a valid wakf requires (1) declaration of wakf (2) appointment of mutawali (3) transfer of possession to mutawali 43 A 416 487.

(14) Wakf—*contd.*

——actual delivery of property to *mutawali* is necessary to give effect to the wakf 49 A. 391 : 1927 All 255 99 I. C 1052 : 25 A. L J 229

——but the Madras H C has held that all that is necessary for a valid wakf is to make a declaration and delivery of possession of the property dedicated is not necessary. 1926 Mad 1110 : 24 L W. 425.

——family arrangement, maintenance charge, validity of, 49 C 820 : 27 C. W N 101 . 37 C L J 56 · 43 M L J 385 : 24 Bom L. R 1257 P. C.

——if the effect of the deed is to give the property in substance to charitable uses it is valid wakf, but not if the effect is to give the property in substance to the testator's family When once it is declared that particular property is wakf or any such expression is used as implies wakf the right of the owner is extinguished and the ownership is transferred to the Almighty The wakfnama does not transfer the property to trustee. The wakf property cannot be transferred except for the purposes of the wakf 44 M. L. J. 24 · 50 C 329 28 C W N. 121 . 38 C L J 242 . 25 Bom L. R 670, P C

——in the absence of proof of dedication a tomb by itself does not become wakf 69 I. C 415

——in order to establish a *wakf* charitable purpose must be substantial and not illusory 17 C 492 : 17 I A 28, P C., 17 B 1. 19 I A. 170 P. C., 4 C L J 442, 24 C W N 494 P. C.

——provision for the dedicator's family out of the appropriated property may be consistent with the making of a valid *wakf*, where the appropriation is substantially for a pious or charitable purpose. 22 C. 619, 6 Pat L J 218 62 I C 455, 19 C W. N 133, 31 A 136, 20 A L J 824

annual income of Rs
enefit of the children
I C 647. 32 C W

——family settlement in perpetuity is contrary to Mahamedan Law, it cannot be made valid by the mere addition of the words that they are made as *wakf*, or for the benefit of the poor, where no substantial benefit is conferred on the latter 22 C 619 P. C., 20 C. 116 F B., *Approved* 24 C W N 100 n

——one of the essential conditions of a valid *wakf* is that it must be made in perpetuity and the ultimate end must be one that cannot fail The object must be charitable or if the object is for the suppport of one's descendants it must include an ultimate dedication for religious, pious or charitable purposes When a deed calling itself a "*wakf*" provided that the grantees and their
1, shall for ever enjoy the
e same, it provides for a
cation for charity and so

(14) Wakf—*contd.*

.. 23 C. W. N 903.

duri and transfer the properl the ... 40 A. 107, ogates from the nature o

—but a person ... f as first mutawali 45 A 68 19 A L J. 227.

pu way of *wakf* for religious ... be alienation by sale or mortgage 19 W. N. 33.

—an *wakf* for the expenses of a mosque and for maintenai of the members of the dedicator's family is valid as to former a not as to latter. 19 C W. N. 76

—in a *suit* to set aside a *wakfnama* on the ground that the was no substantial dedication, the court must see to the intentic of the settler which must be gathered from the document itself C W. N. 449

—if the legitimacy of a transaction is brought to the notice o the ... ıvokes its a C L J 241 e property in at present the the charity

... C L J. 224, P. C.

—dedication ... possession must be given settlor who m A. L. J. 51 : 29 M. W. N. 12 : 8 ... 1. 107 . 53 I. C. 603 P. C.

—conveyance to grand-daughter for the annual performance of Maharam is valid as *wakf* and the property is inalienable C. W. N. 33. in appeal, page 1061, 15 B L. R. 167, *Discussed*, 15 329 : 15 I. A 1 P. C. *Ref*

... in the presenc herself th id and th d, at leas 14, Dist

—a person who professes to act as *mutawali* cannot sue a wrongful holder of wakf property for recovery of possession 31 C W N. 184 . 44 C L J. 339 : 99 I. C. 205 : 1927 Cal. 130.

—a *defacto* mutawali of a mosque can maintain a suit against the tenant for rent 1926 M. W. N. 943 : 51 M. L. J. 598, (33 M 260 : 28 M. L. J. 347) *Ref.*

—a *defacto* mutawali is entitled to collect money due to the trust but he must account to the legal owner. 1924 A. 59, 7 I. C. 756.

—a woman can be a *defacto* mutawali of a mosque and do the temporal duties attached to the office. 1926 M. W. N. 943 : 51 M L. J. 598

) Wakf—*contd.*

——private and public trusts—power of civil court which has en the place of Kazi, over them. 24 C L. J 198, P. C

——descendants of founder if become Mutwali by rights of eritance—jurisdiction of District Judge and the Subordinate lges to exercise the function of *Kazi*. 20 C. W. N. 113.

——the operation of the Musalman Wakf Validating Act of 46 C L J 188 31 C. W : 8 Pat L T 699. 1927 P. 32 I C 701, 19 C W. N. 27 C. W N 101: 24 Bom N 521: 25 C L J 224: 3 94, 24 C W N 18: 30

——but though the Act is not retrospective the definition of kf contains a statement of the Mahomedan Law on the point. Bom L R. 1060

——under s. 3, of the Wakf Validating Act, a *wakf* to be valid st contain at least an ultimate dedication to the poor Generally ch an intention can be implied, but where the deed as originally ifted contained an express clause for charity and this was rposely struck off the Courts cannot imply what the executant liberately struck out and render the deed valid 93 I C. 14.

——under the Wakf Validating Act of 1913 a wakf is not ren-red invalid because the main object of the settlor is to make a tlement of his property on his family rather than to charitable pur-se. While with regard to wakf created before this Act the test of valid wakf is not whether the gift to charity is substantial but [illegible] wakf have been substantially 31 C. W. N 1092 28 Bom C 518 1927 P C 191 · 1927 . 23 All 233 P. C, 17 C. 498

C.,) *fol*

——even under the Wakf Validating Act it is necessary that the strument of wakf should contain a provision for some religious, ous or charitable purpose of a permanant character recognised by e Mahomedan Law 1926 Mad 1110 · 24 L W 425.

——under s. 3(d) it is lawful for a person to create a *wakf* for e payment of his debts out of the rents and profits of the property dicated 34 C L J. 444 67 I C 77

——the Mussulman Wakf Act XLII of 1923 makes provision r the better management of the wakf property and for the keeping id publication of proper accounts thereof. But the Act only pplies to admitted wakf. 101 I. C. 207 1927 Pat. 189 8 Pat. L. T. 3.

——to constitute *wakf* is not necessary to use the word *akf*. 19 C. 203.

——oral dedication may be inferred from repute. 55 I. C. 110), 33 C. W. N 439.

(13) Wakf—*contd*

——no particular formality or ceremony is necessary to make a dedication 61 I. 609.

——substantial dedication is sufficient. 28 M L T. 135. 1923 M. W. N 324. 24 C W N. 494 P. C.

——value of the property may be dedicated 43 A. 508.

——a fraudulent wakf is not binding upon the condition 31 M. L. J. 431 35 I C 877

——a woman may be *mutawali* so also a non-Moslem, if there is no spiritual duties to be performed The lineal descendants of a founder have no absolute right to the trustee-ship, if the founder has not prescribed any line of devolution 34 C. 118 11 C. W. N 297 5 C L J 134 4 A. L J. 30: 9 Bom. L. R. 85: 17 M. L. J 22, P C., 32 C. L J 151.

——a religious office can be held by a woman unless there are duties which she cannot perform 32 C. L. J. 157 - 4 Pat L T. 613

——a female can be appointed *Mutwali*. 20 C W N. 113: 22 C L J 577: 38 M. 491 34 C 118: 11 C. W. N. 297. 5 C L J 134 P. C., 41 M 1033

——when the permanent mutawali is a female infant the court is bound to make suitable arrangements for the upkeep and administration of the estate in its custody 35 C. L. J. 192.

——in appointing a *mutawali* a court will not disregard the direction of the founder except for the manifest benefit of the endowment. 37 C 263.

——the courts have paid more regard to the protection of the trust than to the protection of the alienee, 4 Pat. L. T 675 74 I. C. 403.

——when a managing committee of a wakf appoints a person as manager reserving powers of dismissing him at its option the manager is not really a *mutwali* and is liable to be so dismissed 1928 Cal 651 114 I. C. 413.

——*there may be margin of profits coming to the mutawali* personally *after performing the trust.* 15 C. 329: 15 I. C. 1 P. C.

——if no rules of succession are made by the creator the right of appointing a mutawali rests first in the founder, *after his death* in the executor and in failure of the above two *in the kazi or officer* of the civil court 1923 A. 12: 70 I. C 836.

——when the settlor appoints himself as *mutawali* the ordinary means of showing the change in the nature of his possession is by mutation of name as *mutawali* in the public document 8 Pat L T. 107 45 C L. J. 408 31 C W. N. 365: 29 Bom L R 763: 99 I C 669: 1927 M. W. N. 12: 1927 P. C 2: 25 A. L. J. 51 P. C.

——construction of wakf. 45 M. L. J 359. 72 I C. 941 P. C

——dispute as to *mutawaliship* cannot be referred to arbitration. 1917 Pat. 93 (32 A. 503: 19 C. W. N. 948: 21 C. L J. 213 - 39 A. 137, 21 B. 335), *Fol.*

——where the settler appoints himself as first mutawali no formal delivery of possession is necessary. 34 C L. J. 444: 6 Pat L. J. 218 - 62 I. C. 455

(14) Wakf—*contd.*

——the husband of a minor female mutawali cannot act as mutawali In such case the District Judge is to appoint a mutawali temporarily and to make suitable arrangement 60 I. C. 753 (C).

——minority of the mutawali is not a bar. 59 I C 717, *Contra.* 2 Pat. 819.

——*mutawali* is a trustee and succession of the mutawali is determined by the terms of the wakf 63 I. C 171

——in the absence of provision in the trust deed or any evidence of usage, the last incumbent can on his death-bed nominate his successor. 19 C. 203 45 I. C 581 C.

——principle of hereditary succession does not apply to the management of a wakf property 96 I C 105 1926 Mad 861.

——a *mutawali* may appoint his successor in death illness. 63 I C 136

——where under the deed of an invalid wakf a mutwali remains in possession of the property for more than 12 years it does neither validate the wakf nor does create title in the mutwali by adverse *possession.* 55 C 448 . *32 C W. N 248 1928 Cal 130 : 105 I C.* 647.

——a wakf cannot be made invalid if the provision thereof are not carried out 21 C W N. 222.

——no sanction is required under or 21 r. 8 C. P C to maintain a suit by the members of the community for declaration that a certain property is wakf property 4 U. P L. R. 25 1922 Oudh. 1 · 66 I C 90

——a mutawali cannot alienate wakf property except for wakf necessity 1925 Cal 435

——under the Mahomedans the power of granting permission to mutwali to grant leases of wakf property was vested in the kazi, now an *application must be made to the D Judge in the muffasil* and to the H C in the Presidency towns , no suit is necessary. 38 C L. J 365

——unless authorised by *Kazi* no mutwali can create a lease-hold interest to enure beyond his lifetime, and the lessee cannot acquire title by adverse possession as against the succeeding *mutawali.* If latter recognises the tenancy it is in effect a new tenancy. 90 I. C 781

——under the Mahomedan Law the office of Kazi is not [illegible] valid 50 B 133 93 I C.

[illegible] d public trust is vested [illegible] *none to administer the* trust, it is his duty to see that it is properly administered and to that end he can appoint a trustee to manage the trust property. 32 C W. N 835 . 1928 Cal 368 110 I. C 416

——transfer of wakf property by some mutawali can be avoided by the other. 41 A. 412

——mutawali-ship cannot be transferred 22 C. W. N. 926 : 24 C. 83 : 14 C. W. N. 497 : 11 C. L J. 304 : 37 C 263, 23 C. 645

(14) Wakf—*contd*

——a *mutawali* has no legal estate in the *wakf* property 55 C. 448; 32 C. W. N. 248 · 1928 Cal 130; 105 I. C 647.

——conveyance by way af wakf is valid. 19 C. W. N. 1061.

——the right of worship of each worshipper in a mosque is an independent right wholly irrespective of the other worshippers 20 C. 810.

——limitation does not run against *mutawali* until the death of his predecessor and the date of his own appointment. 19 C. 203

——the rule of the Mahamedan Law that the remuneration of a *mutawali* should not exceed one tenth of the income relates to such Managers or *mutawalis* as have no beneficial interet in the usufruct or are strangers to endowment. 20 C 810.

——mortgage of *wakf* property by the *mutwali* for necessity is valid even if the permission of *cadi* is obtained subsequent to mortgage 37 C 179

——a mutawali should not lease wakf property, if agricultural, for a term exceeding 3 years, if non-agricultural, for a term exceeding one year unless he is specially authorised by the deed or unless he obtains leave of the Court 27 C W N 159; 36 C L J. 43 44 A 677

——existence of mortgage on property, appointment of mutawali. 49 C 477 26 C W N 749

——a permanent lease granted by the husband of an infant mutawali is void 38 C L J 192.

——a person appointed as acting mutawali during the minority of the rightful holder of the office is in the same position as a mutawali and the court has no power to order him to render accounts in the absence of malfeasance or waste. 31 C. W. N. 454; 1927 Cal 382 101 I C 104

——a mutawali is mere a trustee or manager and cannot transfer wakf property 24 C W N 690, 55 C. 448; 32 C. W. N 243; 1928 All 130.

——no court of equity will grant specific performance when a trustee has entered into a contract for a lease which is in excess of his power or has entered into a covenant for renewal which is *ultra vires* 27 C W N 159

——a decree for rent against one mutwali is not binding against other mutawali if he is not represented. 65 I. C. 592 (C)

——a Mahamedan worshipper cannot bring a suit to set aside an alienation, only the *mutawali* can do so. A worshipper can institute a suit only when his individual right is violated or threatend 31 C W N 184 44 C. L. J. 339; 99 I. C 205; 1927 Cal 130

——where the office of the *mutawali* is not hereditary a suit to oust a wrongful holder of the office is governed by Art. 120 of the Limitation Act. 31 C. W. N. 184; 44 C. L. J 339; 1927 Cal 130 · 99 I C 205

——expenses relating to "Mousoleum" the daily breakfast during Ramzan, the expenses on account of camels. dal dal etc., are charitable expenses. 7 Pat. 426; 1928 Pat. 441.

(14) Wakf—*contd.*

——direction in a deed of wakf to pay the Government revenue as it becomes due or any incumbrance subject to the payment of which the wakf is made is not a direction to pay the settlor's debt and does not invalidate wakf. 1928 All. 516 111 I C 283, 24 A. 257 *Ref.*

——if one or more of the items of a charitable endowment *should be excluded as not being the proper object of charity under* the Mahomedan Law that does not invalidate the wakf. 1928 Pat. 441 : 7 Pat. 426.

(15) Will

——according to tho Mahomedan Law, a bequest in favour of [illegible] other heirs. 30 C.
[illegible] he consent of some
[illegible] L. R 301 : 44 M.

[illegible] ithes more than a third of his whole property to a stranger the consent of his heirs to such bequest express or implied will validate it 23 C W N 321· 1919 M N N 507 : 53 I C 54 P. C., 20 B 497, 2 M H C R 350 *Ref.* 42 A 497 61 I C. 947

——such consent may be given before or after the death of the testator. 49 A 547 1927 All 340 1000 I C 673 25 A L J. 382

——a Mahomedan will need not be probated It is admissible in evidence on due proof 37 C. 839, 7 B 266, *not fol*, 8 B 241, *Fol.* 4 C 455, 22 C 788 25 C. 103, 6 B. 73, 4 C 508), *Ref* 24 Bom L. R. 753 : 1922 Bom 392 47 B 231

——a testator has no power to make a gift over after a vested [illegible] 54 I C 853 67 P W. R 1921.
[illegible] is capable of revocation
[illegible] P W R 1916 31 I. C.

——if the legacy is not redeemed by the testator the death of the legacy does not affect the legacy, it descends to the heir of the legacy 49 A 547. 1927 All 340: 100 I. C 673 25 A. L J 382

——bequest may be oral 5 Bur L. T. 255, and need not be attested 43 B. 641

——as a Mahamedan testator cannot dispose of more than one-third of his property, executor of Mahomedan will is a bare trustee for the heir as to two thirds and an active trustee for the one-third. 33 C 116 P C

——under the M. Law a bequest in favour of an heir to which the remaining heirs give their consent after the death of the testator is valid. 42 A 593

——when a bequest is made to an heir as well as to stranger the bequest to the heir is not valid without the consent of others but the bequest to stranger is valid to the extent of one-third without such consent 61 I. C. 947, 42 A. 497.

(15) Will—*contd.*

——under the Shiah Law a will is valid to the extent of one-third even without the consent of the other heirs. 1924 A. 20

——under the Sunni Law, a testamentary disposition is invalid in so far as it purports to dispose of more than one-third of the estate unless the heirs whose interests are affected consent to it after his death expressly or impliedly by only passive acquiescence 85 I C. 945 1925 Mad 997.

——legacy of one-third estate, what it includes 38 M L T. 370, 1923 P C 146.

——though a will in favour of heir is not valid without the consent of other heirs yet a single heir may so agree as to bind his own share, the burden of proving which lies on the legatee 1922 P. C 391 37 C L. J. 30. 44 M L. J. 332 **P. C.**

——when the consenting heirs are insolvents their consent is equally effective in validating the bequest. 42 A. 593 · 18 A. L J 745 59 I C 296

——a device made in favour of non-heirs or for pious and charitable purposes is valid and operative in respect of one-third with their consent 43 I C 196 3 Pat L W. 232.

——a valid *wakf* can be created by will. 25 A. 236.

——Christian marriage being followed by Mahamedan marriage and husband executing a will excluding the wife, the will was inoperative 25 C 537 25 I C. 34.

——occupancy holding cannot be bequeathed by will 18 C. W. N 1920, 1294, 12 C. W. N 1086 8 C. L. J. 261 *Diss.*

MAINTENANCE.

General

——when a claim is based upon contract evidenced by compromise decree the case is governed by art 115 L. A., 26 I C 939

——a decree directing monthly allowance to be paid from month to month can be executed from time to time 19 C. 139, 42 C 903

——what is included in maintenance 4 I. C. 758.

——a heritable annuity created by a will is not a right of future maintenance and is attachable. 24 O. C 250, 63 I. C 851 : 10 C. W. N. 1102, 30 M 279, 27 C. 38, 15 A. 370 **P. C.**

——right to future maintenance in s 60 C P. C. contemplates a bare right 19 A L J. 648 · 34 P. L R. 109 . 69 I. C 181.

——where a person is entitled to a monthly maintenance allowance under a deed the allowance can be attached only after it has become due 38 C 13, 6 W. R Misc. 64, 27 C. 38, 28 C 621

——future maintenance awarded by decree when falling due can be recovered by execution without further suit 35 C. 13, 19 C 139

——right to future maintenance is not transferable under s 6 Tr P Act. but when it is merged into a decree it is transferable 38 C. 13 14 C W. N. 918, 12 C. L. J. 130, 12 C. L. J. 146, 34 M. 7, 40 M. 302, 20 M. L. J. 97, 5 I. C. 879.

General—*contd.*

——right to arrear of maintenance can be transferred 27 C 38 : 4 C. W. N. 87, 9 C. W N. 703

——previous rate may be altered by separate suit or application. 12 C. L J. 173, 26 B 777, 22 M 175

——decision under s 488 Cr P. C. if can be questioned 13 C. W. N. 150 : 32 C 479, 14 C. 276, 30 M 400.

——the question determining the amount of bare maintenance need not be referred to the commissioner It can and should ordinarily be fixed by a rough and ready reference to the general condition of the family as disclosed in the evidence. 49 B 459 : 27 Bom L R 13 . 1925 Bom 153.

Maintenance under the Hindu Law

——an unchaste Hindu wife is not entitled to maintenance 23 M L. J. 289, 26 C 707, 24 W R 428, 20 W R 21, 12 B L R. 238, 17 C 674, 34 B 278, 40 A. 178, 39 M 658, 56 I C 860, but she cannot be absolutely abandoned, 34 B 278, 16 N L R 140 58 I C 860.

——what is condonation. 31 C L J 435

——a Hindu wife would ordinarily be entitled to maintenance in her husband's house 24 W. R 377, but when he does not allow the [illegible] apart from [illegible] L R 373, 14 [illegible] 9 C W. N [illegible] to separate [illegible] 9 W R 475,

——where the wife voluntarily lived apart from her husband for about 23 years without justification the claim for maintenance was disallowed 48 C L J 171 110 I C. 30 . 1928 P C. 187 55 M. L J 242 **P. C**

——the Hindu widow is not bound to reside with the relatives of her husband in order to get maintenance She is not deprived of the right by leaving her husband s residence from any other cause than unchaste or improper purposes. 1928 Mad 216 108 I C 712, 12 B L R 233 **P. C.**

——the Hindu widow is entitled to maintenarce out of the property in which her husband was interested. 11 C 492, 5 B 99, 6 W R 41, **P C.**, 7 W R 47 **P C.**, 22 C 410, 23 A 86, 27 M 45, 15 B 234, 29 B 95 even when she has other means of support, 22 C. 410, 33 B 50, 38 M 153, 30 I C 897, 108 I. C 712 1928 Mad 216, 24 M 147, **P. C** , 55 C 488 1928 Cal. 196, or stridhan jewels, 90 I C 124 1925 Mad 645, *Contra* 4 C L. J. 74.

——but she is not bound to incur debt for maintenance 46 I. C. 269 (C).

——the Hindu mother is entitled to be maintained by her son and out of son s property. 8 M. 236, 9 B 279 2 B. 573

——no hard and fast rule can be laid down as regards the rate of maintenance. The circumstances of each case must be considered, (1) the income of the estate (2) the status of the deceased husband

Maintenance under the Hindu Law—*contd.*

and his widow (3) the expenses involved by the religious and other duties which she has to discharge (4) her separate property if any. 25 C. W. N. 403, 68 I. C 38.

——maintenance depends upon the gathering together of all facts of the situation, the income of the estate, the past life of the parties, survey of the conditions and necessities and right of the members etc 33 C. W. N. 637 : 1929 P. C. 128.

——the principle to ascertain the amount of maintenance of widow is to see (1) mode of life of the family during husband's life time (2) husband's estate (3) justice to other members 9 C. W. N. 651, p 653, 25 C. W. N. 403, 6 C. W. N 530, 22 C. 410. As to other members also the same principle will apply. 21 A. 232.

——the amount of stridhan should be taken into consideration 12 C W. N 1002 36 C. 75, 16 N. L. R 140 : 58 I. C. 860, 90 I C. 124 : 1925 Mad 645.

...has been kept by a Hindu up to the time of
L R. 647, 23 M.
om. L. R. 1009
L J 577 P. C.
...h right. 23 M.

——but a concubine has no right of residence in the family house. 68 I. C 394, 26 B. 163, 12 B. H C. R. 229 *Ref*

...a charge upon the property
. C 5 B. 99, 12 M 260 but it
...ds of a purchaser 15 C 291,
2 M. 45, 6 M. 130, 9 C 535, 3
. 566 (C), 12 C W. N 809,
91, 40 A 96, 45 B 337, 43

M 800 *Dist*

——but the charge of maintenance of widow granted by a decree for maintenance takes preference over the right of a subsequent purchaser of the some property in execution of a money decree binding on the family. 1928 Mad 713 : 109 I. C. 872 F. B. (43 M 800, 2 B. 494) *fol.*

——widow may sue for maintenance and obtain injunction against alienation of property. 12 M. 260, 6 M. 83, 11 C. 492, 24 A. 160 : 20 W. R. 21 : 5 B. 99.

——in granting arrears the court may exercise discretion 21 A 183.

——limitation is 12 years from the date of refusal (Art 129, 132, L. Act) 5 B 63, 3 B. 207.

——a decree for maintenance obtained by a Hindu widow charged on the family property has precedence over other debts 1920 M W. N 458 : 52 I. C. 398.

——a member of the joint Hindu family who cannot file a suit for partition without the consent of certain members is competent to claim maintenance 46 B. 535 : 23 Bom. L. R. 1236 : 64 I C. 553.

Maintenance under the Hindu Law—*contd.*

——a grandfather may not be under any personal obligation to maintain his grandchildren but the manager of a joint Mitakshara family is legally bound to maintain all male members, their wives and children and on the death of one of the male members he is bound to maintain his wife and children. 28 Punj. L. R. 201 : 1927 Lah. 280 : 101 I. C. 201 : 9 Lah L. J. 117.

——a Hindu lady can enforce the claim of maintenance under the will of her husband against the son as well as the step-son. 36 C L. J. 367, 16 C. 785 *Dist.*

——husband's will is the good basis for determining the amount of maintenance. 1922 P. 38

——a provision for the future maintenance of wife is not illegal 45 M 612, 42 M L. J. 410 : 68 I C. 687 F. B.

——wife is entitled to get maintenance from her husband when she declines to live with him as he is a leper 45 M. 812 43 M. L. J 174

——husband is bound to maintain his wife even if he has bequeathed all his property to someone. 8 C L. J 489 12 C. W. N. 808

——where a person takes a property either by inheritance or survivorship he is legally bound to maintain those whose maintenance was a charge upon it in the hands of the last holder. A female heir is under exactly the same obligation to maintain the members of family as a male heir would have been by virtue of succeeding to the estate 1925 P H C. C. 271 90 I. C 732 : 6 Pat. L. T. 731.

——a Hindu widow is bound to reside in her husband's house when so directed 12 C. W. N. 808 : 8 C L J 489, 20 C. 15, 13 I. C. 136.

——when a widow or widowed daughter is justified in living elsewhere 6 C W. N 530, 16 C W. N. 964, 12 C. W N. 808 : 8 C. L. J. 489, 13 I C 136 (C) 5 C. W. N. 297, 29 C. 357, 36 B 383, 15 M. L. T. 95 . 23 I. C 413.

——a widowed sister has not right to claim maintenance from her brother's property 10 Lah 263 30 Punj. L R. 384

——cruelty and ill treatment entitles a widow to separate maintenance. 34 C 971, 19 C 84, 31 M. 338, 20 M 470, 14 C. W. N. 488, 11 A. L. J 161 . 18 I C. 713, 87 I. C 571 1925 Mad. 757

——what amounts to cruelty of a husband towards his wife varies in kind and degree, according to the custom and habits of the people and the states of the family. 87 I C. 571 : 1925 Mad 757

——re-marriage disentitles from maintenance 22 C. 589, 19 C 289 F. B.

——liability of the father-in-law is moral and not legal. 6 C. W N. 530, 19 C W. N 1169 21 C. L. J. 292, 32 I. C 955 (M), 22 C. 410, 37 M. 396, 9 I. C 534 (C)

——an indigent daughter is entitled to maintenance from father's family, 12 M. L. T. 230 : 16 I. C. 139, so also the widowed

Maintenance under the Hindu Law—*contd*,

daughter, sister, son-in-law and their children. 5 C. W. N 297, 27 C. 555, 12 C L J 173, 4 C. W. N 669.

——unmarried sister 17 C 373, 43 M. 635, 56 I. C 521 step mother 9 B 279, grand-mother 12 W. R. 409, an adopted son where adoption is invalid 1 M 45, 363, a disqualified son and his wife 17 C W N 341 and a *ghar-jamai* and his family 12 C. L J. 173, are entitled to maintenance.

——a widow daughter-in-law has no legal right to maintenance as against the self-acquired property of her father-in-law, but the obligation of the father-in-law to maintain her is moral which ripens into a legal obligation when the estate passes into the hands of his heirs 73 I. C. 235, 29 C. 557, 11 A. 194, 37 M 396

——when joint family property is partitioned, provision may be made for the maintenance of those females who are entitled to maintenance from the estate. 73 I. C. 235.

——Art 128 L Act applies to a suit by Hindu for arrears of maintenance where the maintenance is based upon the Hindu Law and not to a case when the right is based upon contract. 23 C 615, 87 I C 571 1925 Mad. 757.

——when the claim is based upon contract evidenced by compromise decree the case is governed by Art 115 L Act. 26 I. C 939

——a decree directing monthly allowance to be paid from month to month can be executed from time to time. 19 C. 139, 21 C. 903

——a permanent concubine who remains chaste, is entitled to maintenance from the family property of her deceased paramour. The rule in favour of the maintenance of concubine is not confined to cases where there are not other heirs and the property would otherwise escheat to the sovereign. 48 M. 805 : 90 I. C. 983 : 49 M L J 348

——an heir is bound to maintain, out of the estate inherited, persons whom late propritor was morally or legally bound to maintain 84 I C. 168 : 1925 Lah. 32.

——an illegitimate son of a *Sudra* is entitled to maintenance out of the properties belonging to his putative father's joint family for the whole of his life and this maintenance can be charged on the properties 22 L. W. 650.

——where a Hindu widow whose husband died 27 years ago sued for maintenance and for all arrears and she made a demand for maintenance only *for 3 years prior to suit*, *held that* the court had a discretion in the matter of fixing the period for which the arrears would be granted and in the present case it was sufficient if arrears for 3 years were granted 1925 M. W. N. 213 : 87 I. C. 210 : 1925 Mad 795, 43 B 66 *Ref*

Maintenance under the Mahomedan Law-

——in a suit by the Mahomedan wife for maintenance if no decree or agreement for maintenance had been made before the suit, the maintenance should be made payable only from the date of the decree in the suit. Such future maintenance can be payable only

Maintenance under the Mahamedan Law—*contd.*

during the continuance of the marriage, and not for the natural life of the wife. 6 C. 631 : 8 C. L. R. 242

——a Mahomedan widow is not entitled to maintenance out of her husband's estate, in addition to what she is entitled to by inheritance or under his will. The court on a point of this kind should not attempt to put its own construction on the Koran in opposition to the express ruling of commentators of great antiquity and high authority. 25 C 9 24 I. A 195 : 1 C. W. N. 449, P. C.

——an agreement providing certain maintenance to be given to wife in case of separation, is void as being opposed to public policy under sec 23 Contract Act 37 B 280 17 I C 946

——the mere fact that children are in the custody of their mother during their infancy does not relieve the father from obligation of maintaining them 6 Bom. L. R 536.

——*arrears of maintenance may* be *transferred*, 33 M 80

——a decree in maintenance suit should make it a charge upon specific property. 6 A 617, 6 M 83

——according to Shafi School of Hanafi doctrine arrears of maintenance can be recovered as a debt although not fixed by previous decree 41 M. 211 42 I. C. 517 6 L W 288

——in a suit where right to maintenance is allowed the quantum of maintenance should also be devised although not originally prayed for. 1923 Bom 419

——an interim order awarding plff maintenance pending the suit can only be made if plff makes out that she is clearly entitled to some relief in the suit 1925 M. W N. 109 86 I C. 909 : 48 M L. J. 395

——the rights of maintenance are enforcible in a civil court under Anglo Mahomedan Law and is unaffected by the fact that there is a concurrent permission for their enforcement in criminal courts under s 488 Cr. P C A minor can sue his father for *maintenance even when the custody of the* minor is withheld from the father and the minor is in the lawful custody of his mother 37 B 71 15 I C 520 14 Bom L R 336, 6 Bom. L R 586 *Ref*

——the maintenance of a minor son cannot be charged on the father's property *above case*

[illegible] to her husband's family and [illegible] ers of her natural family to [illegible] 36 M 385 1911 M W N.

——where a marriage is invalid the wife is not entitled to maintenance out of estate of the deceased husband 49 P R 1913. 19 I. C 837 139 P L R. 1913

——when lands are granted in lieu of maintenance the grant is presumed to be made for life time of the grantee 35 I. C 764 : 3 O L J 351

MAJORITY ACT (ACT IX OF 1875).

——*the Majority Act applies to Hindus also.* 33 A. 525 : 9 I. C. 1017 : 8 A. L. J. 385.

——the Majority Act has modified the Hindu Law on the question of minority except in respect of marriage and adoption. 36 B. 622 : 17 I. C. 86, 18 C. 69.

——the words in sec. 2 of the Act "to act in the matter of dower" mean to do all acts in relation thereto, including entering into a contract for payment of dower, which are permissible under *the personal law of the* party free *from the restriction* of age put by the Indian Majority Act. If a Mahomedan who is a major by his personal law but a minor under the Indian Majority Act enters into a marriage, as he is capable of doing, *he must enter into a contract for payment of dower. Even if he does not do* so, the law will presume such contract. 80 Ind. C. 914 (C), 44 I. C. 293, 41 M. 1026, 23 M. L. T. 78, 1918 M. W. N. 246, 35 M. L. J. 468 *not fol.*

——*the words "court of justice" in the Act mean* a court of justice which has jurisdiction to do an act. 26 I. C. 708 : 10 N. L. R. 159.

——when a guardian has been appointed under the G. and W. Act the minor cannot attain majority until the age *of* 21. 69 I. C. 401, 13 C. W. N. 643, 36 C. 765 : 1 I. C. 724, but when the order of appointment is subsequently cancelled age of majority *is 18 years.* 15 O. C. 153. 14 I. C. 301, but where the minor *is released from* guardianship minority extends to 21 *years.* 59 I. C. 196 (N).

——*a conditional order of* appointment *of* guardian on furnishing security being invalid under the Guardian and Wards Act has not the effect of postponing the age of majority to *twenty second* year. 49 M. 809. 99 I. C. 213, 51 M. L. J. 726, 1927 Mad. 36 F. B.

——*a person who is* minor under the Act but has attained the age of discretion can adopt. 43 B. 481 : 50 I. C. 736. 21 Bom. L. R. 217.

——s. 2 does not apply to the marriage *under the* Mahomedan *Law.* 1923 Lah 192 : 68 I. C. 727.

——the capacity of minor is, as regards questions *of* marriage adoption etc. the same as if this Act was not *passed.* 42 M. L. J. 129, 66 I. C. 265, 1922 Mad. 1, 47 C. L. J. 372.

——in *order* that the *reservations of* the Indian Majority Act should be applicable to a case relating to dower, it is essential that the minor should have made the gift at the *time of or by reason of or in consideration of* the marriage. 1913 M. W. N. 365 ; 16 I. C. 943.

——to relinquish *dower* debt is not "to act in the matter of dower" so a minor under this Act cannot *relinquish a* dower. *41 M. 1026 ; 44 I. C. 293, 1925 Cal. 322 contra.* 22 B. 430.

——majors under Personal Law though not under sec. 2 of this Act can fix amount and nature of dower. 1925 Cal. 322 ; 89 I. C. 914

Majority Act (Act IX of 1875)—*contd.*

——a Mahomedan boy is under the Indian Majority Act bound ... attains 18, notwith- ... ncipation would have ... 0 M. L J 21. ... is major under the ... 36 B 622: 17 I C. 86, 18 C. W. N. 524

——where the mother has been appointed guardian of her two minor sons forming a joint Hindu family, the age of majority for the latter is 21 years. 35 A. 150 18 I C. 251 11 A. L J. 107, 1924 Lah. 127.

... appointed the minor cannot ... 27. 57 I. C 678: 11 L W. ... before 5 Pat L. J. 460: ... 00, 2 P L T. 556: 61 I C.

——in case of married woman governed by the Succession Act, (X of 1865) when a guardian is appointed by court, age of minority extends to 21 years. 28 C. W. N 527.

——where a minor was adopted after 18 but before 21 years and a guardian had been appointed before his 18th age, he cannot be a minor with respect to the property of his natural father and major with respect to the property inherited by him from his adoptive father. 1924 All 892

... Act V of ... in of the ... sec. 3,

MALICIOUS PROSECUTION

which he was tried 30 C. W N 866, 43 C L J 521 · 24 A. L J. 453: 28 Bom L. R. 921. 1926 M. W N. 482: 95 I. C. 329 1926 P. C. 46: 7 Pat L T. 591 P. C

——where the allegations in the plaint are that the deft ... and probable cause insti- ... ff was obliged to defend ... cause of action for mali- ... 387. 67 I. C 705

... malicious prosecution does ... osecution in the sense in ... e case

... not limited to prosecution ... When a Judicial Tribunal ... the case of an ... 35 Cr P. C the ... 796: 33 C. W. ... *Fol.*

Malicious Prosecution—*contd*

——malice can be inferred if the complaint was false to the knowledge of the deft. 46 I C 190 (A), 12 C. W. N. 1017 : 8 C L. J. 337, 45 B 227

——the pliff is to prove his innocence, the finding of the criminal court is not conclusive on the matter. 17 C. L J 105. 17 C W N. 454, 36 M 475. 44 A. 485, 72 I C. 411, 50 A. 713 : 110 I C. 413. 1928 All 337 26 A. L. J 439

——the pliff is to prove the absence of reasonable and probable cause and not the deft 36 M. 375, 91 I. C. 223, 99 I. C. 633. 1927 Lah 120

——the question of reasonable and probable cause depends upon the pliff having a reasonable *bonafide* belief in the existence of such facts as would justify a prosecution. 95 I C. 39. 1926 Bom 356 28 Bom L R 459.

——elements are altogether six in number which are to be proved by the prosecution. (1) the commencement or continuance of criminal proceeding, (2) its legal causation by the present deft, (3) its *bonafide* termination in favour of the pliff. (4) the absence of probable cause for such proceedings. (5) the presence of malice therein, (6) damage conforming to legal standards resulting to the pliff 17 C W N. 554 : 17 C L J. 105 : 18 I. C 737.

——if the deft gives information to the authorities which naturally leads to prosecution he is liable, he need not have actually prosecuted the pliff 30 C W N 866 43 C. L J 521 : 24 A L J 453 28 Bom L R 921 . 1926 M W N. 482 : 95 I. C 329 : 1926 P. C 46 · 7 Pat. L T. 591 P. C

——a prosecution may not be entirely *malofide*, but a claim for damages for malicious prosecution is maintainable when the prosecution is continued after it is discovered that the facts upon which it is based are not true 33 C. W N. 79 : 48 C. L. J. 339, 1929 Cal 691, (30 B 37, 30 A. 525, 12 C. L J. 418) *Rel. on.*

——malicious prosecution commences when the prosecutor has taken the initial step, namely has made his complaint to the Magistrate No question of result thereof arises. 20 C. L J. 315, 19 C. W N 935, 64 I. C 741, 17 C. L. J 105. 17 C W. N. 554 *Fol*, 13 M L J 370, 37 M. 181, *Diss.* (37 C. 358, 38 C 880) *Diss*

——unless summoned in the Cr Court no suit for malicious prosecution lies. 15 C W. N. 917 : 38 C. 880, 37 C 358, 36 A 8 9 I C. 351 : 1926 Mad W. N. 527, 93 I C 8 : 50 M L J. 460 : 49 M 315 1926 Mad 521.

——in a suit for damages for malicious prosecution the court found that one of the accusations was not supported by evidence, but the case as a whole was not laid withotu reasonable and probable cause, held the pliff. was not entitled to recover damages The simple thing a pliff is to prove in an action for malicious prosecution is his innocence. 85 I. C. 476 · 1925 Pat. 469.

——the word prosecution must be interpreted in restrictive ense 19 C. W. N. 935, 37 M. 181.

Malicious Prosecution—*contd*

—— where it is found that deft. not only lodged complaint but virtually fabricated false evidence and there was want of reasonable and probable cause for prosecution, deft. will be liable for damages, 56 C. 278, 12 C. W. N. 818 *fol.*

——a suit for malicious prosecution lies in respect of proceedings being taken under s. 107 Cr P. C 43, A 402

——deft's heir cannot be substituted in the suit 44 M. 257

——suit for malicious prosecution lies against informant only 12 L. W 170 : 59 I C 973 *Contra*. 28 M L. T. 298 59 I C. 218, 30 A. 525, 31 M. 800 *Dist.*

——suit for malicious prosecuton lies against the informant though he was not the prosecutor 42 M 880 59 I C. 973 (M)

——malice may be presumed from the want of reasonable and probable cause To constitute a defence prosecutor's belief in the guilt of the accused must be based on grounds some of which are at least reasonable and arrived at after due enquiry 45 B 227 : 61 I. C 970

——from the most express malice the want of probable cause cannot be implied. The judgment of the criminal court is no evidence 61 I. C. 970.

——when servant acts at the instigation of his master to launch a complaint the master will be liable in damages. 64 I. C 741.

——for the sake of public justice charges and communications which could otherwise be scandalous are protected, if *bona-fide* made in the prosecution of inquiry into a suspected crime, 1923 Oudh. 247 . 72 I C. 57, 5 W. R. 282, 19 B. 717 3 A 815.

——where the plff was convicted and ultimately acquitted on appeal the presumption is against the absence of reasonable and probable cause unless the original conviction is proved to have proceeded on evidence known to the deft to be false or on wilful suppression by him of material information. 4 Pat. L. T. 202 72 I. C. 409 : 12 C L J. 410, *fol.*

——suit for malicious prosecution lies even if the complaint is dismissed for default, 42 A 305, or for technical ground. 42 A 305.

——a person is liable for damages for intentionally interfering [illegible] executing a form of invalid [illegible] 540 . 14 C L J 515 · [illegible] civil proceeding cannot [illegible] rosecution. 41 A. 503 ; 32

——no suit for damages lies for maliciously instituting civil suit. 31 C. L. J 495 F. B., 18 C. W. N. 1189 21 C L. J. 68 42 C. 550 : 14 C. L. J. 515

——proceedings under s 145 Cr. P. C may constitute a cause of action for damages if maliciously prosecuted, 1927 All. 412 . 100 I. C. 449.

MANDATORY, IMPERATIVE AND DIRECTORY.

——*the principle to be applied in considering whether the provisions* of a Statute or an Act, are imperative or directory is this; the court must look to the subject matter, consider the *importance of the provision that has been disregarded and the relation of that* provision to the general object intended to be secured by the Act, and upon a review of the case in that aspect decide whether the *matter is what is called imperative or only directory.* 38 C. L. J 77, F B

——there is an universal rule that disobedience *of a mandatory provision in a statute has the consequence of nullification of all* proceedings irrespective of any question of prejudice Whether a mandatory provision is imperative or only directory *depends upon* a consideration of various circumstances. 42 C. L. J. 131 90 I C. 308 · 1925 Cal. 1246.

MARKET.

——in India there is no such thing as a market *franchise* or a right to hold a market, *conferred* by grant from the Crown nor can such right be acquired by prescription. No market *holder* has monopoly or privilege which is *entitled to protection* and no immunity from competition. 47 C. 1079 . 24 C. W. N. 800 · 58 I C 879, 17 C 458 : 11 C W. N 1128, *Ref.*

——collecting dues from traders in *market is neither* unreasonable nor opposed to public policy. Right to market is an ancient ownership of land A person is liable for damages if he *by illegal* means induce traders not to go to *pltf's market.* 1 P. L. W 603 43 I C. 451 and *above case.*

——when a *hat* is started on joint land by two co-sharers and subsequently improvement is made by one, *other* co-sharers are not excluded from profits. 1925 Cal. 266.

——pltf is entitled to damages from deft. who has *induced the traders to go from the pltf's market* to that of the deft. 24 C. W. N. 800 . 47 C. 1079.

——a *hat* is a benefit arising out of land. and therefore within the *definition of immoveable* property as given in s 2 cl. 5 of the General Clauses Act. (1868) 22 C. 752.

MARRIED WOMENS' PROPERTIES ACT. (Act III of 1874.)

——s. 6 is not applicable to a policy of assurance effected by a Hindu for the benefit of his wife and children, so a sum payable under or by virtue of the policy, is available to the payment of the debts of the assured *18 C. W. N. 1335 : 20 C. L. J. 44,* 37 B 471. 35 M. 162 : 9 M L. T. 451 · 10 I. C. 263 *fol.* 25 M. L. J. 65 · 37 M 483 1913 M. W N 697 : 20 I. C 934, *F. B., not fol.* But by the *Amendment Act XIII of 1923, s 6* has been made applicable to the Hindus, Mahamedans, Sikhs and Jains.

——this Act does not apply to a case *where* the wife claims to recover the money due to her under a Life Insurance Policy as nominee of her deceased husband. 47 C. L. J. 587 : 32 C W. N 651: *1928 Cal 518 : 114 I. C. 658.*

MASTER AND SERVANT.

——a servant receiving daily wages which is paid at the end of the month and calculated for the days on which he works, is not a monthly servant. If he leaves service in the middle of the month he is entitled to the full wages apart from the question of notice 46 B 44 . 23 Bom. L R 793 64 I. C 114

——in the absence of custom or stipulation as to notice if the contract of service is not yearly one the service is terminable by reasonable notice. 33 C L. J. 336 60 I C 756.

——where no reasons were assigned for the suspension or removal the servant (here the Head Clerk of Silchar Municipality) was entitled to his wages during the whole of the period of suspension 33 C L. J 336 . 60 I. C 758

work does not
aster and ser-
ce may deter-
305 . 112 I C.

——it is general rule and well established principle that in the absence of statutory provision any servant in the civil or military employment of the Crown can be dismissed by it 15 C. W N. 486 n 13 C L J. 537 9 I. C 858

——an agreement for attendance and manual labour is illegal 19 C W N 1118.

——when a teacher drawing monthly salary resigns without notice in the midst of the month he is not entitled to recover salary for that fraction of the month 1923 Mad. 102 ; 1922 M W. N. 153 · 69 I C 767

——the rule of one month's notice which is applicable to menials will not apply to the case of a school master in whose case specially when he intends to leave his profession and join another, a notice of 3 months would be reasonable as that period may be regarded as equivalent to a term 1923 P 24, 44 C. 917 *fol*

——in a case of tutor 6 months notice is reasonable 36 C. L J 256 · 44 C 917 . 43 I C 11.

——the master is liable for damages for the malicious prosecution by the servant at his instigation, 64 I C 741

——master is not liable for the servant's tort when the latter . 102 n, 78 n.
it/.
the engine at
car was left
leaner started
the engine and dashed against something causing damage, in a suit for damages against the master it was held that he was not
f his em-
al 87.
iable even
the ser-
st of his

Master and Servant—*contd.*

master and not out of private spite ; but if the act be done so as to divest him of his character as servant the master is not liable. 48 A. 560 ; 95 I. C 1030 1926 All 538 : 24 A L. J. 682

——where a criminal act is done by a servant deliberately of his own choice to effect a purpose of his own the master is not liat but if the criminal act is facilitated by the negligence of ti master the master is liable. 32 C. W. N. 805 : 48 C. L J. 37 : 19. Cal. 491 112 I. C. 303.

——when a servant is lent to another for a particular employ ment he must be dealt with as the servant of the man to whom h is lent, for anything done in that particular employment 47 C L J 258 104 I C 113 : 1927 P. C. 173, 30 Bom. L R 162 192 Bom. 91 . 109 I. C. 191

——the servant has no implied authority to engage a stranger to do work on behalf of his master so as to render the latter liable for the stranger's acts or defaults except in case of necessity. 47 C L. J 460 110 I C 326 ; 1928 Cal. 410 . 29 Cr L. J. 694.

——Secretary of State is liable for the damage on the ground of negligence and carelessness of servants and officers of Govt but is not liable for the negligence and carelessness of the servants of the Municipality and the District Board. 39 M. 351, 41 M 533. *contra* 13 I C 799 1912 M. W. N. 42.

——a servant is not justified in abandoning his contract before the expiration of the term unless good and just causes exist therefor. Generally speaking any breach of the expressed or implied provision of the contract of employment by the master or any act or neglect on his part which is prejudicial to the safety, health morals or reputation of the servant will be deemed a sufficient ground for abandonment. 86 I. C. 310 : 1925 Cal. 87

——whatever divergence of judicial opinion may be discoverable from the decision on the subject, it is clear that where the refusal by the master to find work for the servant indicates reduction of rank or material change of duties employee is not entitled to treat this as a violation of the contract of employment, justifying his quitting the same 86 I. C. 310 . 1925 Cal 87.

——where a servant engaged on monthly salary disappeared from service on a day without applying for leave and his master waited for him for 5 or 6 days and as he did not turn up, dismissed him from service the servant was not entitled to his salary for even the broken period for which he had served. The English principle of common law that the servant should perform his part of the contract for the whole period for which wages are paid and that if he fails to perform his part of the contract or is rightfully discharged at any intervening period between the dates when his wages are due, he can recover nothing for the broken period of service, must prevail in India also as there is no statutory provision 48 A. 31 : 88 I. C. 1018 : 1925 All. 680 : 23 A. L. J 653

——where a person who was employed as superintendent of a timber and tea estate knew nothing about the timber and caused the

Master and Servant—*contd.*

estate severe losses and was consequently dismissed from service, he was entitled to no damages for wrongful dismissal 22 L. W. 675 · 91 I C. 615 1926 Mad. 270.

——if a master on discovering that his servant has been guilty of misconduct which would justify a dismissal, elects to continue him in his service he cannot at any subsequent time dismiss him on account of that which he has waived or condoned 86 I C. 310 1925 Cal 87

——a servant to whom a master has entrusted his business is not empowered to dispose of his master's interest by putting the other party to the option of taking a special oath 3 Pat L R 87 87 I C 741 1925 Pat. 498

——it is open to a master before the expiry of the full terms of service and without serving any notice beforehand, to dispense with the services of a skilled servant employed for a particular work on the ground that he found him unfit for it. 82 I C 727

——the only remedy of a servant wrongfully dismissed by his master is by way of damages A servant dismissed from service has no *locus standi* to question the validity of the appointment by the master of a person as his successor 41 C 19 17 C W. N. 1045 20 I C 157.

——a servant by whom notice of his dismissal has been received and wages for the remainder of the term covered by the notice have been got cannot sue for wrongful dismissal. 15 C W. N 486 n : 13 C L J 537 9 I C 858.

MAXIMS

——the general principle of all grants *quando aliquid conceditur idiam conceditur sine quo res ipsa non esse potest* is always true as between grantor and grantee, but it does not necessarily apply as against third parties. 6 P. L T 42 29 C. W. N. 725. 86 I. C. 289 1925 P C 42 27 B. L R 753 P. C.

——the rule of the civil law expressed in the maxims "*actio personalis moritur cum persona*" is limited to action in respect of personal wrongs or torts and the principle underlying it has been much questioned and shaken in recent years. It does not apply to a Hindu wife's action for maintenance against the heirs of her husband, 87 I C 571 1925 Mad 757. 21 L. W 461, 1912 M W. N. 899. 12 M L. T. 383 : 17 I C 226, 64 I C. 311, in the case of a claim for damages for wrongful trespass and extraction of coal from a mine, the estate of a deceased deft in the hands of his legal representative or heir remain liable and the above maxim does not apply 31 C W. N 82, 1927 Cal 117. 101 I C. 62 In India this maxim does not form a part of the Law Claims by and against the [illegible] f the [illegible]enta- [illegible]rmer. : 676,

Maxims—*contd*

——applicability in India of the maxim "*falsus in uno falsus in omnibus.*" 1925 Oudh. 65.

——application of the maxim "he who seeks equity must do equity" 36 C. L. J. 326 : 1923 Cal. 150, 42 I C. 200 : 13 N. L. R. 130 F B.

——application of the maxim *lex non facet votis delicatorum.* 92 I. C. 678

——a person cannot suffer for an act of default of the court. 57 I C 492.

——the maxim that "a man shall not take advantage of his own fraud" is different from estoppel. 41 B. 93 : 37 I C. 945 13 Bom L R. 954, 36 B 185 - 12 I. C 913 : 13 Bom. L. R. 1200.

——the doctrine that "equity considers that as done which should have been done" cannot be applied to a case of a transfer of a *spes successionis* i e., such as the interests of reversioner. 25 C W. N 496 : 65 I C 27 . 38 C L J. 457.

——the doctrine is that a grant carries with it the means reasonably necessary for its enjoyment 41 C. 286, 18 C. L. J. 151 17 C. W N 1195

——the maxim '*expressio unius exclusio alteriom*" is at best an uncertain guide to the true meaning of a statute 41 C 1153. 18 C. W N 828 19 C. L J 505 . 25 I. C 562. the scope of this maxim is very wide. 36 C L J. 382 : 1923 Cal. 66, 93 I C 331. 1926 Sind. 133

——application of the maxim 'the express mention of one thing implies exclusion of another." 36 C. L. J. 382.

——the doctrine is that "a general rule does not weaken a special rule" *Generalia specialibus non derogant* " 42 B 5 - 19 Bom. L R 771 : 42 I. C. 67, this maxim applies to statements made by the accused to police which are governed by the special law under s 27 Evi Act and not by the general law under s. 162 Cr. P C 44 C L J. 253 · 1927 Cal 17 : 54 C. 237 : 99 I C 227.

——if the bad is not separable from the good the whole is bad 34 C L. J. 253 . 66 I C. 342.

——application of the maxim "*ignorantia juris not excusat.*" It must be applied according to circumstances 59 I. C. 33 : 1 Lah 440, the meaning of "juris" is not private right but general law 94 P. R 1916 : 37 I. C 119, it does not apply where *bona fides* or otherwise are to be determined 5 N. L J. 73 : 1922 Nag. 28

——the doctrine that "there is no contribution between joint tortfeasors" cannot be safely extended to India. 38 A. 237 . 33 I. C. 165 . 14 A. L J. 275.

——though a superior court supersedes an old court and the decisions of the latter are not binding on the former still applying the maxim *stare decisis* they ought to be valued as the embodiment of the settled law of the land 1927 Rang. 4 : 4 Rang 313 F. B

——the principle of *stare decisis* need not be followed when it is a question of procedure only. 50 A. 41 . 102 I C. 665 : 25 A L. J. 530 1927 All. 401 F. B.

Maxims—*contd.*

——whether a latrine constitutes a nuisance must be judged by general standards, the maxim *lex non facet votis delicatorum* applying 92 I. C. 678

——the maxim *de minimis non curat lex* which applies to computation of time does not apply to legal question. 51 B 247 · 29 Bom. L. R. 19 1927 Bom 195 · 101 I. C 229.

——there is nothing in the laws and customs of India to show any traces of the existence of any absolute rule that the maxim *quicquid plantatur solo cedit* whatever is affixed or built on the ... l to the same rights of pro- W N 965 46 C L J 1: 198 . 1927 M W N. 461:

MATERIAL ALTERATION.

——a party who has the custody of an instrument made for his benefit, is bound to preserve it in its original state, any material alteration vitiates it, if it be fraudulently altered to the knowledge of the plff he cannot succeed upon it. 7 C. 616.

——addition of names of witnesses in a document which does not require attestation is not material alteration, but change of date of payment of consideration is 12 C 313.

——an alteration in a document after its execution and registration made in good faith to carry out the original intention of the parties, does not vitiate the document 34 C. L. J. 333, 25 C L J. 155

——a material change or alteration of an instrument is one which causes it to speak a language different in legal effect from what was its original scope. 34 C. L J 333, 33 C 812, 18 C L J 354 *Ref.*

——the test of material alteration is, (1) whether the change speaks a different language in legal effect. (2) whether the integrity and identity of the contract is changed In the absence of fraud the original debt is not destroyed. 3 C L. J 363 10 C W N, 788 · 33 C. 812, 5 C. W. N. 56, 25 B 617, 23 M 137, 25 A 580

——a document is vitiated and deprived of all its effect by the

proved independently of *Hatchitha* 1 C W. N 710, but see 5 C W N 56.

——addition of the word 'per cent' after registration of a mort- ... 25 C L J 155 44 C 154. where altered document is ...d as evidence 9 C W. N.

——independently of the document materially altered the debt may be proved by other evidence 5 C. W. N. 56, 23 C. 851 *Fol.*

Material alteration—*contd.*

——an instrument is not vitiated by an alteration made in good faith by a party without the knowledge of the others if it was intended to carry out the original intention of the parties. 41 C 151 35 I C. 182 . 25 C L J. 155.

MEANING OF TERMS.

——the word '*jote*' does not necessarily show that it is simply an ordinary holding and not a tenure. 8 C W. N. 117, 21 C W. N. 188, 505 15 C. W. N. 902.

——the word '*kaimi*' does not import fixity of rent but only permanance of occupation of land. 6 C W. N. 916, 19 C. W. N 1129, 17 C W N 209 n., 24 C W. N. 93, 51 I. C. 852 (C).

——*thika mukrari* means permanent tenancy. 35 C L J. 90

——'*sthayee karsha kabuliyat*' does not necessarily imply permanent heritable interest. 19 C. W. N. 1129.

——'*permanent*' in s 38 B T Act, must be construed with reference to existing facts. 20 C. W. N. 1157.

——'*putra-poutradikramay*' means permanent lease 20 C W. N 182, 37 C. L J. 350, 23 C W. N. 866, P. C.

——'*strike off*' is dismissal. 17 C. W. N 204

——'*mukarari* means fixed rent 12 C. W. N. 172, 12 C W. N. 154 8 C L J 525

——'*moursidar*' does not mean fixity of rent but '*durmourasi mukarari*' does. 7 C. L J 284.

——*mirash* right may be raiyati right. 18 C. L. J. 334, 27 C. L J 298.

——*kurfa*' means under raiyat. 19 C. W. N. 35. It may mean raiyat or under raiyat 21 C W. N. 505, 452, 39 I. C. 240 (C)

——the word '*raiyat*' may be used simply for the purpose of describing a cultivator without defining his status 33 C L J. 357, 21 C W N. 452, it may mean tenants of various classes 21 C. W. N 452, 505

——*mourasi* means heritable. 27 C. 156 ; 4 C. W N. 274, 31 C. 20, 883, 41 I. C. 875 (C) but *istimari moukarari* does not mean heritable, *above case*

——*mourasi mukarari jamin jama* applies to raiyati right 50 I. C 641 (C).

——the word '*suit*' ought to be confined to such proceedings as are directly dealt with in C. P. C., or such as by the operation of the particular Act, are treated as suits. 22 C. 943.

——rent which is properly tendered but improperly refused is not '*arrear*'. 35 C. 34 : 11 C. W. N. 983 : 6 C. L. J 273, F. B

——'*santan*' means issue generally and is not limited to male issue 26 C. L. J. 251, 21 C. L. J. 854

——the word '*adhia*' means appertaining to. 19 C. W. N 1211

——'*taluki-patta*' means a permanent lease. 22 C. W N 273

——land held by an under-raiyat is not a '*holding*' within the meaning of s. 3, cl. (9) B T. Act. 16 C. L. J. 539 : 16 C. W. N 811

Meaning of terms—*contd.*

——'*marginal note*' is no part of legislative enactment, 23 C 55, 28 B. 129, 7 C. W. N. 883

——'*right title and interest*' of the Jt Dr. means what under the circumstances, the purchaser understood to have bought. 8 C. W. N. 186; 31 I A 1 27 M. 131. 6 Bom. L R 7 P. C

——the word "malik" is not a term of art and does not necessarily define the quality of the estate taken but the ownership of *whatever that estate may be. 1 Pat 295 1922 Pat 70: 65 I C 977,* it may mean raiyat or a tenure-holder or a proprietor 52 I C 314(C)

——the word "malik" does not necessarily mean ownership. 10 C 342, 8 C L J 20, 21 C W N 102 P C. 40 All 575, 26 C W. N. 129, 425 P. C *contra*, it ordinarily implies absolute ownership. 24 C 406, 27 C. 44, 649, 23 C 679, 24 C 834 P. C, 14 C W. N 458, 25 C W N 527.

——the word '*kar*' covers revenue, rent or any kind of tax including road cess 65 I. C. 598 (C). 1923 Cal 283

——the words "heir and representative" are words of limitation. 45 A. 596 21 A L. J 777 33 M L. T 355 1922 M W N 591 P C.

——the word "*jama kamel*" means the full amount of rent. 27 C W. N 328.

——the word "*saranjam*" ordinarily signifies collection charges. 33 C L J 330, 25 C. W N 308.

——a jalkar may mean either a grant of a mere right of fishery or it may mean the grant of a sheet of water together with the subsoil, which must be determined by construction of the original grant if available or by subsequent history of the property. 37 C L J 580.

——meaning of the word *Praja* 21 C W N. 505

MERGER.

——in cases where Tr P Act sec 111, cl (d) and B T. Act. S. 21 do not apply, the union of superior and subordinate rights does not operate as merger, but the conduct of the party may show that he did not intend to keep the two rights alive. 29 C. L. J. 427 23 C W N 830

——a proprietor in occupation of land within his own estate, cannot acquire the status of a raiyat. 15 W R 430, 23 W. R 387.

——the English law of merger does not apply in India in its entirety Intention and the benefit of the persons must be considered. 19 C. W N 435

——the doctrine of merger does not apply to lands in the mofussil in this country 10 W. R 15, 25 W R. 503, 19 C 760, 11 W R 485, 13 C W. N 913, 18 C. W. N 860, but the conduct of the party may show that he did not intend to keep the two [illegible]), 33 C. P. C,

of the W. N. . C. 489,

Merger—*contd.*

26 C. W. N. 565 : 1922 M. W. N. 58 : 30 M. L. T. 216 : 66 I. C. 551 P. C *Ref.* and *fol.* 20 C W. N. 800 : 5 P. L. J. 302 : 1920 Pat 168 : 1 P L. T. 310 : 55 I. C. 366 not *fol*

——when the mortgagee purchases the interest of the mortgagor the mortgage is extinguished. 31 I. C. 891 (A.)

——when the mortgagor inherits the interest of the prior mortgagee the prior [illegible] nd cannot be enforced against the [illegible]

——a debt is ext[illegible] to receive is also the person who i[illegible]. But in the case of limited owner (here Hindu widow who is creditor of husband) the presumption is against merger as it is not for her advantage that the charge should sink for the benefit of the remainderman. 19 L. W. 678.

——there must be complete unity of seisin or the absolute ownership of the dominant and servient tenements must vest in the same person in order that easements may be extinguished. 85 I. C. 739.

MESNE PROFITS.

What is mesne profit

——mesne profits include profits which the Jt Dr. might with ordinary diligence have received but it is discretionary with the court. 35 C L J. 369.

——profits may be said to have been wrongfully received when it was received during possession under a decree which was subsequently reversed. 27 C. L. J. 257 : 22 C. W. N. 263.

——where the plff. is not entitled to immediate possession of the land for the period of claim his claim for mesne profits is not sustainable. 72 I. C. 47 (C)

——mesne profits is in the nature of damages and it must be moulded according to the circumstance of each case. 45 C L J 462 . 1927 Cal. 616 : 103 I. C. 639.

Principle of assessment

[illegible] before trespass should be ascer[illegible] As regards [illegible] basis of produce, [illegible]ulative conduct of [illegible]8), (34 C. 934 : 11 trespasser 35 C. 1000 : [illegible] 29 C. 622 : C W. N 1133 : 6 C. L. J. 255, F. B., 6 C. W. N. 732, 12 C. W. 6 C. W N. 409, 30 C. 536). *Ref.* 16 C. L. J. 93 (1910) 12 C. W. N. 285, *contra*. It should not be assessed with reference to what the rightful owner was receiving before wrongful eviction but with reference to what the wrong-doer received or might with ordinary diligence have realised. 15 C. W. N. 825 (1906)

——Where it is proved that some lands have been let out at a produce rent the presumption will be that all the lands were let out at a produce rent which the tort feasor is to rebut 34 C. 992 . 31 C. W. N. 112 ; 1927 Cal. 182 : 99 I. C. 428, (8 C. 175 P. C. 29 C 622, 15 C. W. N. 825) *Rel.*

Principle of assessment—*contd.*

[illegible] doer is not affected by the [illegible] A. L J. 628 . 102 I C. 599 : [illegible] P C 159 8 Pat L. T 623 : [illegible] L T. I P C.

[illegible] oer should not be allowed [illegible] ay to the rightful owner, [illegible] to be considered and the [illegible] position financially as if [illegible] nined by seeing what use [illegible] ime of dispossession. 1917 [illegible] 69 I. C. 560.

——when the defts are of different grades each retaining a share of the rent paid by the tenant and set up title in good faith and there is no conspiracy or combination, each will be liable for the portion of rent paid to him by the raiyat less the cost of collection or other similar charges. 14 C. W. N 849,, (1910). But in case of wrong-doer it is not so. 15 C. W N 825.

——if different persons are in possession of different items of property each of them shall be made liable only for the mesne profits in respect of the particular item in his possession, 111 I C. 378, 1928 Mad 387

[illegible] actual value of the [illegible] lucting the necessary [illegible] L. T. 563, 12 C. W. [illegible]

——when tenant sues the landlord for mesne profits the latter is entitled to a deduction of rent although the rent suit was dismissed. 44 M L J 486 : 73 I C. 670

——mesne profits should be assessed with reference to what the wrong-doer might or might not have realised and not with reference to what the rightful owner was receiving before dispossession. If the person [illegible] be entitled to profit [illegible] minus the cost of [illegible] rent from the raiya [illegible] 31 C. W N. 112 : 99 [illegible]

[illegible] deduction for cost [illegible] of assessment of [illegible] at and proprietor's [illegible] . N. 732.

——rate of interest is generally 6 p. c 12 C. W. N. 285.

——the net and not the gross produce is the true measure of damages 12 C W. N 650.

——mesne profits include profits which the Jt. Dr. might with ordinary diligence have received but it is discretionary with the court, 35 C L. J 369.

——the indolence of the deft. or his reluctance to cultivate the land should not be a ground for depriving the plff. of his just dues. When the plff. was entitled to khas possession the profits which the

Principle of assessment—*contd.*

defts. might have made is the basis of the mesne profits. 45 C L. J 462 : 1927 Cal 616 103 I C 639

——*the deft* can claim deduction for improvement, 12 C. L. J 391, for management, 11 M L T. 90 : 14 I. C. 396, for cost of cultivation when he is not cultivator. 6 C. W. N. 732, 24 M. L. J 30 : 18 I C 615 4 P L J 301 , 51 I. C. 747.

——usufructuary mortgagee is entitled to take the crop he has produced though the money was paid before. 18 C W. N 76a.

——*when there is ouster by co sharer, mesne profit may be awarded against him but excess of enjoyment does not amount to ouster* 18 C W. N 124n

——*mesne* profits cannot be ascertained in execution proceeding 16 C L J 3, 37 I C 997 (C)

Whether Liability is joint or several, contribution

——wrong-doers are jointly and severally liable. 15 C W. N. 821 But when the defts act in good faith or in assertion of title and there is no collusion or combination, the liabilities are several. 14 C W. N 849 37 C. 552.

——where there is conspiracy among the defts. in illegally opposing the pltf a joint decree is good. 2 Pat L. T. 143 : 6 Pat L J 60 I C 346

—— all trespassers whether *bona-fide* or *mala-fide* are liable for mesne profits The *bona-fide* trespassers are entitled to deduct collection charges but not the *mala-fide* trespassers. 34 C L. J. 415 . 11 A 518 41 C. 1 42 *Ref.*

——members of Hindu joint family possessing wrongfully not according to their respective shares, are liable to contribution of mesne profit, according to their respective shares 31 C. 597 - 31 I A 94 8 C W N 625, **P. C.**

——where the defts have been in possession of separate plots in assertion of an imperfect title mesne profits ought to be calculated as against each deft. on the basis of the possession 1 Pat L. T 235 61 I. C 425

——where the defts are wrong-doers in the sense that they knew or ought to have known that they were doing an illegal or wrong act, there is no contribution, but if they acted under a *bona-fide* claim of right, there is the right of contribution *inter se* 5 C. W N 393

——where tort is not wilful, contribution, *inter se* lies 18 C W N 622

——the doctrine that there is no contribution between joint tort feasors cannot safely be extended to India 38 A. 237 33 I C. 165 . 14 A. L J: 275

Release of some wrong-doers, effect of.

——release of one of the joint tortfeasors is strong evidence that he has been satisfied for the wrong and this *is the foundation* of the *rule* that the absolute release of some operates as a release of all But a release *of* one joint wrong-doer without any intention to release the others but only as a partial satisfaction, discharges the others only *pro tanto* 14 C. W. N. 849, 11 C. L. J. 503.

Estoppel

——acceptance of rent from a person not a tenant, thoug under mistake of law, disentitles owner from claiming mesne pr fits 29 C. W. N. 533 40 C L. J 468 : 46 A 728 82 I C 946 : 26 Bo L. R. 1134 : 35 M L T 247 P. C.

Assignment of the right to mesne profits

——the mere right to recover mesne profits. or damages f breach of contract is not transferable. 13 C W N 584 36 345, 38 M. 308, 37 I. C. 993, 2 C. W. N 42, 18 C W N. 450, 19 M. W. N 525 · 104 I. C. 409 1927 Mad. 817, 44 M 539, *doubte* but when the claim merges in judgment, it can be transferr before assessment. 18 C. W. N 450.

——*a decree for mesne profits is a decree for money within t* meaning of Or. 21 C P. C A decree for mesne profits connot sold under s 60 C P. C. the only procedure is to attach the decr and to execute it under Or. 21, r 53. C P. C , 1918 Pat 257

——a benamdar can sue for mesne profits 18 C. W. N 450

For what period it may be claimed.

——wrong-doer is liable for mesne profits for the period of h wrongful possession, but when he vacates the land by giving noti to the rightful owner he is not liable 5 C W. N 720 16 C. L J 93

——period of 3 years up to which the mesne profits may granted, must be counted from the date of the decision of the Pri Council, and not from the date of the decree of the original cou even though the P C order did not expressly mention the mes profits. 5 C. W. N 52 27 I A. 209 , 23 A 152 P C

——mesne profits can be granted from the date of the ins tution of the suit, only up to three years from the date of the decr although the party dispossessed may recover possession in executi beyond the said period 35 C 1017

——in case of revenue purchase the right to receive mes profits runs from the date on which notice of annulment of incu brance is expressed to expire or from the date of annulment of i cumbrance 17 C W N 934, 37 C 559 14 C W N 849. *Ref*

——where no period is prescribed in the decree, it is for 3 yea 24 I. C 484.

——in case of joint Hindu family (here Mitakshara) when individual co-sharer unequivocally expresses and clearly intimat to his co sharer his decision to sever himself from the joint fami he is entitled to the usufruct of his share from that date. 20 W N 1085 P C , 17 C. L J 238 17 C. W N 333 : 28 I C 30. A. 80, P. C , but separation from commensality does not, as necessary consequence, effect a division of joint undivided propert *see* the latter case

——as to entitle the plff to mesne profits wrongful possessi of the deft is essential, the deft is not liable for mesne profits fo period of attachment under s 146 Cr. P. C., 39 C L J 447.

——*Jt Dr after setting aside sale can recover mesne prof* only for 3 years. 19 C. W. N. 1167.

For what period it may be claimed—*contd.*

——it is incumbent on the plff to establish not only the existence of his right but also the extent of it, 5 C. W. N. 720

——the wrong-doer is not liable for the period for which he remains dispossessed 24 C. 413

——mesne profits should be decreed for the period the deft. was in possession 25 C. L. J. 140

——the plff cannot claim mesne profits subsequent to the offer of possession by deft 34 C. L. J. 415, 25 C. W. N. 369, or during the attachment under s 146 Cr P. C, 39 C. L. J 447, 25 C L J. 140

——a trespasser is liable for mesne profits only from the date on which he enters into wrongful possession; so also a purchaser from a trespasser. *above case.*

——a transfer by Hindu widow is voidable and until the reversioner signifies his intention to avoid it the transferee cannot be deemed to be in wrongful possession. 59 I. C. 368

——if a person holds possession under a deed liable to be set aside on payment of an amount his possession is lawful until such payment 61 I C 543.

——a wrong-doer is not responsible for the acts of another wrong doer who is independent of him 39 C L. J. 447, 5 C W. N 728

——damages are claimable only for the period of the deft's wrongful possession, actual or constructive. 5 C. W. N 723, 15 W R 221. 10 C. 785, 25 C. L J. 140, 39 C. L. J. 447.

——when deft is not in actual wrongful possession he is not liable for mesne profits 18 C. W. N 542, 25 C. L J. 140

——wrong-doer is not liable to mesne profits from the date when he vacates the land by giving notice. 16 C L. J. 93 5 C. W. N 720, 25 C. W N. 369, notice may be private 25 C. W N. 369, 66 I C. 48

——where a decree of a trial court is affirmed in appeal mesne profits must be calculated from the decree of the trial court. 23 C W. N 55 P. C

Limitation period in suits for mesne profits

——mesne profits accrue due from day to day unless shown to fall due otherwise So mesne profits due for a period antecedent to three years previous to the suit is barred (Art. 109). 32 C. 185, 10 C 785, P. C

——when the deft is not in wrongful possession but in possession through court, Art. 109 (3 years) does not apply; Art 120 (6 years) applies 50 C 475 · 1923 Cal. 379, 3 C. L J. 183, 25 M. 103, 17 M. L T. 168 28 I. C. 85 *Contra.* 28 I. C. 85.

——a suit by co-sharer for his share of mesne profits or money is governed by Art. 181 and limitation is 6 years. 29 C. W. N 279 · 1925 P C 93, 35 I C 430 : 1 P L J. 69, 41 I C. 848 13 N. L R. 127, 25 C W N. 813 . 62 I. C 615, 37 A 318, 23 C. 799.

——Art 109(3 years from the date when the profits are received) applies when the deft is sued after the setting aside of a sale under the Putni Regulation 22 C. W. N 263 : 27 C. L J. 257, 35 C. 996 13 C. W N 15 : 8 C. L. J. 181, *Fol.* 3 C. L. J. 182. *Ref.*

Limitation period in suits for mesne profits—*contd.*

——computation of three years 35 C 1017, 19 C. W. N. 1167.

——when natural guardian fraudulently possesses land the minor on attaining majority may sue for the whole period and not for three years only. 33 C. 23 : 10 C. W. N. 1 : 2 C. L. J 238 : 32 I. C. 91 P. C.

——an application for ascertainment of mesne profits under Or 20 r. 12 C. P C is not one for execution and Art. 181 applies to it. 37 M. 186 : 13 M.L. T. 79 1913 M. W N. 114 . 24 M. L. J. 96, *contra. below*

mesne profits awarded ·roceeding in execution 57 84 I. C. 272 . 1924

Jurisdiction and procedure of court

——when the claim for mesne profits exceeds the pecuniary jurisdiction of the court the proper procedure for the judge is to return the plaint to the plff 38 C L. J 142.

——a suit for mesne profit is not maintainable without bringing a suit for declaration of title 17 C W N. 324 21 C. 244 *Fol.* But the Courts of Small causes can decide question of title 16 C W. N. 947.

——the court connot delegate power to ascertain amount to any officer of the court 19 C W N 609

——mesne profits cannot be granted in execution unless there is order in decree 6 C W N. 672.

——interest should ordinarily be allowed on mesne profits 34 C L. J. 415.

——the court may allow interest on mesne profits as it likes 33 C. 329 this rate is generally 6 p c 12 C W N. 285

——Or 20 r 12 C. P. C. applies to matters between plff. and deft and not between co-defts 23 C L J 215.

——an application for mesne profits is not an application for execution, so it can be made in ordinary form. 19 C. 139 F. B. 24 C. 173, 25 C. 203 6 C L J. 462, 39 C. 220, 16 C. L J 3 *contra-* 28 C 242, 7 C. L J 301.

——where a decree for ascertainment of mesne profits has been passed it is not competent to that court to dismiss an application for ascertainment of the mesne profits at a subsequent stage. 1925 P H. C C 357

——an application for assessment of mesne profits is an application in the suit and when it is dismissed for default a fresh application in the same matter is not admissible. 16 C L. J 3

——there is no reason why the claim for mesne profits should not be gone into in further proceedings after the decree, although an application is not made for that purpose. 29 C. W. N. 861 : 89 I. C. 207 . 1925 Cal 1195

——if the decree for possession leaves a claim for mesne profits undecided, a fresh suit will lie. 41 M. 188 F. B.

Jurisdiction and procedure of court—contd.

——if the preliminary decree is silent as to the *mesne* profits in a partition suit it cannot be ascertained in the final decree. 42 M 295.

——suit for damages for use and occupation, for a period after auction purchase but before taking possession, is a suit not for rent. 19 C. W. N. 204 n.

——lessees *pendente lite* may be added as parties after decree for possession and at the time of assessment of mesne profits 1917 Pat. 34, 39 C 220 ; 16 C. W. N. 109 *Ref.* reversed in 27 C W. N 29 P. C 19 C 683 P. C. *Ref.*

——plff. is bound to state approximate amount. 24 I C. 232

——a munsiff cannot try in excess of pecuniary *jurisdiction* 24 I C. 232.

——court-fee cannot be levied in respect of claim *pendente lite*. 24 I C. 232, 13 C W. N. 815, *fol.*

——when in a decree mesne profits are directed *to be ascertained* in *execution*, court-fee in *memorandum* of appeal should be paid upon the *original* claim 13 C. W. N. 815, 15 B. 416, 92 M. 378, *Ref*

——decree for mesne profits is a decree for *money* and cannot be sold in execution under sec 60 C. P. C. the procedure is under Or. 21 r. 53 C. P. C. 1918 Pat. 257.

MISREPRESENTATION.

——misrepresentation by a minor that he is *sui juris does not* estop him to *repudiate* a contract 20 C. W. N. 418, (26 C. 381 3 C W N 468, 25 C. 616 : 2 C. W. N. 320), *Fol.* 15 C. W. *N.* 239 *Dist* But in case of fraudulent misrepresentation *minority* cannot be *pleaded by way of defence* 2 C. W. N. 18, but no personal decree against the minor can be passed 24 C. 265.

——a stranger cannot impugn a registered *document* on the *ground of misrepresentation &c.* 36 B. 37.

——when in an auction sale the auctioneer misrepresented the title of the Jt. Dr a suit to set aside the sale *would lie.* 13 C W N. 249 36 C 323 : 9 C L. J. 165 P. C.

MISTAKE.

——s 20 Contract Act deals with the case of a *common mistake* at the time of the transaction "as to a matter of *fact essential* to the agreement" 26 C W. N. 573

——*where in an agreement* to pay debt in instalment the amount was erroneously stated by the debtor to be greater *than* what is stated, the debtor cannot set aside the *agreement* altogether but can *reform* the account. 3 C. 602 ; 5 I. C. 78, P. C.

——mistake of law and due diligence saves limitation 22 C W N 169 P. C , 13 C. 266, 13 M. 269, 10 A. 525, 19 A. 349 F B, but a bare mistake of law is not sufficient. 12 A. 461 : 10 A. W. N 149 F. B.

——when the *vendor* and the *vendee did* not know that the *land* had already become the subject of proceedings under the Calcutta Improvement Act and as such might any day come under the Act

Mistake—*contd.*

there is a mistake of fact essential to the agreement and the agreement is void. 50 C 615.

——acceptance of rent from a trespasser, though under mistake of law, disentitles the owner from claiming mesne profits. 29 C. W. N. 533. 40 C. L. J 468 · 46 A 728. 82 I. C. 946. 26 Bom. L. R. 1134 P C

For other cases, see "*C P. C. Or. 22*" *and* "*L. Act. s 5*"

Mortgage See "*T. P Act*"

discharge from
75 I. C 827

——where the document as executed was not an unconditional contract it was not a promissory note under the N I. Act. 4 Pat. L T. 577, 5 Lah L J 148 : 1923 Lah. 39.

——a suit on a promissory made is not maintainable by a person othar than the holder of it alleging that he is the real owner. 44 A. 290.

——where promissory note was executed in the name of one of the partners of a partnership suit on the note is maintainable by the partnership. 105 I. C 549 55 C. 551 : 1928 Cal 148

——a principal can sue on a pro-note executed in favour of his agent without obtaining an assigment from him. 90 I. C. 1047: 1925 Mad 1130 : 21 L. W. 696.

——where a hundi was not accepted by the drawee as required by s. 7, verbal acceptance by him was not sufficient. L. R. 4 A 355 : 74 I C 692.

——what document is a negotiable intrument 22 C. W. N 1036.

——where there is a prohibitory order of the court restraining the payee from dealing with or receiving the money due under a promissory note an endorsee from him who has knowledge of such prohibition is not a holder in due course under s. 9 46 M 415.

——meaning of notice under s 27 and 28. 41 M. 815

——a promissory note payable on demand does not become [illegible] demand is valid.

ssory note, bill of
r to bearer and a
payable to order
which is expressed to be so payable to a particular person and does not contain words prohibitting transfer. 1923 Lah. 388. 22 C. W. N. 1036.

——a promissory note which expresses a promise to pay on demand a certain sum with interest at 10 p c p a. with quarterly rests [illegible] nstrument. 7 Pat. 41.

and conveys no title to

sight or demand can be

Negotiable Instrument Act—*contd.*

——distinction between bill of exchange and promissory note 58 I. C. 313 (N).

——post-dated cheques are cheques and after the due dates may be sued upon as cheques. 52 C. 677 : 90 I. C. 59 : 1925 Cal 1007

——a person holding a bill for collection with a lien on the bill is a holder of the bill for consideration. 49 B. 270. 87 I. C. 982 · 1925 Bom. 369.

——Shah Jog hundis sued upon are negotiable instruments within the definition of s 13 (2) 31 M. L. T. 284 : 68 I. C. 921

——omission to state the amount of the pro-note in the body of the instrument does not affect if it can be found out from the instrument 1 Bur. L. J. 172.

——bill of exchange may include a *hundi*; but *hundi* does not include a bill of exchange. 23 C. W. N. 524 · 29 C. L. J. 305.

——hundis known in the Indian Commercial circles as *Dhanyog* hundis and payable to bearer are negotiable instruments. 111 I. C 686 · 1928 All. 549.

——the executant is personally liable unless it is otherwise indicated from the body of the instrument 64 I. C. 742 (C)

——personal liability is to be determined by the language of the promissory note. 1926 Mad. 390 92 I. C. 805 : 50 M. L. J. 125

——but s. 28 does not apply to a case where the *hundi* is signed as munim 1923 A. 407, 75 I. C. 609.

——the language in 29 is different from that of s 28 in that there must be express words limiting liability which can only be limited to the extent of the assets of the deceased 1926 Mad 390. 92 I. C. 305.

——where a property primarily liable on a negotiable instrument pays the amount thereof to a wrong person who holds it under a forged endorsement he remains liable to the true owner. 25 Bom. L. R. 604, 24 B. 65, 28 A. 428, 36 C. 239.

——where a promissory note was executed in favour of an executor, a suit by the assignee from the legatee without the endorsement of the executor is not maintainable. 1923 M. W. N 332 · 70 I C. 670.

——whether undisclosed principle may be sued upon 23 C. W. N. 937

——where a Hundi drawn in favour of payee or bearer is endorsed by the payee to a named person, it ceases to be a bearer Hundi and it can be paid only to the endorsee named. 86 I. C. 118: 27 Bom. L R 34 : 1925 Bom. 173.

——the presentment requisite in the case of hundi is presentment for payment and not presentment for acceptance 1923 A 345 : 71 I. C. 610.

——neither the bankruptcy nor death of the party dispenses with the presentment under s 64 as even the loss of the bill or the note does not excuse non-presentment. 72 I. C 777

——where a promissory note contained no agreement to pay interest and the agreement to pay interest at 2 per cent. was

Negotiable Instrument Act—*contd.*

hat the promissory
as such was void.
796 23 A. L. J.

——where in a pro-note word "at 5 p. c. per mensem" were written at the time of its execution but the words ' with interest" were inserted subsequently, there was no material alteration. 29 C. W. N. 965 : 86 I C 552 23 A. L. J 109 . 49 M. L J. 132 . 27 Bom. L R 777 . 26 Punj. L. R 419. P. C.

——under s 87 a negotiable instrument is void if there is any
nst whom
to carry
48 . 1925

——where in a promissory note the plff. was a party to the fraud by which the 2nd deft's. name was inserted by the first deft the forgery was a material alteration. 1928 M. W. N 591 ; 112 I C 404 : 1928 Mad 1092

——where the year in the promissory note was altered from 1926 to 1925 and the name of the executant appeared below it was the correction of a clerical error and not a material alteration. 31 C. W. N 683 . 1927 Cal. 612

trumen
wrote
correct
Cal 605 : 104 I. C. 559.

——where the promissory note sued upon is not a negotiable instrument within the meaning the definition given in Act 26 of 1881, there is no presumption under s. 118 of the Act that it was made for consideration When in such a case therefore the defendant admits execution and pleads partial of total absence of consideration for a promissory note, the initial onus is almost invariably on the plff. to prove that consideration did pass. 84 I. C 866 : 6 Lah. L J 542 · 1925 Lah. 272

——where a person alleges that a hundi was given by way of loan and the transaction was really one of loan in the form of a hundi the onus of proof lies on him. 1923 Nag 62 · 60 I C. 541
in the shape of
le to sue on the
28 M. 544, 31 M.

——an endorsee of a pro-note can only sue on the note as such and cannot fall back on the original consideration. 66 I. C. 584, 21 M. L. J. 526.

——the presumption as to the receipt of full consideration arising from a debtor's signature as a promissory note can be available against the debtor only but not against the Official

Negotiable Instument Act—*contd.*

Receiver or a creditor in insolvency proceedings. 1928 All. 380 : 103 I. C. 147 : 26 A. L. J. 241.

——when the recital of consideration in a promissory note is admittedly false the burden of proving consideration is shifted on to the holder of the note as against the maker of it and must stronger would be the case when passing of consideration is to be proved against third person. 111 I. C. 407 : 1928 M. W. N. 425 : 1928 Mad. 773.

——a person to whom promissory note is handed over without endorsement cannot sue. 18 C. W. N. 494.

——s. 51 does not require that the endorsements should be at one and the same time. 1922 M. W. N. 263.

——a negotiable instrument cannot be assigned without endorsement, but can be put an end to in any manner. 36 C. 403 : 12 C. W. N. 1102.

——a person drawing a hundi or bill of exchange or making a pro-note as trustee is personally liable 41 M. 815.

——in a case where the drawee and the drawer of a hundi are the same presentation for payment is not necessary as no question of damage can arise. 44 A. 554, 27 Punj. L. R. 75 : 92 I. C. 1015, 7 Lah. 113. 1926 Lah. 328 : 8 Lah. L. J. 3.

——though the plff. in a suit on a Hundi fails to prove that there had been a presentation of the Hundi alleged by him he could nevertheless show that the case was one in which or presentation was necesrary. 1922 All. 422.

——an alteration of the name of the payee so as to make him an altogether different person, is a material alteration within s. 87, 20 A. L. J. 987, so also the interpolation of the rate of interest. 23 A. L. J. 253 : 87 I. C. 796 ; 1925 All. 282.

——deliberately inserting a false date on the promissory note is a material alteration so as to vitiate the document. 28 Bom L. R. 944 : 1926 Bom. 491. (6 B. 371, 12 M. 239) *Fol.*

——promissory note payable to a person or bearer or order is illegal and void. 40 M. 585.

——promissory note executed in favour of trustee can be sued on by his successor without endorsement or assignment. 41 M. 353.

——mere written acknowledgment of a receipt of money due under a promissory note does not fall under ss. 15 and 16 of the Act. 39 M. L. J. 273.

——a *hundi* payable *shah jog* is one which is only payable to a respectable holder and is not the same as a *hundi* payable to a bearer. 5 C. W. N. 313, 1 A. L. J. 254, 26 A. 493.

——the negotiability of the *shahjog* hundi as a bearer hundi comes to an end where it reaches the hands of the sha who presents it for acceptance or for payment. 1926 Bom. 471 : 28 Bom. L. R. 897. 5 C. W. N. 213, *Ref.*

——*jokhmi hundi* is always drawn on or against goods shipped on the vessel mentioned in the *hundi*. 4 B. 333.

Negotiable Instrument Act—*contd.*

——an instrument containing a promise to pay to a certain person without the words 'order' or 'bearer' or their equivalent is a non-negotiable promissory note and it cannot be transferred by mere endorsement. 7 M. L. J. 231.

[illegible] made after the bill had [illegible] 442 . 22 A. L. J 319.

[illegible] sufficient to constitute [illegible] non-presentment. 47 A.

[illegible] the presentment was [illegible] was required to accept the bill, and that he dishonored it by non-acceptance 86 I. C 576 1925 Mad 444 21 L. W. 210

——acceptance of bill-rights and duties of acceptor. 1926 Cal 189.

——for the purpose of stamp, an attested document, purporting to be a promissory note but not payable to bearer or order, is a bond as defined in s 2 (5) of the Stamp Act, but a similar document payable to order or bearer is a promissory note 29 B 82 : 6 Bom. L. R. 841 10 M 158, 8 M 87 F. B , 13 M. 147

——a document attested by witnesses and containing unconditional undertaking to pay and expressing to the bearer is a bond 3 Bom L R 699

——simple attestation does not change the character of the promissory note. 8 M 87, 17 A. 211, 14 A W N. 204, 14 P R. 1902.

——a letter requesting a loan with a promise to repay is not a promissory note as it is dependent on advance being made 27 M 1.

——"on demand" is a mere formula meaning that the money is payable immediately or at once , it does not import a condition [illegible] nt can be enforced, [illegible] I L J, 364, but in [illegible] instant the note is [illegible] nd' is distinct from [illegible] essary before suit, [illegible] demand arises from the date of the note and not from the date of demand, and under the provisions of s. 80 interest also runs from the date of note. 94 I C. 21 : 28 Bom. L R. 141 . 1926 Bom 241, 50 B 266.

——where a promissory note is payable on sight it means payable on demand and Art 73 or 80 applies. (3 years from the date of execution of the note). 40 C. L. J. 84

——stipulation to pay interest does not change the character of the promissory note. 4 Bom. L R. 912 . 9 A 351 : 3 A 260 F B.

——there must be express promise to pay. 22 B. 986, 21 M. 49 : 2 M. W. N. 38.

——"I am bound to pay" or "I am liable to pay" only constitutes an acknowledgment of liability to pay and does not amount to an undertaking to pay. 21 M. 49.

Negotiable Instrument Act—*contd.*

——mere memorandum or note in respect of a transaction just settled between the parties, with a stipulation to pay interest but no promise to repay the money is neither a promissory note nor an agreement. 27 A. 84 : 1 A. L. J 43.

——an instrument containing an express promise to pay the amount acknowledged to be due is a *promissory note*. 8 C. 645, and in case it is not a promissory note it may be valid as an agreement 25 B 373

——*pro-note must be expressed to be payable in money only* 4 M 296, F. B

——there may be collateral security. 17 M 85 : 3 M. L J 221.

——collateral agreement is not valid. 7 N. L. R. 39, 2 C W N. 168 *contra* 16 M. L. J. 103 : 29 M. 212 : 19 M. 368.

——where the cause of action as set out in the plaint is based on a *hundi*, the court cannot pass a decree on the debt independently of the hundi 93 I. C. 63 : I. C. 63 : 1926 All 859 : 48 A 332, *contra*. if the hundi is inadmissible in evidence for being unstamped a decree can be given as the original cause of action 92 I. C 1015 1926 Lah 528 27 *Punj. L. R.* 75, *but when a pro-note is unstamped*, no decree can be passed on the original consideration 7 Pat L T 559 1926 Pat. 432 95 I C 348.

——suit may be brought against some of the makers of pro-note 5 M 37, 6 B 700, 14 B 408, 25 B 378, 3 C. 351, 21 A. 301, 22 A. 307

——*bona fide* transferee under forged endorsement does not acquire any title. 24 B. 65.

——Negotiable Instrument Act applies to Govt. pro-note 24 B 65, 12 C L. J 470, 5 M. I. A. 1, P. C.

——when the *karta* of a joint Hindu family borrowed money for the purpose of the *family by executing* pro-note, it may be enforced against all the members 11 C. W. N 139, 23 M. 597, 7 C. W. N. 725

——a suit *instituted* on a promissory note executed by the *karta* of a joint Hindu family against all the members of the family cannot be decided against the members of the family as they had not signed the promissory note. But they will be liable on an entirely different cause of action, namely, on debt. 41 C L J. 535, 88 I. C. 1025 : 1925 Cal 1153.

——when the handnote was executed *for old* debt, limitation would run from the date of handnote. 1918 Pat. 318.

——a *new instrument* executed in place of an existing one does not discharge the instrument then existing but acts as a *conditional* satisfaction of it so that *if the new* instrument is duly paid at maturity the first is discharged otherwise the first can be revived. 49 A 257, 1927 All. 236 · 100 I. C. 341 : 25 A. L J 102, 7 C 256 *Fol.* (35 M 580, 4 A 330) *Ref.*

——when interest is not provided in a handnote, it is payable at 6 p c, *51 I. C. 106 (N)*, 40 I. C 350 : 1 P. L. W. 615, 1917 Pat. 279, 52 B 89, 107 I. C 257 : 1928 Bom 35 F. B, 107 I. C. 753 : 1928 Lah. 665 (29 A 33, 11 C W. N. 105 : 6 A. L. J. 233 : 30 C. 416 : 7 C W. N 412) *Ref* there may be collateral agreement as to interest. 11 C W. N. 105 : 5 C. L. J. 7 P. C.

Negotiable Instrument Act—*contd.*

——a person to whom promissory note is handed over without endorsement cannot sue, 18 C. W. N. 494, (16 C. W. N. 666, 25 C. 9), *Ref*

——although an assignment of a negotiable instrumet can be effected only by endorsement, that does not prevent any arrangement not to negotiate it but to put an end to it 12 C. W. N 1102 : 36 C. 493

——where the instrument of debt and security for its payment are found in the hands of the debtor, presumption is that the debt has been discharged. 29 C 334 : 29 I A. 43 : 6 C W. N. 401 P C.

——suit on pro note may be brought in the place of payment. 9 C 105

——a promissory note may be transferred in one of three ways,(1) by endorsement and delivery as a negotiable instrument under s. 48, (2) by written assignment under s. 130 Tr P Act (3) by transfer

——s 50 is not limited to negotiable instruments payable to order. It applies to any negotiable instruments whether it is payable in the first instance to order or to bearer. 27 Bom. L. R. 34 : 86 I C 118 1925 Bom. 173

NON-JOINDER OF PARTIES see *C. P. C. party.*
NON-TRANSFERABLE, see *B. T. Act, transferability*

NOTICE.

Miscellaneous

——search in the Registry office gives rise to the presumption that the person making the search had notice of the contents of the book 17 C. W N 224

——licensee is not entitled to any notice. 18 C W N. 136.

——in case of resumption of service-tenure no notice is necessary. 25 O. L. J. 332, 1 C. L. J 16 n, 2 C L J 403, 3 C. L. J. 272 : 33 C. 339

——the question whether registration is or is not notice in itself, depends upon the facts and circumstances of each case 32 C L. J 479 P. C, 48 C. 1. P C, 88 I C 398 : 1925 All. 557

——tenants paying annual rent are entitled to a resonable notice before the suit of ejectment 8 C W. N. 774, F. B

——*if the deft. is a tenant from year to year he is entitled* to a reasonable notice to quit. 34 C. 57 : 11 C. W. N. 225 : 5 C L. J. 181.

Sufficient Notice—*contd.*

but in case of tenant at will a mere demand of possession is sufficient *above case.*

——a notice containing inaccurate description is not invalid if it is covered by the terms of a statute. 109 I. C. 344:1928 Bom 136: 30 Bom. L R 339.

——when a letter is posted and specially when it is registered and a receipt for it signed by the addressee himself is produced the presumption will be that it was received by the person to whom it was addressed. 33 C. W. N. 659.

——in order that a notification in a newspaper may amount to actual notice to the subscriber it must be shown that his attention was drawn to the said notification 33 C. W. N 563

For other cases see "B. T. Act. ss. 49, 155, 181" and "C. P. C. S 80" and "Tr P Act. ss. 3 106" Master and servant."

NUISANCE.

——the question whether a latrine constitutes a nuisance from the legal point of view must be judged by general standard by the application of the maxim *lex non favet rotis delicatorum* 92 I. C 678

——what may not be appreciable and be no nuisance if done by one may become a serious nuisance if done by many. 7 C. 665

For other cases see "Injunction" and "Easement."

OCCUPANCY RIGHT, *B. T. Act. Occupancy right.*

PARDANASHIN LADY.

——a *pardanashin* lady is a woman of rank living in seclusion shut in the Zenana having no communication except from behind the pardah or screen with any male persons except a few privileged relations or dependents 1929 Lah. 303: 30 Punj. L. R. 288, 34 A. 455 P. C., 28 C. L J. 306, 1922 Cal. 203

——a *pardanashin* lady who had appeared personally in the Police Court was allowed to be examined on commission in the Civil Court 3 C W. N. 753.

——a *pardanashin* lady may completely alter her mode of life and cease to be included in the statutory description of "woman who according to the custom and manners of the country ought not to be compelled to appear in public." When the transformation has taken place, she can no longer claim, as of right, the statutory exemption formulated in sec. 132 C. P. C. but if she is in fact a *pardanashin* lady she is not deprived of the statutory protection merely because she may have previously appeared in public 45 C. 697 · 26 C. L. J. 319 : 22 C. W. N. 197 : 41 I. C. 610, (26 C. 651, 26 C. 650) *fol*

——where a pardanashin lady embarks on a scheme of house building for profit she must be taken to have given up the privilege pertaining to a pardanashin lady and any contract by her with an agent for the supervision of her house must be treated as a contract entered into by an ordinary employer. 97 I. C. 200 : 43 C. L J. 479 : 1926 Cal. 988.

Pardanashin Lady—*contd.*

——in case of disposition of property by a pardanashin lady specially when she is illiterate it must be established that the transaction was one which she thoroughly comprehended and deliberately and of her free will carried out. 48 C. L J. 412: 32 C W. N. 929: 110 I. C 260: 1928 P. C 303: 55 M L J 84 P. C.

——it must be proved that document was explained to her, 28 C. 546 · 5 C W. N. 489 · 28 I A. 71 P C., and that it was understood by her. 29 C 749 . 6 C W. N. 682 : 29 I.A 127, P C, 5 C. W. N. 505, 17 C W. N 991, 18 C. W. N. 282 P. C 20 C W. N. 638, 957, 5 C W. N. 505 and it was intelligibly and properly executed by her 16 C L. J. 613, 27 Bom L. R. 184 ; 86 I. C 886 1925 Bom 305, 84 I. C 490 1925 Cal 239.

——when the *bonafide* of a document executed by a pardanashin lady is challenged the validity of the document from every possible angle of attack must be proved, but in case of absolute transfer it will be sufficient if the lady knew that it was so and the term need not be explained to her. 111 I C 746 (c)

——undue influence vitiates the execution of the document. 20 C W. N 957 P. C, 18 C. W N. 282 P C, 20 C W N 688, 17 C. W N. 389 18 C W. N. 134 n., 19 C W N 92, P C., 5 C. W N 505, 21 C 233 *Dist.*

——execution was held good where the lady was sitting behind the screen but her voice was known to the witnesses who recognised it. 19 C W. N. 991, P. C., 11 C L J 563.

——the lady must have independent advice but if she is proved to have been of business habits, literate and to have possesses capacity to judge for herself the deed should not be set aside, 28 C. L. J. 336, 11 C. L. J. 563, 9 C. L J. 19 . 11 A 573, so also when the terms are such as may be understood by her 24 C W. N. 977, P. C

——any person taking conveyance from a *pardanashin* lady must prove that the document was read to her, that she understood what she was doing and that she had independent advice. 90 I. C. 229 (c).

——although it is usual and necessary that the document should be read ever to her at the time af execution it is not necessary that it should be explained to her at that time where she is already well aware of the nature of the document. 96 I. C 571 1926 Pat. 529.

——the person who alleges that the lady acted under pressure must prove that 9 C L J. 19 1 I. C 573

——a mortgage deed was not valid which was attested by witnesses on the information from the son that his mother signed the deed behind the *parda.* 22 C. W N 697 P. C, 27 C. L J. 548, 45 C. 748, 16 C W. N. 1009 . 39 I. A 218, P. C. (19 C. W.N. 991 : 42 42 I. A. 162 P. C.), *Fol.*

——when one witness to the will was within the sight of the executrix and the other was *placed behind a curtain, both witnesses* were sufficiently present to make their attestation valid. 16 C. 19.

Pardanashin Lady—*contd*

——attestation of bond executed by pardanashin lady by witness knowing her voice only is good attestation 19 C. W. N 1309: 19 C W. N 999: 22 C. L. J. 165 37 A. 474 P. C., 37 C. 526 14 C. W. N. 974 11 C. L J. 568: 14 C W. N. 165.

——a *pardanashin* illiterate lady cannot be presumed to be aware of collateral recitals made in a document. 13 C W. N 370, 31 I A. 116 19 M. L. J 180: 9 C. L. J. 172: 11 Bom. L. R 196, P. C

——a Hindu lady appearing in public may have the privilege of being examined by commission. 45 C 492: 44 I. C. 157: 22 C. W. N 147, 197

——the rule of English practice about counsel's inherent power to enter into a compromise which had its root in different traditions and environments was not applicable in this country particularly in the muffissil and specially where pardanashin ladies are concerned. Tarubala Dasi &c. Surindranath Mitra 29 C. W. N. 597

——a deed executed by a pardanashin lady relinquishing without consideration her right of succession in favour of one who had submitted the prepared document and got her signature, is invalid. 43 A 525 P. C., 34 A. 535 *Appeal*.

——the fairness of the bargain is the critical test. 34 C. L J 529

——independent and competent advice means that the adviser shall be removed entirely from the suspected atmosphere free from taint of interest. 34 C L J. 529.

——intellectual attainments of the lady concerned should be looked to and a deed should not be set aside where the lady is proved to have been of business habits, to have been literate and to have possessed of capacity to judge for herself. 34 C L. J 529: 47 C 175 P C. *Ref*

——all the points relating to a document purporting to be executed by pardanashin lady have been freely discussed in 34 C. L J. 333, 529 563

——the legal protection cannot be transmitted with a legal disability 6 Pat. L J. 465, 2 Pat. L. T. 752.

——the circumstances must be carefully examined in order to ascertain (1) that she had sufficient independent advice (2) that she had sufficient intelligence to understand the relevant and important matters (3) that she did understand them as they were explained to her (4) that nothing was concealed and (5) that there was no undue influence or misrepresentation, 25 C W. N. 265: 28 M. L T 35 P. C., 8 Pat. L. T. 48: 31 O. W. N. 693: 25 A. L. J. 314: 1927 P C. 84: 101 I. C. 29 P. C.

——in a suit by an old and almost illiterate *pardanashin* lady for cancellation of a deed of settlement the deft. is to prove that she understood the nature of the deed. 40 C. L. J. 393

——a *tadbithar* of a pardanashin lady cannot compromise a case on any terms he thinks fit and thereby bind the lady 41 C. L. J 213: 29 C. W. N. 597: 1925 Cal. 866: 88 I. C. 369.

Pardanashin Lady—*contd.*

——the authority to compromise a case on behalf of a pardanashin lady must be proved. *above case.*

——a deed of compromise signed by a *pardanashin* lady will be binding on her, if it is proved she understood what it was, and that disinterested people competent to advise her, gave her such advice. 91 I. C 1050.

——the law of India contains well known principles for the protection of persons who transfer their property to their own disadvantage, when they have not the usual means of fully understanding the nature and effect of what they are doing. 42 C. L. J. 331 : 47 A. 703 ; 1925 M W. N. 918 49 M. L. J 758 P C.

——strict proof of execution and independent and competent advice is necessary to be proved in case the person who claims under the document stands in fiduciary character. 34 C. L. J. 529, 28 C. L. J. 306 367.

——the rule that a pardanashin lady should have independent advice is not an inflexible one and it is not necessary where she has full capacity of understanding business transaction. 1926 Pat 582 : 5 Pat 646 : 99 I C. 782 · 46 I C. 272 *Ref*

——when a wakf deed is executed by a pardanashin lady independent advice is not essential but the disposition made must be substantially understood. 30 C. W. N. 337 28 Bom L R 493 : 1925 P. C. 204.

——where a person sets up an agreement to compromise a litigation entered into by a *pardanashin* lady he must satisfy the Court that it had been explained to the lady and that she understood the same and that some disinterested and competent persons with a fair understanding of the whole matter advised her to enter into the agreement 91 I. C. 705 · 1926 Cal. 643.

Who are *pardanashins*

——a lady who has no objection to communicate when necessary in matters of business with men other than members of her family who was able to go to court to give evidence and to attend at the Registration office in person is not a *Pardanashin* lady. 33 C. 773, 3 C. L. J 484 10 C W. N. 570 P C

——a *quasi Pardanashin* woman means a woman who, not being of the *pardanashin class* is yet close to them in kinship and habits and secluded from ordinary social intercourse, such a woman is not entitled to the same protection which the law extends to the *pardanashins* 5 C. W. N 1, 23 A. 137 : 2 Bom. L. R. 971, P. C.

——an Indian lady who does not ordinarily appear in public but goes about making purchases in the bazars can hardly be described as a *pardanashin*. 167 P W R. 1912 : 17 I. C. 243 : 193 P. L. R 1912.

——a pardanashin lady is a woman of rank living in seclusion shut in the Zenana having no communication except from behind the *pardah* or screen with any male person except a few privileged relations and dependants. 1923 Lah. 309 : 30 Punj. L R. 288 (34 A. 455 P. C , 28 C. L. J. 306, 1922 Cal. 223) *fol.*

PARTITION.

General

——claim for partition is a matter of right. Difficulty in making a division of the subject-matter or a resulting prejudice to some co-tenant is no ground for refusing partition Partition may be claimed even though it is impossible to divide the property without materially impairing its value or even totally destroying it 37 C. L. J 191, 20 A. L. J 90, 64 I. C 948.

——partition is not transfer as it does not change the rights of the parties but the mode of enjoyment only. It approximates to an exchange as defined in s 118 of the T. P. Act., 94 I C. 232: 1926 Nag. 355

——a partition for convenience of possession by itself cannot stand in the way of a decree for partition so long as it is not found that it was in conformity with the shares of the separate parties 29 C W N 229. 85 I. C. 1053: 1925 Cal. 425, 21 C. L. J. 266, 18 I. C 583

——when the pltf is unwilling to proceed with the suit the deft can demand partition. 5 N. L. R 151: 4 I. C. 236

——right to sue for partition, is a continuing one. 10 C W. N. 839, 37 A 155

——temporary lessees can demand partition 24 C. L. J. 26, 20 C. W. N 1306, 37 C 918, 9 C. W. N. 699.

——religious offices and place of worship may be partitioned by means of management by rotation. 19 C. W. N. 208: 20 C. L. J 183, 42 C 455

——there may be partition by definement of shares. 15 C L. J. 376 17 C W. N. 453 · 35 A 41 P C., 21 C L. J. 296. 10 C. L. J. 121, 13 C. W N 983 P. C, 43 C 1031: 20 C. W. N 1085: 24 C. L J 207 P. C

——inconvenience and difficulty of partitioning the subject-matter (here stair-case and partition wall) is no answer to a claim *for partition.* 20 A. L. J. 90: 64 I C. 948

——the general rule is that all properties held in co-tenancy and nothing but those properties should be included in partition suit 37 C L. J. 191, this principle applies to Mahamedans also 15 C. W N 677

——a partial partition cannot as a general rule be compelled against co-tenants who do not consent thereto. It is allowable in *the following cases, (1) when co-tenants* by mutual agreement make partition of a part only of the joint property retaining *the rest* in common (2) when some of the co-tenants desire to continue holding their moieties together and undivided, (3) *in case of family property* (a) when different portions of the family property are situate in different jurisdiction and, (b) different rules of substantive and adjective laws prevail in different courts, (4) when the portion excluded is not in the possession of co-parcener and may consequently be deemed not to be really available for partition (5) when the portion excepted is impartible property, (6) when the portion excluded is held jointly with strangers who had no interest in family partition, 37 C. L. J. 191.

General—*contd.*

——but these exceptions must not be taken to have frittered away the fundamental rule that *a partition suit should embrace all the joint properies* 37 C L J. 191,

——if there is no inconvenience partial partition i e partition of joint dwelling house only is maintainable 29 C. L. J. 494.

——it cannot be said that the general rule is that a joint owner cannot claim a partition of the joint property without bringing the whole of it under partition. 19 C. W. N 356. (10 C. L. J 503, 28 A. 39, 12 C W. N 640), *fol Contra.* 14 C 122, 835, 35 C. 961, 15 C. W N. 677 p 679, 17 C. W. N. 521 p 552.

——a suit for partition need not always embrace all the properties jointly held by the parties. 23 C. L J 231, 14 C. 835, 28 A 39, 12 C W. N. 640, 19 C. W N. 356, 34 C. 1025 but under ordinary rule it should embrace all the joint properties 23 C L J 231, 14 C 122, 35 C 961 · 6 C. L J 735, 15 C W N 677, 10 C L. J 503, 17 C W N 521, as a necessary corollary of this rule a partition suit cannot include property which each of the parties does not claim 23 C. L. J. 231, 18 C L J. 556, 1 C L J. 40, 5 C. L. J. 307, 11 C. L J 384, 34 C 1026 28 A. 39

——a suit for partition of portion of a joint estate is maintainable when such portion is the only property held jointly by the plff and the deft, although the *deft* may be interested in the other portion 1 C. L J 40, (7 C 577, 24 C. 725) *Dist*, (7 C. 153, 20 C. 379, 682), *Fol*

which was
ths cause
recurring
3 C W N
J 135, 15

——all the joint properties which belong to the family must be included in a partition suit, but if exempted it may be partitioned subsequently. 39 C. L. J. 140 . 28 C W. N. 181

——a suit for partial partition between co-owners of an estate is maintainable since the reasons against the partial partition of joint family property do not apply to the case of co-owners of an estate. 12 C. W N. 640, 28 A. 39, *Fol.* 7 C. 577 *Com* 1 C L. J. 40 *Reld*, 45 M 840

——a suit for partition of *common* property, not *joint* property is not to be dismissed on the ground of joint property not being included. 46 M. 840

——pleadings may be amended at any time to include all the joint properties 20 C W. N. 1276, 15 C. W. N. 677, 6 C. W N 641 . 22 M. 538 P. C.

——in a partition suit all the co-sharers are made parties, so a residuary co-sharer cannot question the previous partition. 24 I C. 26 n. 21 C. L. J. 23, P. C. 19 C. W N. 531, P C.

——plots belonging to some of the parties cannot be brought into hotchpot 18 C. L J. 556 12 C. W. N. 640.

General—contd.

——to succeed in a partition suit there must be unity of tit as well as possession 68 I. C 804.

——a partition suit must include all the claim relating to th subject matter. A susequent suit for account does not li 46 B. 829

——in a partition suit the pltf. can establish his title i necessary 29 C. W N. 76.

——all disputes between parties may be decided in a partition suit although all are not interested in the question There may be interlocutory order deciding question affecting different defts 35 C L J. 530.

——considering that partition suit are always extremely complicated, any question regarding disputes relating to particulars such as between mortgagor and mortgagee should be kept out of main suit 1923 Bom 294.

——co sharers may amicably enjoy some parts exclusively and it will hold good including leases until some other arrangement. 17 C. W N. 517, 35 C. L. J. 166

——a lease created by co-sharer in exclusive possession with the consent of other is not affected by subsequent partition between co-sharers 35 C. L. J. 166. 64 I. C 448, 1 C. W. N 62 *fol.*

—— the difference between a lease and a mortgage of the undivided share in joint property is that in the former case followed by possession, title of the lessee is complete but in the latter case no title is perfected until the security is enforced. 35 C. L J 166

——co-sharers may effect the partition of a *mahal* by private arrangement 45 A. 711.

——no compromise in a partition suit is binding upon all the parties unless they have all joined in the compromise 28 C L. J 111.

——s 99 Estate Partition Act (saving of tenures leases and incumbrances), does not apply where there was private partition 23 C W N. 319, 15 C W. N. 426, 20 C. 285.

——where there is no private partition any tenure of incumbrance created by a co-proprietor is not binding on the other co-sharers on partition. 3 C. W. N. 209; 26 C. 434, (1 C W N 62, 1 I A. 106) *Ref.* 17 C W. N. 36n But if on partition the co-proprietor to whose allotment it falls does not disturb the possession of such tenure-holder or of his sublessee, the latter is bound to pay rent to the former and cannot question his title 11 C. L J. 95

——private partition is binding against minors also if not unfair 23 C W. N. 118, 31 A 412; 13 C. W. N. 983; 10 C. L. J. 121 P C

——the partition of an estate under the Partition Act makes each proprietor the sole landlord of the holding even if it be divided 10 C. W. N. 818.

——but a civil court partition does not divide the holding 12 C. W N 568.

——partition in civil court should follow the principles of Estate P. Act 6 C. 150 (C).

General—*contd.*

——land on which any party has made some improvement should be allotted to him and division should be made on the basis of unimproved value. 15 C W N. 575, 12 C L. J 25.

——when money compensation should be given 10 C. 675.

——Owelty money has priority over mortgage debt 35 C 338 : 12 C. W. N 373

[illegible] not that [illegible] e position [illegible] partition.

——a partition decree is a joint declaration of the rights of persons interested in the property of which partition is sought and is a decree in favour of each sharer whether plaintiff or defendant. All rights under the decree can be worked out in *execution. 90 I C. 1009.*

——the plffs. and the defts. are entitled to get blocks for their respective sharers. 17 C. W N. 128.

——like the Hindus amongst Mahomedans also partition of moveables without partitioning immoveable cannot be allowed. 15 C. W. N. 677.

——all the Hindu joint family properties must be brought to partition' 20 C. W. N. 1276.

——it is competent to a member to separate himself from the joint family by a clear and unequivocal intimation of his intention to sever and it is so with respect to an impartible estate clear and strong evidence is necessary to prove such separation. 37 C. L. J 187, 26 C. L J. 101 : 39 A 496 44 I A 159, P C, 43 C. 1031 : 24 C. L J. 207 43 I. A. 151 P. C. *Ref*

——in the case of ordinary joint family estate, the income, [illegible]

——a co-sharer cannot sue for khas possession of the transferred portion of a holding which has been allotted to him on partition, 1 P. L. W 19 : 38 I C. 72, 2 P. L. J 225 · 39 I. C. 98.

——a sale by a tenant of the entire plot that has been separated constitutes abandonment which entitles the landlord to re-enter. There can be a partition of a tenancy into separate tenancies without the consent of the tenants. 37 I C. 440. 1 P. L. J. 270 : 2 P. L. W. 440.

——property held in co-tenancy, subject to certain exception [illegible] ot an inferior [illegible] sue for parti- [illegible] nt to effect a [illegible] 12 C. L. J. 25.

General—*contd.*

——joint character of property must be determined before preliminary decree. 12 C. L. J. 25, 13 M. 281.

——in a suit for partition of joint family property all moveable and immoveables should be joined. 22 C. W. N. 669.

——in a partition suit, holder of inferior right need not be made party, but he can be allowed to watch the proceeding, though not made party. 12 C W. N. 670 : 7 C. L. J. 449, 37 C. 918, P. C.

——a person holding a *permanent interest* of an inferior grade may bring a suit for partition against persons holding interest of superior grade 12 C W. N. 670. 7 C. L J. 449, 37 C. 918 P. C., 19 C. L. J. 374

——there may be partition between persons holding permanent titles of superior and inferior grade but there cannot be partition between a person holding superior grade and a tenant having occupancy right, and the occupancy right cannot be said to be permanent title 43 C. L J 601 : 1926 Cal. 1076 : 97 I. C 188.

——partition between holders of superior and inferior interest is a matter of consideration in each case having regard to the balance of convenience 24 C 575 1 C W. N. 406, F. B, 9 C W N. 699, 5 C L J 307. 11 C. W. N. 397, 1 C. L. J. 40, 31 C. 214. 8 C W. N 11, 12 C. W. N. 670. 7 C L. J. 449.

——when two properties A and B are jointly owned by X and Y each possessing one property by mutual arrangement, and X created a shikmi in respect of his share in the property in possession of Y. the Shikmidar is entitled to partition. 23 C. L. J. 231.

——on a severance of tenements by a partition of joint property, and in the absence of contrary intention expressed or implied, all such easements as are apparent, continuous and necessary pass to the co-parceners with their respective allotments. 36 C. L. J. 406. 14 C 797, 26 C. 516, 14 B 452, 28 M 495.

——when the pliff drops the execution of a partition decree the property being partly burnt down the deft. may insist on the execution 1923 B. 23.

——agreement not to partition in perpetuity is bad, 8 C W. N. 126, 27 I. C. 3 but for a limited time is binding between the parties, 28 C. 769, 12 C W. N. 793, 20 C. W. N. 92 n *contra*. it is valid 29 I. C. 549. 1915 M. W. N 405.

——after a decree for partitition was passed in a partition suit the parties entered into an agreement to hold the properties as tenants in common, held that a subsequent suit for partition was not barred, as the agreement furnished a fresh cause of action. 1925 M W. N. 543 · 1925 Mad 1149 : 49 M. L J. 675.

——a person having contingent interest may claim partition. 24 C L. J. 26 (12 A. 51. 37 C. 918), *fol.* 20 C W. N. 1036 *contra* 9 C W. N. 699.

——a lessee for a term can sue for partition. 20 C. W. N 1306.

——co-owners of life-interest are entitled to partition. 13 C W. N 611 9 C. L. J 421 ; 2 I. C. 641.

General—*contd.*

——improvement by co-sharers in exclusive possession must be taken into consideration. 15 C W. N. 375, 12 C. L J. 25.

——partition of Revenue paying estate may be in the civil court if no division of Revenue is asked for. 1917 Pat. 13, (24 C. 725 : 1 C. W. N. 374, 43 C 1031 : 20 C W N. 1085, P. C.) *Fol.*

——the civil court can decide the question of title against the decision of Collector, but not when it concerns the Revenue. 15 C. W. N. 45.

——ss. 88 and 119 of the Estate Partition Act—Civil Court's jurisdiction against the order of the Collector. 19 C. W. N 1322

——civil court cannot partition the liability for Revenue and cannot re-open a partition properly made except by review 1918 Pat. 134

——the judgment and decree in a suit for partition in which a prior mortgagee is not made a party, are not binding on him and the mortgagee cannot take advantage of any such finding 13 C. W. N. 281 : 8 C. L. J 478 · 4 I. C 92

——where a preliminary decree is passed and the commissioner partitions some lands other than the joint property the court should not dismiss the suit but should direct the commissioner to the partition of the lands directed to be divided under the preliminary decree 4 Pat. L T. 257 : 72 I. C 916.

——a compromise decree which did not contain the provision of re-partition under the compromise was a bar to a fresh suit for partition 1923 Cal. 197,

——when in case of waste land trees are allotted to one and land to another the latter may, within 12 years of the partition, sue for the removal of the trees 73 I C. 768 (A)

——the court can refuse partition between minors. 11 C W. N. 769 : 31 B 373 . 2 M. L T 295 17 M. L J. 343 9 Bom L. R. 646 : 6 C. L. J 1 P. C.

——minor members of a joint Hindu family may impeach a partition on the ground that it was unfair or prejudicial to their interest 1922 M. W N 732 16 L. W. 721 : 73 I. C 863

——when the nature of the property does not admit division, the plff. though in possession cannot claim that the deft should be compelled to transfer his share at a valuation, the proper course is to direct a sale of the property amongst the co-sharers and to give it to the share-holder offering the highest price. 15 C. W. N 552, 15 C W. N. 555 n. *Dist.* in which case possession was given to the person in occupation of the dwelling house and the other person who was compensated was a stranger.

——when a partition of a dwelling house is effected the common procedure is to divide rooms, if necessary, by means of walls which are kept joint. 12 C. L J 346

——an application under sec. 4 of the Partition Act, (IV of 1893) can be made after the preliminary decree 12 C. L. J. 525, (5 C. W. N. 128, 24 M. 639, 21 A. 409, 32 Bom 103: 10 Bom. L R. 23) *Ref.* 7 C. L. J. 98, *Dist.* The elements necessary to apply

General—contd.

sec. 4, are, (1) dwelling house should belong to an individua (2) share thereof should have been transferred to a non membe (3) the transferee should sue for partition. His purchase of oth lands as well will not help him. "Family" includes a group persons related by blood, they need not constantly reside in th dwelling house nor they should be joint in mess. 12 C L. J. 52 (30 A. 324 F B, 23 B. 73) Fol

——the term 'house' in the above case embraces not merely th structure or building but includes also adjacent buildings, curtilag garden, court yard, orchard and all that is necessary for the conv nient occupation of the house. 12 C. L. J. 525.

——dwelling house generally means not only the house itself b also the land and appurtenances which are ordinarily necessary f its enjoyment 22 C. W. N 515.

——whenever the plff. is a stranger and any sharer is willing pay the price, the above sec. will apply. 21 C. W N. 87n.

——previous suit for rent by the ex-proprietors is binding upo the auction-purchaser at revenue sale even though the latter is n his successor-in-interest. 23 C. W. N 204 n.

——purchaser at Revenue sale is not bound by a decisi previously obtained against the defaulting proprietor, but th principle does not apply when the sale is not of the entire estat 1911 Pat 134.

——partition deed of property of Rs. 100 or upward must registered 15 C W N 375, 12 C. L. J 25, (13 M. 281 2 Bo L. R 800, 2 Bom, L R. 635), *Expld' Contra.* It need not be writing. 25 C. 210

——an unregistered deed of partition is not admissible evidence nor any oral evidence is admissible, but if any arrangeme has been acted upon it is admissible. 4 Pat. L T. 657.

Court fee.

——in a suit for partition of joint property where the plff is possession of some portion, court-fee of Rs. 10 is payable. Deft' denial of pliff's *title and possession* will not affect, but if it established that he has been ousted then he must sue for recovery possession and partition and pay *ad valorem* court-fee 12 C W 37: 6 C, L J. 651, 20 C W. N. 51 p. 57, 1921 Pat. 89.

——where the joint properties described in two schedules a situate in two different villages and are entirely different propert and the plff's. possession is admitted only in the lands which cons tute the more valuable portion of the property in the suit, a court f of Rs. 10, is payable, and not *ad valorem* court-fee. 15 C. L J. 418

——in a suit for partition if the plff. alleges that he is in posse sion, court-fee of Rs. 10, is payable. 34 A. 184.

——the title of the plff. can be established in a partition su 29 C. W. N. 76.

——there is nothing in the law which requires the deft in a su for partition to pay court fee in order to have his share separate allotted to him. The decree that is finally drawn up has to

Court fee—*contd.*

stamped as a partition deed under the Stamp Act but apart from it no other fee is payable. 90 I. C. 739 : 1925 P. H. C. C. 330.

Jurisdiction

— [illegible] as and Patna High [illegible] entire property and [illegible] value of the share

——in a suit for partition the entire value of property determines jurisdiction and s. 8 of the suits valuation Act does not apply. 29 C W. N. 76.

——the plff can in a partition suit establish his title if necessary. 29 C. W. N. 76.

——an order for partition can be made by the civil court where the title of the plff has not been precarious by virtue of the periodical settlement for the assessment of revenue made by the Revenue authorities 33 C. L. J. 497.

——after the preliminary decree by way of compromise a partition proceeding cannot be dismissed for default of plff., 40 C L. J 441 P C

As to cost in partition suit see, "*C. P. C. s, 35, p. 276*"

PARTITION ACT (IV of 1893).

S. 2.

——the partition Act should be construed strictly. 27 A. L. J. 651 . 1929 All 443.

——when the "request" is general, s. 2 does not apply. 27 A. L. J. 651 : 1929 All. 443

——the principle underlying this sec. is that a partition should not be made if the intrinsic value of the property is destroyed thereby. 1927 All. 686 · 103 I C. 367.

——under this sec. action can be taken not only when the property is wholly impartible but when partition cannot conveniently be made 69 I. C. 196 · 1924 Lah. 325. 66 I. C. 885 · 3 Lah. L. J. 102.

——if a decree for partition causes undue inconvenience it is open to either party to apply for modification. 4 U. B. R (1921) 37 : 64 I C 949, 20 A L. J. 90 : 64 I C 948.

[illegible] to a suit at original [illegible] 83 1923 A. 293, it [illegible] 's taken in original

——when there are two percels of land, one only being capable of partition, the court can order the sale of the other but not after it has been allotted 49 C 1043 · 39 C. L J 217 : 1923 Cal 221, 70 I C 687 . 66 I. C 885

——the sale which a court directing partition can order under this sec can only be that of a complete share and not of a portion thereof 91 I. C. 1009 : 1926 Oudh, 230.

S. 2—*contd*.

——if a party to a decree for partition finds it inconvenient in actual practice it is open to him to apply under s. 2. 20 A. L J 90; 1922 A 185

——when partition can be conveniently made by allotting to each sharer houses and lands approximately of the value of his share at the same time respecting as far as possible previous actual possession, as far as houses are concerned, any small excess or deficiency being made good by money payments there is no occasion for resort to the method of auction. 61 P. L R. 1916. 34 I. C. 587

Ss 2 and 3.

——where in a suit for partition among the co-parceners in a joint Hindu family, a consent order was passed to the effect that the property in the suit, a house, should be sold under the Partition Act and the plff thereafter applied under s. 3 of the Act claiming to buy the property at a valuation fixed by the court, held s. 3 could not be applied after the court had already directed a sale. The proper time to apply under s 3 being before the court made an order under s 2 and after the request had been made by one of the parties that the properties should be sold. The words "such share-holders" occurring in the latter part of sec. 3 (1) must necessarily mean the share holder who applied for leave to buy 48 M. 920: 1925 M. W. N. 786. 49 M L. J. 411. 1925 Mad. 1234: 91 I. C 516

——in a suit by one of two co-sharers for the purchase of the deft's share at a valuation fixed by the court and in the alternative for sale and division of the proceeds, the deft. is entitled to ask the court that the plff's share might be sold to him at the court's valuation. Cl. 2 of s. 3 applies only when there are more than two co-sharers 44 C L. J 47; 1926 Cal. 1190: 97 I. C. 690.

——when two or more co-sharers apply for leave to buy property procedure laid down in s 3 cl 2 should be followed. 1927 All 686 103 I. C. 367, (39 A. 672, 15 C. W. N. 552) *Dist.*

S. 4.

——the principle of this sec is that property must so far as possible be *left* in the possession of the person in occupation. 73 I C. 748.

——an application under sec. 4 of the partition Act (IV of 1893), can be made after the preliminary decree 12 C. L. J 525, 15 C W. N. 128, 24 M. 639 21 A. 409, 32 Bom. 103 · 10 Bom L R 231 *Ref* 7 C L J. 98 *Dist*, 1922 Cal. 129, 45 C. 873, 69 I. C. 785, 40 I C. 577 (c), 30 I. C. 936. 9 S L. R. 84.

——an application under s. 4 can be made at any stage of a suit even in an appellate court. 49 C. L. J. 136: 1929 Cal. 269

——The elements necessary to apply sec. 4 are, (1) dwelling house should belong to an individual, (2) share thereof should have been transferred to a non-member, (3) the transferee should sue for partition His purchase of other lands as well will not help him "Family" includes a group of persons related by blood, they need not constantly reside in the dwelling house nor they should be joint in

S. 4—*contd.*

mess (12 C. L. J. 525, 30 A. 324 F. B., 23 B. 73) *Fol.*, 46 B. 341 : 64 I. C. 917, 73 I. C. 748.

——to constitute an undivided family the member should not constantly reside in the dwelling house nor they need be joint in mess. It is the ownership of the dowelling house and not its actual occupation which brings the operation of the section into play. The object of the sec is to prevent a transferee of a member of a family who is an outsider from forcing his way into a dwelling house where other members of the family have a right to reside. 1928 Cal 539 109 I C. 67.

——the term 'house' in the above case embraces not merely the structure or building but includes also adjacent buildings, curtilage, garden, court yard, orchard and all that is necessary for the convenient occupation of the house 12 C. L. J, 525, 1928 Cal 539 : 109 I. C. 67

——dwelling house generally means not only the house itself but also the land and appurtenances which are ordinarily necessary for its enjoyment. 22 C. W N. 515 45 C. 873

——whenever the plff is stranger and any sharer is willing to pay the price, the above sec will apply. 21 C. W. N 87n.

——the operation of sec 4 comes into play after it is found that stranger transferee is entitled to partition In fact no order can be passed under the Partition Act before such a transferee establishes his claim 90 I C 121

——for the purposes of Sec 4 a deft can be treated as plff 49 C. L. J 136 : 1929 Cal. 269

——property not conveniently divisible should be sold to the highest bidder. 15 C. W. N. 552 13 C L J 322

——lessee of a portion of dwelling house cannot sue for partition of the house 23 C. W N 32n.

——s. 4 applies to cases where a share of dwelling house belonging to an undivided family has been transferred to a person who is not a member of such a family, the principle being that property must *so far as possible be left in the possession of the person in occupation.* 73 I C. 748

——the word "undivided" in sec 4 does not mean that it should be a joint Hindu family but it includes every family which is undivided *qua* the particular dwelling house and includes a house belonging to the family and in which the members have a right to live 97 I C 416.

——s 4 is not justified in scope and applies even when the [illegible]

—— [illegible] es not admit division, [illegible] at the deft should be [illegible] the proper course is [illegible] o-sharers and to give

Part performance—*contd.*

claim specific performance subsists. 25 C. W. N. 905, 1920 Cal. 345, 45 M. L. J. 826.

——unregistered transfer by way of exchange cannot be questioned on the application of the principle of part performance, *above case.*

——the rule is not restricted to cases where at the date of the suit a suit for specific performance is not barred by limitation, 45 M. L. J. 826, 25 Bom. L. R. 1027.

——where in persuance of an agreement to transfer, the intended transferee takes possession though the legal documents have not been executed and registered, position is the same as if the documents had been executed, provided specific performance can be obtained between parties to the agreement in the same court and at the same time as the subsequent legal question falls to be determined, 27 C. W. N. 159 ; 36 C. L. J. 48, 31 C. L. J. 75 *Ref.* 73 I. C. 211.

——where the sale cannot take place for want of formality it has the effect of an agreement for sale with its consequences in equity. Such agreement followed by possession creates a good title by the application of the equitable doctrine of part performance 73 I. C. 30.

——under the above circumstances a plea in defence that the deft. has a valid contract capable of specific performance is quite good. The deft. can only rely on possession as part performance of the contract. 46 M. 919 F. B., 29 M. 336 and 40 M. 1131 *overruled.*

——when the pltf. agreed to sell property to the deft. who was already in possession and paid the purchase money but there was no registered deed of sale the deft. can successfully resist the suit for possession by the pltf. although the time for suing to get a sale deed has expired, 46 B. 722.

——equity supports a transaction though clothed imperfectly in legal forms where the agreement has been acted upon by the parties and equity will also not allow a statute to be made an instrument of fraud, 63 I. C. 22.

——where the sale deed was not registered but the consideration money was paid and the vendee was put in possession, the vendor cannot eject the vendee. 114 I. C. 416.

——where the contract is invalid for want of registration but both ... entitled to an enforcement of ... 466 : 35 I. C. 829

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Part performance—*contd*

be applied and the conduct of the plff considered fraudulent 55 C. 1090 · 33 C W. N. 333 112 I. C 865 1929 Cal. 101, similarly where the deft takes possession under an unregistered agreement and the plff sues him for rent and the deft. pleads that as there is no registered lease the plff is not entitled to rent, the doctrine of part-performance applies. 49 C. L. J 12 1929 186

——purchaser of immoveable property paying the full consideration of Rs 500 and being placed in possession and having the right to sue the vendor for specific performance has the right to retain possession against a subsequent purchaser under a registered conveyance 18 C. W N. 445.

——purchaser under subsequent registered document having notice of the title created by prior unregistered document has no better title. 18 C W. N 657, (8 C. 597, 6 B. 515, 8 A. 540, 16 M. 184) *Ref.* but the burden of proof lies upon the person who alleges such knowledge or notice, 18 C W N 657, 25 M 1 *Fol*

——where vendee has paid full purchase-money and obtained possession the doctrine of part performance will prevail over s. 54 Tr. P Act. 22 C. W. N 522, 20 C W N. 149, 19 C W. N 250 42 I A 1 P. C. *Ref* 24 C. W. N 468 all the cases have been discussed there

——s 54 of the Tr. P Act is not exhaustive, a person in possession [illegible] d not formally executed [illegible] a subsequent purchaser [illegible] ere must be delivery of [illegible] W N 513.

——though specific performance of an agreement may be too late to enforce, possession is itself a title to remain in possession. 23 C. W N 284

——s. 54 Tr. P Act prohibits only unregistered conveyance and not contracts as under the sec an unregistered conveyance does not create title 46 M 919

——parties are estopped from going behind the agreement embodied even in unregistered deed But to apply the doctrine of [illegible] that the respective parties have [illegible] s that the change can only be [illegible] mere payment of the purchase [illegible] B. 621, 42 I A 1 P. C., 23 Bom. [illegible] M 1134 *fol*

——the doctrine is only applicable to cases where parties have so changed their respective position that the change can only be referable to the alleged contract 96 I C 827 28 Bom L R 743 : 1926 Bom 384.

[illegible]

——limitation commences to run from the date when the vendee becomes aware of the vendor's refusal to perform the contract 1923 Rang 125 : 72 I. C. 6.

Part performance—*contd.*

——an agreement to lease intended to operate as a present demise is a lease within s. 17 Cl. (d) Registration Act and *as such*, if not registered, is inadmissible in evidence under s. 49 of that Act. In a suit for specific performance though the tenant is in possession under the said agreement, there cannot be an estoppel against the provisions of statute and English cases under the statute of frauds have no applications to this country. 26 C. W. N. 329: 49 C 507, 47 C 280 Rel. 2 C. L. J. 343, 11 C. L. J. 548, 25 C. W. N. 220, 24 C W. N. 463, 39 C 663, 47 C. 280 P. C. *Ref.*

——where a tenant was put in possession under a lease for 5 years but the document was not registered and the landlord sued for possession on the ground that the lease wasnot valid, the doctrine of part performance applied and the tenant could not be ejected. 96 I C 822, 1926 Pat. 184 5 Pat 40: 7 Pat. L. T. 183.

——although the lease is not registered induction of the lessee into actual possession completes the transaction by part performance 5 Pat 40 1926 Pat. 184: 7 Pat L. T. 183: 90 I. C. 822

——the doctrine does not apply to the more stringent provisions of Cl. 2 of the Ordinance 7 of 1840 by which an agreement as to land not duly attested by a Notary and two witnesses is of no force 111 I. C 351 1928 P. C. 273

PATENTS AND DESIGNS ACT Act (II of 1911).

PATNI SALE LAW (REG. VIII OF 1819)

(1) Abwab.
(2) Division and partition
(3) Incidents of patni tenures.
(4) Incumbrances-darpatni and other under rights.
(5) Patni sale, procedure, validity and setting aside of.

(1) **Abwab.**

——the general law against abwab as embodied in s. 3 of Reg V of 1812 is not intended to be restricted by the Patni Reg, 26 C L J. 634.

——stipulation in a *kabulyat* to deliver one seer of *ghee* and one kid every year is an abwab and hence is irrecoverable 26 C W N 634: 1922 Cal 80: 68 I. C. 161.

——stipulation to pay an abwab (certain number of jackfruit) under a permanent *makarari* lease is valid under s 179, B T. Act, which is not controlled by s. 74, 26 C. 611. But an auction-purchaser of a *darpatni* is not bound to pay an abwab which was not in-

(2) Division and partition.

——partition amongst the patnidars is binding on themselves but it is not binding on the Zemindar. 3 B. L. R App 120 : 12 W. R. 160, 9 W R 487, 11 W R. 294.

——the zemindar may recognise the division in various ways. 25 C. 19, 10 C W N. 272, 11 C W. N. 217, 15 W. R. 255.

——but a receipt for rent granted by the zemindar or his agent separately to tenants even according to their shares [illegible] 6 C. W N. 823, [illegible] N. 923, 22 W. R. [illegible] l.

[illegible] an inferior grade [illegible] ling such interest [illegible] 70 . 7 C. L J 449, [illegible] sue for partition, [illegible] sferable interest."

[illegible] C [illegible], F. B.

(3) Incidents of patni tenures.

——a patni taluk is a permanent heritable and transferable tenure A zemindar can create this tenure over whole or part of his estate A patni talukdar has a corresponding right to let the whole or part of his tenure to co-subordinate tenure-holders called darpatnidars This process of sub-infudation may be carried further down to several lower degrees. The zemindar can apply to the Collector to sell the Taluk or arrears of rent and the sale cancels all under-tenures. 41 C. 926 . 18 C W. N. 747 1914 M W 397 : 25 C. L. J 434 P. C.

——ss. 15 and 16 of the B. T. Act apply to putni tenures, 19 C 504, 2 C L. J. 377 but they do not apply when the suit is for arrears due to predecessor, 27 C 535.

——the patnidar is not a proprietor within s 38 or 78, L R. Act, so he is not required to register his name to entitle him to sue for rent. 1 C W. N 92n

——patni rent can be realised under the B T Act. 22 C. W. N. 131, 12 C W. N. 122 n., 37 C. 747, 5 Pat 415 1926 Pat 465, *contra.* 28 C 744.

——a patni lease *prima facie* comes within the provisions of the Tr. P. Act 28 C 744

——B T Act, does not apply to transfer of patni tenures, 17 C. 162, 20 C 247, but it applies to the transfer of durpatni tenures. 18 C 360

——the title of the purchaser of a patni is perfect on the transfer but the zemindar is not bound to recognise him, 16 C L J 301 : 18 C. W N. 103

——until the registration of a transferee of a patni tenure is [illegible] indar's right who may [illegible] sible for the rent and [illegible] I. C. 557.

[illegible] uk though registered does not confer any interest on the transferee by virtue of ss. 12 and

(3) Incidents of patni tenures—*contd.*

17 of the B. T. Act, unless it is registered with the zemindar according to the provision of the Patni Regulations. 18 C. W. N. 363 : 18 I C 712

——the transferee of a part of the patni is not entitled to recognition by the zemindar, 18 C. W. N. 629 : 22 I C 783, but the transfer is not void 26 C 103, 8 C. L. J. 554 and the transferee is jointly liable for rent if the landlord so chooses. 26 C. 103, 8 C. L. J. 554, 12 C. L. J. 609, 3 C. L. J. 39, 4 C. W. N. 590, 10 C. W. N. 270 and the tenant is liable to payment to the purchaser after receipt of notice. 25 C. 445, 4 W. R. (Act x) 38, 25 C. 330

——intermediate right between zeminder and patnidar and between patnidar and darpatnidar may be created. 34 C L J 76, 77, 79, 9 C. W. N 656 *Fol.* 14 C. W N 389 *not fol.*

——the idea of a patni being created over another patni is absolutely foreign to the scheme of the Patni Regulation and the position resulting therefrom would be anomalous. In the Patni Regulation a patnidar has been given certain right as against the zamindars The patnidar is described as talukdar of the first decree and a tenure cannot be created over a talukdar of the first decree and a tenure cannot be created over a talukdar of the first decree There can be no objection to the assignment of the right of the zamindar to receive rent from the patnidar. Where a sale under the Regulation is held without jurisdiction even a person not affected by it can question it. 27 C. W. N. 189 : 37 C L. J 141. 50 C 146 71 I C. 327

——a mirashdar between a zaminder and patnidar can get rent from the patnidar 34 C. L. J. 77.

——s 65 of the B. T. Act, applies to patni tenures 6 C. W. N 88 N.

——from ss. 5 and 7 it appears that a talukdar may be the actual proprietor of the land or he may be a lease-holder. 33 C W. N. 7 48 C. L J 268 1928 P. C. 234 : 111 I. C. 345 : 26 A. L J. 1233 : 1928 M W N. 841 P C.

——a transferee from a sepatnidar cannot compel the darpatnidar to register his name 3 C W. N. 19.

——the refusal of the zaminder to recognise the transferee inspite of the latter's repeated tender of rent and security is indefensible. 10 C L. J. 538.

——the transfer of a partni tenure is subject to the payment of fees and security to the landlord as required by s. 5. Inspite of the transfer the landlord may ignore the transferee and may continue to hold the recorded tenant responsible for the rents and other obligations. 5 Pat. 415 : 1926 Pat. 465, but in the same case it has been held that though an unregistered assignee cannot claim to be a tenant he can impugn a sale held under the Regulation as being illegal or irregular or tainted with fraud.

——the liability of the patnidar continues till the zemindar registers the name of the transfers as tenant 48 C. L. J 392 : 33 C. W. N 186 . 114 I C. 150 1929 Cal. 108.

(3) Incidents of patni tenure—*contd.*

——where a patni is found to be *benami* a *bonafide* darpatni does not necessarily lapse. 5 W R. 240.

——for rent accruing due prior to the transfer, a transferee of a tenure is not personally liable. 1 Pat. 444 . 66 I. C. 711 : 3 Pat L. T. 318.

——under s 3 the patnidar gets transferable and heritable rights over the subject of the grant but no right to the sub-soil in the contrary. 5 Pat L J. Pat. 49, 9 Pat L. T 593 'I. 7 : 111 I C 345 1928 P. L T 66 P. C

——by the patni deed every right of the zamindar passes to the patnidar and unless there is some limitation expressly mentioned the patnidar can exercise those rights 55 C. 35 . 46 C L J. 307 · 1927 Cal. 956 106 I. C 117, 1917 P. C 8, 1925 P. C 952 P C. *Fol*

——not only can patni tenure be sold under the B. T Act but decrees for rent for earlier periods can be enforced against the surplus sale proceeds of a patni tenure when sold in execution of a decree for rent under the B T Act. *per N. R. Chatterjee J.* 22 C. W. N 131 : 43 I C 996 (*Smither, J. contra*)

——though the patni has diminished in area from whatever

——under s. 14 of the Act the Collector can make only a summary investigation if the *talukdar* contests the zaminder's demand for any arrear The determination of what is the rent payable for the tenure in future is beyond the scope of the Collector's power. 17 C W N 374 : *17 I. C. 504*

——s. 65 B T. Act does not contradict s. 17 of this Act 19 C. W. N. 1001 . 20 C L. J 1 · 25 I. C. 197.

——s 3, of Act (VIII B C. of 1865) does not affect clause (2) of s 15 and a purchaser of a patni tenure must apply to the Dt Judge and not the Collector. 44 C. 715 25 C. L J 535 · 40 I C. 368.

——rent is a first charge under the Patni Reg as well as under the B. T. Act, there is no conflict between the two, so far as the rat charge is concerned 22

, Act cannot be applied by idar is competent to use or bricks and it is wholly consis- 41 C L. J. 527: 89 I C. 785

(3) Incidents of patni tenure—*contd*

——a patni instrument cannot be taken to forbid brick-making by implication and a reservation against digging tanks without permission cannot be construed as a reservation against the excavation involved in brick-making *above case.*

——a zaminder has nothing to complain against if the use of the land by the patnider does not threaten the complete destruction of property or such a change as to endanger the rent, *above case.*

——the relation between the zaminder and patnidar is not similar to the relation between the English owner in fee simple and the lessees for a term of years. *above case.*

(4) Incumbrances, darpatni and other under-rights

——an encroachment by a trespasser or adverse possession against the defaulting patnidar is an incumbrance within s. 11. 38 I C. 173 (C), 17 C W N 340 : 15 I C 869.

——purchaser at patni sale is not bound by the adverse possession acquired after the creation of *patni.* 21 C. L. J. 265, 19 C W N 18, 43 C W. N. 201

——the terms of s 11 Cl (1) are not satisfied unless at the least the right of transfer is expressly stated in the lease or other engagement to be a right to make transfers which shall not be mere incumbrances That seems to be the natural meaning of the first paragraph of the first clause and that construction is borne out by the emphatic language of the 2nd paragraph. 69 I. C 655 (C)

——a purchaser of a patni taluk takes it free not only of all incumbrances that might have accrued owing to the default of the proprietor but also free of any interest acquired by adverse possession commencing after the creation of the 'patni. 19 C. W. N 18: 21 C. L J 265 · 26 I C. 436.

——if an action in ejectment is brought by the purchaser limitation will run against him only from the date when the purchase became final 17 C W N. 340 : 15 I C 869

——s 13 merely gives the darpatnidar making an advance under it a usufructuary mortgage of the patni in order to recover the amount advanced from the profits thereof 15 C W N. 401 · 9 I C 489

——where a *darpatnidar* deposits the rent due to the zemindar from the patni, the lien of darpatnidar for the amount of a statutory lien is not affected by sec 65 of the B. T. Act. or a sale thereunder. 41 C 926 · 18 C. W N. 747 : 25 C L. J. 434, P. C.

——a tenure-holder or a darpatnidar who is put in possession of a patni for depositing patni rent, under s. 13, is in the position of a mortgagee in possession and his possession is that of a landlord within the meaning of the B. T. Act. He is entitled to sue for rent due before he was put in possession. 41 I. C. 711 (C)

——in a suit for the reversal of a sale of a patni taluk for arrears of rent brought by the departments s 14 unambiguously and imparatively imposes a duty on the court to indemnify the purchases against loss at the charge of the zemindar &c 46 C. 670 : 17 A. L. J. 514 ; 23 C. W. N. 721 : 50 I. C. 444 : 30 C. L. J. 71, P. C.

(4) Incumbrances, darpatni and other under-rights—*contd.*

——a person who purchases a patni at auction sale becomes entitled to the *chowkidari chakran* lands even if they were not mentioned in the sale proclamation. 41 C. L. J. 295 87 I. C. 529 : 1925 Cal. 807

——the phrase "to that effect" in the 2nd sub-clause to s. 11 must by logical interpretation mean "to make such transfer by sale etc." as to bar the indefeasable right of the zemindar to hold the tenure of his creation answerable in the state in which he created it for the rent of the tenure. 90 I. C 405 : 1926 Cal. 314.

——how incumb[illegible] be annulled. 18 C. W. N. 747, P [illegible] 60, 37 C. 322, 6 C. W. N. 249n 29 [illegible] W. N 803 : 32 C 911 35 C. 737, [illegible] W. N. 795 : 2 C L J. 87.

——under-tenures created by a patnidar are *ipso facto* void on the sale under the Regulations by the provisions of s. 11 (2) and are not merely voidable, the purchaser can take possession immediately. 19 C. L. J. 360 : 17 C. W N. 1092 : 20 I C 654.

——an under-tenure can be avoided otherwise than by suit by an overt act such as for instance a proclamation under cl. (2) of s. 15 indicating an intention to exercise a power of avoidance. 11 I. C. 85 (C)

——purchase in execution of a mortgage decree prevails over ordinary rent sale. 38 I C 520 (C)

——a purchaser under the Patni Regulation is entitled to eject tenants from their holdings when they have no protected right. 27 I. C. 928 (C)

——in a patnidar's suit for possession of lands in a patni the deft. has to prove that the lands are lakhiraj and not *mal* 19 I. C. 64 (C)

——when a patni is sold in execution of its rent and purchased by the zemindar a mortgagee from patnidar has only personal remedy against the patnidar. 16 C W. N. 561 : 14 I. C 145.

——the policy of the law at the time of the enactment of the Patni Reg. seems to have been to protect from eviction those cultivating the land ; at the time of the enactment of the Regulation occupancy rights did not exist, those cultivating the lands were either khudkasht raiyats or paikast raiyats 87 I C. 32 : 1925 Cal. 1169.

——khudkhasht is a resident hereditary cultivator in contra distinction to Paikast raiyat who is a migratory tenant 54 C. 788, 3 C. W. N 13, 37 C. 322, 19 C. W. N 13, *Ref.*

——under s 11, a *khudkasht* is protected from ejectment from his holding including the land he uses for residential purposes, the waste land and the land he cultivates. 1923 Cal. 327 : 67 I C. 709.

——resident hereditary cultivators are entitled to protection by the proviso to cl. (3) of s 11 and the clause further provides that the purchasers of the taluk are not entitled to cancel *bona fide* engagements made to such tenants by the late incumbent and cannot

(4) Incumbrances, darpatni and other under-rights—*contd.*

demand from them any rent in excess of their previous engagements 53 I. C. 271 (C)

——provis- ... the person in occupation nc: ... are liable to ... under the B T ...

——a *khudkasht* raiyat *i.e.*, a resident and hereditary cultivator does not cease to hold that position on his entering into an arrangement professing to be granting *merasi* right by the *darpatnidar*. The purchaser of a *patni* cannot eject the raiyat under s. 11 (3) of the Patni Reg. of 1891. 18 C. L. J. 334 : 21 I. C. 530

——s 11 (3) does not protect a raiyat from ejectment by a purchaser at sale under the Regulation, unless he is khudkasht or resident cultivator. 15 I. C 468 (C).

——in sales under the above two Acts purchaser gets the property free of any incumbrance but he has no power to eject khudkasht raiyats and h ... finds that plff is not entitled to kh ... equitable rent payable if ... 56 I. C. 678 : 1 Pat. L. T. ...

(5) Putni sale, Procedure, Validity and setting aside of

——proceedings taken under the Patni Regulation by the zemindar for the recovery of his dues are not against the putnidar ... but against the tenure which is security for the dues, so ... the Collector the name of ... does not invalidate the sale. 1923 Cal. 527 : 19 C. 703.

——the authority of the zeminder to proceed to recover arrears of subsequent periods by summary procedure is not suspended by the pendency of litigations to contest prior sale. 48 C. 451 : 25 C. W. N. 42 : 62 I. C. 73.

——the Collector has power to determine the actual rent due and has a quasi judicial capacity and therefore has jurisdiction to award costs. 40 I. C. 614 (C).

——for rent accruing due prior to a transfer, a transferee of a tenure is not personally liable. 1 Pat. 449 : 66 I. C. 711 : 3 Pat. L. T. 318 · 1922 Pat. 137.

——an unregistered proprietor of a putni can sue to set aside sale. 15 C. 345 : 12 C. 622 *contra*. 15 W. R. 152 so an *unregistered* transferee can sue for the recovery of surplus sale proceeds. 7 C. W. N. 552, and to recover the possession of *chowkidari chakran* lands. 15 C. W. N. 5, 3 C. L. J. 81.

——the cause of action being recurring one there is no period of limitation to sue for registration of name. 6 C. 69, 70.

——an unregistered transferee is bound by rent decree and is a representative within s 244 C. P. C. 32 C. 1031, 9 C. W. N. 834.

——where the *putni jama* is not separately assessed Putni Reg. will not apply inspite of the contract. 33 C. 381

(5) Patni sale, Procedure, Validity and setting aside of—*contd.*

——defaulter cannot bid in his own name or in the *benami* of another, 14 C. W. N 1031 : 17 C L. J. 96, but such bid is voidable only. 2 C L. J. 45 n, 15 C. W. N 5 : 3 C. L. J. 81, 2 C. L. R. 419, 20 W. R. 33

——deficiency is to be recovered by civil suit 7 C W. N. 111.

——on reversal of patni sale the purchaser must have recourse to the remedy provided by s 14 and not to separate suit 50 C 756 : 38 C L. J. 192

——when sale is set aside purchaser is to be indemnified. 1 C. W. N. 36; 27 C. 308, and if the putnider is dispossessed by the purchaser the former will get mesne profits from the latter. 1 C. L J. 77 n

——a putnidar cannot stop the sale at the moment of sale by a deposit in the Collectorate. 30 C. L. J. 433 : 15 W. R 560 *Ref.*

——having regard to the nature of all procedure provided by s. 14 a payment of rent by patnidar to his zemindar upon receipt of the notice of sale, does not fall within the rule that the money paid under pressure of legal proceedings is irrecoverable. 46 C 1: 28 C. L J. 165 : 22 C. W. N. 1009 . 45 I. C. 827 . 16 A L J 569 P. C.
[illegible]

[illegible] *Ref.*

——arrears of rent for a period antecedent to the period, to recover the rent of which, the tenure had been sold, must be regarded as personal debts recoverable under the ordinary procedure for the recovery of debts and not by resale of the tenure. 16 C W. N. 804 14 I C. 728.

——when the putni regulation mentions Bengali months and dates throughout, the legislature intends that a day is to be reckoned in the manner prevalent in Bengal, that is sunrise to sunrise. A sale after a valid payment has been made to the officer of a zemindar, is without jurisdiction. 30 C L. J 433 · 54 I. C. 736.

——by the payment of arrears of putni-rent under-tenure-holders acquire a lien over the putni. 18 C. W. N. 747, P. C, *contra*. 1. C. W. N. 458, 32 C. 643, 34 C. 92.

——in a suit to set aside sale s. 8 of the L. Act does not apply. 14 C. W. N. 128, 33 C L. J. 339, 13 C W. N. 404.

——in case of fraudulent sale limitation for suing to set aside sale runs from the date of knowledge. 34 C. 711 11 C. W N. 817.
[illegible]

(5) Patni sale, Procedure, Validity and setting aside of—contd.

——sale of a putni in the name of a wrong person is voidable and not void and is to be avoided under s. 14. 29 C L. J 841: 51 I. C. 933: provisions must be strictly complied with 37 I C 895, (C), 15 I. C. 537 (C).

——a putni sale can only be set aside by a suit under s 14 of the Regulation and not by any other proceeding and such a suit must be brought within one year under Act 12 (d) of the L. Act. 46 Cal. 51: 1927 733: 104 I. C. 151.

——putni sale must be set aside for defect of notice. 13 C W N. 404: 30 C. L J. 433: 24 C. W. N. 972, notice must specify lots 32 C. 953 · 20 C. 86, service of notice how to be made 32 C 953, 20 C. 86, 11 C. W. N. 729, 37 I. C 897, (C), 19 C W. N. 963

——strict conformity with the requirements of s 8 and 10, in matter of the contents and service of the notice is essential to secure valid sale. 34 C. L. J 399: 66 I C. 793, 9 C W. N 619, P.C. 52 I. A 439 · 1925 P. C. 297. 53 C. 1: 92 I. C. 681, P. C.

——where co-sharer zeminders jointly make an application for sale of a patni and have several *kutcheries* the notice required by s. 8 must be served upon each *kutchery*. The provision must be strictly followed. 37 I. C. 897 (C).

——the notices being absent on the Collector's notice board immediately preceding the sale though they were from 21-4-1909 to 15-5-1909, the sale was invalid. 36 I. C. 917 (C).

——a due publication of the notices prescribed by this Reg forms an essential portion of the foundation on which the summar power of sale is exercised and makes the zeminder who institute the proceedings exclusively responsible for the irregularities 19 C W. N. 963 · 27 I. C. 825.

——a putni sale is voidable and not void by reason of an irregularities in the transaction and it can only be avoided by suit under s. 14 (1) of the Putni Reg. 15 I. C. 537 (C), (20 C. 746 16 C. W. N 805) *Ref.*

——a sale under Reg. VIII of 1819 is not void but voidable, so long as the putni sale is in tact and if a suit would be barred, the title of the auction purchaser could not be questioned collaterally 16 C W. N. 805: 13 C. L. J. 404: 10 I. C. 90

——a purchase of a patni at a sale under the Patni Reg by one of the defaulters is not void but voidable 41 C. L. J. 149, 33 C. 666 3 C L. J 93 n, 14 C. W. N. 1031, 17 C L. J. 96.

——second auction sale is binding although the previous one i subsequently set aside. 25 C. W. N. 42, 47 C. 782: 24 C. W. N 785 . 60 I. C. 182

——under s 13 the defaulter can recover his tenure on paymen of the advance made with interest, or on proof that the advance ha been real'sed from the usufruct. The rent paid to the superio landlord for the years during which he has been in possession canno be added. 27 C. L. J. 480: 41 I. C. 694, 19 C. 185 *Ref.*

PAYMENT (*Into or out of court.*)

——payment to one of the several persons who are entitled to receive money is not good against other 17 C. L. J. 371.

——a payment to one of the two joint mortgagees does not ... the debt, in so far as the other
3, 63 I. C. 745, 38 C. 342, 1921
(20 M. 461 : 21 M. 544 F B.)
23 . 1923 Lah 64 *contra.* 73
I. C 682.

——payment made to one or two joint mortgagees is a valid discharge of the mortgage liability, but a mere undertaking to pay the amount at some future date is not equivalent to payment, 48 M 693 · 1925 Mad 261 47 M. L. J. 840.

——when a joint right to sue arises out of a tort, some cannot give a full discharge unless authorised. 6 C. L. J. 38.

——payment to a partner in fraud of his copartners is not a valid discharge 19 M. 471

——payment out of court cannot be recognised in making a mortgage decree absolute 25 C. L. J 553, 21 C. W. N. 920.

——a tender to be valid must be made in the current coin of the realm. 34 C 305 5 C. L J 270

——creditor is not bound to accept a smaller sum than is due and a tender of such sum does not stop interest running. 3 C. 468; 16 B. 148.

PERMANENT STRUCTURE

——where the predecessors of the plffs. let to the predecessors of the defts certain lands for the construction thereon a saltpetre factory agreeing that as long as the rent was paid the lessors would not be competent to dispossess the lessee and after the manufacture of saltpetre only for 4 or 5 years permanent structures were raised on the land by the lessee to the knowledge of the lessor who did not ...

tion that he had contracted to change the original right of tenancy into a permanent right of occupation 3 C. W N. 502. 21 A 496; 26 I A 58 1906 A W N 245. P C

——in order to raise an equitable estoppel against the lessors it is incumbent upon the lessee to show that the conduct of the ...

Permanent Structure—*contd.*

be changed into a perpetual right of occupation. 3 C W. N. 502; 21 A. 496; 26 I. A 58; 1906 A. W. N. 245. P. C.

——but where the owner of land sees another person erecting building upon it and knowing that he is under the mistaken belief that the land is his own property purposely abstains from interference with the view of claiming the building when it is erected, equity comes in and he cannot eject that other person. 3 C. W N 502 · 21 A 496 · 26 I A. 58 : 1906 A. W. N. 245 P C. and following this principle it has been held in 33c. 1119 : 10 C. W. N. 765 : 3 C L J. 616 that if a stranger begins to build on the land supposing it to be his own the real owner perceiving his mistake abstains from setting his right and leaves him to persevere in his error, a court of equity will not afterwards allow the real owner to assert his title to the land Similarly it has been held in 1904 A. W. N. 70 that where the deft built upon the land under the *bona fide* belief that he was building on land which so far he knew was land on which he was entitled to build and the pltf did not purposely assert his right and never interfered for a full one year, the court ought not to order the removal of the building. But it has been clearly pointed out in 27 C 307 that to avail himself of the plea of acquiscence and estoppel it is necessary for the deft. to show that in spending money in erecting this building he was acting under an honest belief that he had a permanent right in the land and that the landlord knowing that he was acting under such belief stood by and allowed him to go on with the completion of the building.

——there is in India even less reason than in England for raising a plea of equitable estoppel against the landlord in the case of a lease for a term of years 21 M. 211 : 14 M. L. J. 25.

——where lease is given for building purposes the court may presume that it was intended to be a perpetual grant. In 26 I A. 58 the lessee had no right whatsoever to build but he chose to build at his own risk and so there was no equity on his side, 32 C. 64; 9 C W. N 463

——what is said of acquiescence in 26 I. A. 58 that it is not a question of fact but of legal inference from the facts found, is equally applicable to estoppel 28 B. 440 : 6 Bom L. R 410.

——mere delay in bringing a suit is not in itself sufficient to create an equity in favour of the persons building so as to deprive the owner of his rights 94 I. C. 168; 1926 Lah. 354. (20 B. 293, 28, B 440) *Applied*

PERMANENT SETTLEMENT REGULATION (I of 1793).

——the Permanent Settlement Regulations I and VIII of 1793 apply to Ramgarh Estate. 1925 Pat. 294.

——a Zaminder holding under the Permanent Settlement has a right from time to time to raise the rent of all rent paying lands within his Zamindery according to the current rule unless he is precluded from the exercise of that right by a contract binding on him or by the law in force. 42 C. L. J. 172 : 1925 Cal. 1243 : 87 I. C. 758.

Permanent Settlement Regulation (I of 1793)—*contd.*

——the proprietor of a permanently settled estate is the owner of the soil and has right to the minerals unless he has expressly parted with them 1928 Pat. 294 : 114 I. C. 194.

——upon re-emergence of sub-mergence subsequent to the Permanent Settlement and assessed as such, revenue cannot be assessed by the Govt. on the lands. 29 C. W. N. 119. 1925 Cal. 273.

——land whether cultivated or waste at the time of the settlement, but included in a permanent settlement estate, are exempt from further assessment under Bengal Regulation 1 of 1793 But this protection extends only to lands actually in existence at the time of the settlement and specially included in the estate as settled. 49 C. 103 : 26 C. W N. 619 35 C. L J. 92 : 1922 P. C. 6 P. C.

——*churs* formed after the Decennial Settlement within the limits of the Zamindery are to be treated as unsettled under Bengal Regulation II of 1890, even though the river bed from which the churs have been thrown up was the property of the Zemindar at the time of the settlement and the jumma was imposed on the Zaminderi as a whole It is therefore competent to the Govt to assess to public revenue under Bengal Act IX of 1847 *above case.* 17 C. 590 Dist

——from the fact that the bed of a large navigable river is shown to be included within the thak boundaries of a particular estate, it does not follow that the bed was settled with the Zemindar at the time of the Permanent Settlement. 65 I C. 76 (C)

——the mere fact that the permanently settled estate has become more valuable by the formation of churs is no ground for altering the assessment The Revenue assessment on Riparian *Mauzas* at the time of the settlement was imposed on the adjoining half of the bed of the river also. 22 C. W. N. 872 46 C. 390 : 46 I. C. 305

[illegible]y a military tenure by [illegible] It cannot affect the [illegible] settlement was not [illegible]

——where the plffs. sued to recover under the terms of a Permanent Settlement in 1865 additional malikana or *dasturat* for a *mouzah* which formed part of a jagir carved out of the estate of his predecessor, the malikana for which jagir has been fixed in 1780 at Rs. 796 and odd, held, disallowing the plff's claim that the [illegible] fixed in [illegible] as was [illegible] of the [illegible] view of [illegible] 12 I C. 114 P. C.

——where at the Permanent Settlement the zemindari was settled with the deft. and the *Nimak Sayar Mahal* with the plff.,

Permanent Settlement Regulation (1 of 1793)—*contd*

held that the plff was entitled to dig for saltpetre in the land but so as to cause as little inconvenience as possible to the deft. as owner of the village The plff was not merely entitled to collect revenue. 41 C. 286 : 18 C L J. 151 : 17 C. W. N. 1195 : 20 I. C. 650

——since the Permanent Settlement the zaminders have had at least a *prima facie* title to all lands for which they pay revenue, such lands being known as Malguzari lands 44 C 841 : 21 C. W. N 609 . 25 C L J 499 1917 M W. N. 459 : 40 I. C 931 P. C

——the mere fact that no rent is reserved in a patta does not necessarily imply that by it, a revenue free estate was granted Direct payment of cess on account of rent free lands is not conclusive that those rent free lands constitute a separate estate 5 P L. J 273 56 I C 184 1920 Pat 146.

——the mere fact that in various reports and proceedings under the then existing Regulation the *taluks* are described as dearmar *taluks* does not make them independant taluks 1927 Cal. 136 : 98 I. C. 211.

——service of notice under s. 10 is a condition precedent to the validity of a sale Therefore when the fact of service is denied, the onus is on the party alleging service to prove it; and the presumption in ill. (e) of sec. 114 of the Evi. Act, that official acts have been regularly performed, has no application to such cases. An *ex-parte* entry in the order sheet is not even *prima facie* evidence against the person denying service of notice. 11 I C. 472 (C)

Permanent Tenancy, see "*B. T. Act s. 8, Permanent tenure.*"

PLEADING (GENERAL)

——plffs. allegation of division does not bar him to get an alternative relief of joint possession 31 C. W. N. 60.

——when a plff is granted one of two alternative reliefs asked for he cannot afterwards refuse to accept that and want the other 69 I C 504 (C) nor he can claim both. 74 I. C. 331.

——in a suit for right of way on the allegation that the lease belonged to the plff. claim of easement may be allowed where the plea of ownership is not proved 46 B. 200, 69 I. C. 183

——where the plff claim an easement right of way along with others but the evidence discloses that the plff has the right but not the others his claim should be decreed, 1936 Cal 647 : 91 I C. 348

——a plaint should not be allowed to be amended when its effect is to take away from the deft. a legal right which has accrued to him by lapse of time. 41 C L. J 149

——neither party can be allowed to set up an entirely new and inconsistent plea at the hearing. 26 C. W. N. 294 . 35 C L J 103

——the test is whether the party aggrieved has really been taken by surprise 26 C. W. N. 294 · 35 C. L J. 103

——in a suit for possession on the ground of an alleged mortgage being fraudulent and void the plff. on failing to prove his case cannot turn round and change his case and claim redemption on the

Pleading (General)—*contd.*

Cal. 296, (17 C.

ation in a suit
pleadings or
27 C. W. N.
73, 34 C L. J.
178, 34 C. L. J. 319, 34 C. L J 529, 11 M L. A. ... P. C. 14 C 801) *Ref.*

——when a plff fails to prove his case of adoption he cannot succeed to the extent of one item of property on the admission of one of the defts. as the adoption cannot be valid so as to affect that item alone 45 A 571.

can treat the
any equitable
Cal 434

POSSESSION AND DISPOSSESSION.

(1) **Possession (general)**
(2) **Permissive possession**
(3) **Evidence of Possession.**
(4) **Delivery of possession.**
(5) **Dispossession.**
(6) **Adverse possession**, see, "*Adverse possession p 28*"

(1) Possession (*General*)

——*distinction between lawful possession and peaceful possession.* 40 C. L. J 171 p. 177 38 A. 581, 17 W. R. 113, P C

——plff can recover only on previous possession against a trespasser, he may not have title. 1917 Pat 164, (15 C. W N. 63). *Fol*, 3 Lab. L J 271. 67 I C. 948, 5 Pat 765 1927 Pat 1.

posses-
W. N.

within
N. 630.
9 C W. N 18, and all persons dispossessing must be made parties
C. L J 460.

——mere previous possession does not entitle a plff to get a ... under s 9 of the Sp R. Act.,
79: 3 C. W. N. 568, 3 C. W.
857 103 I C 428. 1927 All.
dverse possession 14 C. 592, 5
W. N. 533.

——person in possession of land before diluvion is presumed to have continued possession during diluvion, till he is dispossessed,

(1) **Possession** (*General*)—*contd.*

6 C. 725, 7 C. 225, but in case of possession by trespasser, pos sion during sub-mergence rests with true owner. 29 C. 518 : 2 A. 104 : 6 C. W. N. 617. 8 Bom. L. R 537, P. C, 9 C. W. N. 21 C. W N 642, P. C.

——when evidence of possession on both sides is conflicting equally strong it may be presumed that possession follows ti 8 C W N 876, 12 C. 33, 27 C. 25, 20 W. R. 25, 13 C L J 625 C W. N 305, 36 C. L J 396, but this principle does not apply wh evidence of possession is equally unworthy of reliance. 27 C. 25

——possession of land includes possession of superstructu also. 1923 Cal 704.

——possession of open sites naturally goes with the possess of adjoining building. 24 Bom. L. R 373 : 66 I. C. 764.

——if a land is such that there can be no exercise of possess possession would ordinarily follow title 1922 P 503

——as long as reliable evidence of acts of ownership is for coming there is no difference between the proof of possession the case of jungle or uncultivated lands and that in the case cultivated lands 67 I. C 1005 : 1922 Cal. 224, I C. W. N. 2 5 C. L. J 481 *Ref.*

——nature of possession depends on the character and conditi of the land in dispute Where the land is incapable of act enjoyment as in the case of diluvion by river, possession contin with the owner so long it remains submerged In waste and jung lands possession may be exercised by cattle, putting up bounda marks, fences &c. They form no exception to the general r that pliff must prove possession and dispossession within 12 yea 26 C W. N. 724

——in cases of vacant site mere intermittent or temporary us does not establish title by adverse possession 4 Lah L J. 163 : I. C. 363, 4 Lah. L. J. 467, 69 I. C 4, 69 I. C. 573 (c)

——in respect of jungly or hilly land possession must be pr sumed to be with the rightful owner. 12 C W. N. 273 : 7 C. L. 414 : 3 M L T. 212

——jungly lands are incapable of possession in suit a way as be capable of dispossession and the possession must in such a ca be deemed to continue with the owner. The cutting of wild grass jungly land is not as act of possession of dispossession 44 C L. 265 : 1997 Cal 49

——in case of waste lands possession follows title 46 C. L. 575 : 1238 Cal 104 . 107 I C. 95.

——a decre for possession may be given to the lessor when th lessee, a party to the suit, does not object. 11 C W. N 838

——when land is in the possession of tenant, he, and not th lessor, unless he is affected, is entitled, to sue for possession 20 C. W N 773 and lands under attachment under s 146, Cr. P. C are presum ed to continue in the possession of the true owner. 1 C W. N 569

——Arts. 137, 138, 142, L. Act. application of, in a suit by auction purchaser for possession against third person burden of proof o

Possession *(General)—contd.*

——auction purchaser may sue for possession even when there is no sale-certificate. 19 C. W. N 835 · 20 C L. J 433.

Permissive possession

——where a person enters upon a land subject to an agreement to be afterwards arrived at as to the rent &c. continues on the land without any concluded agreement having been arrived at and does not hold the land as a raiyat, his possession being merely permissive, he does not acquire any right to hold the land for cultivation and is liable to eviction at the will of the landlord after reasonable notice to remove his effects. 23 C. W. N 773 59 I C. 454.

Evidence of possession

——the mere registration of names under the Land Registration Act does not constitute possession 18 C. W. N 940.

——rent decree is evidence of possession. 6 C L J 472.

——entry in Record of Right is evidence of possession. 19 C. W. N. 172n 21 C W N 175

——judgment of criminal court is evidence of possession. 19 C. W. N. 172n 26 C W. N 432.

——the entry in the order-sheet of the Collector, to the effect that possession has been delivered, is no evidence of possession. 36 C 726 · 10 C L J 189 1 I C 549

——possession of one member of the Hindu joint family is the possession of all 11 B. L R 193

——*when plff has proved a prima facie title complied with* possession he is entitled to be protected against disturbance by an outsider, unless such outsider proves that he has a better title than the person in possession 27 Bom. L R. 474 : 87 I. C 696. 1925 Bom. 377 27 B 287 *fol.*

——evidence of payment of revenue and receipt of rent is *prima facie* evidence of hereditary title to Zemindary but does not prove heirship to the last holder. 1925 Pat 68.

Delivery of possession.

——though the Jt. Dr being in actual possession the D. Hr is entitled to take delivery of *actual* possession yet the delivery of symbolical possession is in the eye of law sufficient possession as against the Jt. Dr 27 C. W N. 673 : 37 C. L J. 545, (35 M L. J. 97, 6 C. L J. 472, 11 C. 93, 24 C. 715) *Fol.*

——symbolical possession is effective against J. Dr. though not operative against stranger 17 C. W. N. 324, 20 C. W. N 796, 40 C.

Delivery of possession—*contd.*

982 : 17 C. W. N 944, 36 C. L. J 472, 1922 Cal. 313, 24 Bom. L. R 499 : 1922 Bom. 2 ; 68 I. C. 91, 71 I. C. 885, 43 A. 520, 36 B. 378, 3 P. L. T. 628 : 1923 P 76 : 71 I. C 999, 17 M. L. J. 598, as between parties it is conclusive as regards continuance of possession 18 C. W. N. 940.

——after delivery of symbolical possession the J. Dr. becomes a trespasser and a regular suit for physical possession is to be entertained 20 C. W. N. 679, 19 C. W. N. 835 : 20 C. L. J. 433, 8 C W. N. 49

——delivery of symbolical possession gives a fresh starting point. 8 C W. N 49, even if the D. Hr. could take actual possession. 5 C. 584 F. B., 16 C. 530 F. B., 7 W. R. 60, 23 W. R. 127, 4 C 870, 19 W. R 101 P C , 7 C. 418, 11 C. 93, 24 C. 715, 6 C. L. J. 472p 481, 17 Mad. L. J. 598, 28 All. 722, 27 C W. N. 24 *Contra* 24 W. R 418, 36 Bom. 373 F. B., this principle applies to the auction-purchaser. 27 C. W N. 24, 24 C. 715, 6 C. L. J. 472, but not against a stranger. 36 C L. J. 472, 6 C. L. J. 472, 11 C L R 395 *Ref. and Ref*, (18 C 520, 16 C. 530, 24 C 715, 18 C. 520, 21 C 269), *Expld*, 27 C L J. 191

——delivery of symbolical possession to an auction-purchaser does not amount to dispossession of a tenant in possession. 1 C W. N. 343, 33 C. 487 · 3 C. L. J. 293, *Dist.*

——to interrupt adverse possession against stranger delivery of actual possession is necessary. 36 C. L. J. 472.

——when the property is capable of immediate actual possession no symbolical possession is effective. 6 N. L. J. 157 : 1923 Nag 237 72 I. C 318

——where a D. Hr. takes delivery of possession and is disturbed therefrom his only remedy is either in criminal prosecution or in a suit for damages 43 M L J. 179 : 31 M L T. 356 . 1923 M 25, 70 I C 755.

——when a D. Hr is obstructed in taking delivery of possession he can apply again for possession under Or. 21 r. 97. His acquiescence of the earlier obstruction will not bar him to make a second application and the application though made after 30 days will not be barred under Art 167 L. Act. 1921 M. W. N. 698

——failure to affix a copy of the warrant vitiates symbolical delivery 1923 Lah 693 · 74 I. C 1.

——when title of the pliff. is once established, his possession however obtained is possession within Art. 142, L Act 6 C L J 472, (10 C W. N 1081 : 33 C 821, 2 O L J. 1, 9 C. W N 1061) *Ref.*

——when a decree for possession is not executed the deft. does not hold adversely to the pliff and the pliff's. taking possession out of court will hold good. 45 B. 943 : 23 Bom. L. R. 310 . 61 I. C 414, 6 C. L J. 472, 9 C. W. N. 1061, 30 I C. 606 (M)

——when D. Hr. can take possession amicably he need not take possession through court and subsequent dispossession gives rise to fresh cause of action. 6 C. L. J. 472, 9 C. W. N. 1061, 30 I. C. 606 (M).

Delivery of possession—*contd.*

——deft appellant gaining a case in appeal may be restored to

——a direction by the vendor in the sale deed to the vendee to keep the property as absolute owner amounts to delivery of possession. 87 I. C 331. 48 M L J 264: 21 L. W. 327

Dispossession.

——dispossession implies the coming in of a person and his driving out another from possession Discontinuance of possession implies the going out of the person in possession and his being followed into possession by another. 36 C. L. J 35

——there is no dispossession or discontinuance of possession unless one person's possession terminates and is followed another's possession 46 C. L J 575.

——the mere bringing of a suit for rent is not an attempt to disturb possession 49 C. L J 281. 1929 Cal. 417.

——distinction between adverse possession and disspossession, entry into land with permission and then claiming title is adverse possession and not dispossession. 10 C L. J 91

——dispossession during suit does not affect suit. 10 C L. J. 189: 36 C 726.

——previous suit by deft. for title and possession was dismissed for want of title, pliff is subsequently dispossessed by deft. but cannot prove title he will succeed on the old decree. 5 C W. N 234

——constructive possession cannot operate as dispossession. 23 C. L. J. 487 P. C., 13 C. L. J. 30, 625 · 15 C L J. 281, 12 C. W. N, 127: 19 C. W N. 159n., 12 C W. N 273. 7 C L J. 414 · 3 M L T. 212.

(6) **Adverse possession** see. "*Adverse possession p. 28*"

POUNDAGE.

——unless provided by the rules no deduction can be made from the poundage; consequently the expenses of the court sale cannot be deducted from the poundage 1926 Bom 335. 28 Bom. L. R 590: 96 I C 363.

POWER OF ATTORNEY.

——a registered power of attorney was admitted under sec. 57 Evl Act, without proof, as the registering officer is a court under sec. 3 of the Act 14 C 176, 9 Bom L R 401, *Ref*, 17 C. 903, *Diss* which lays down that mere registration of a document is not in itself sufficient proof of its execution.

——a general power of attorney does not necessarily imply an unlimited authority to borrow, and general words in a power of attorney confer upon the agent only such general powers as are necessary to carry out the special power. 12 C. L. J 115, 6 C. L. J. 490 *Ref.*

——when an act done under general power of attorney is impeached, the instrument should be fairly considered. 6 C. L. J, 490.

Power of Attorney—*contd.*

——power of attorney should be construed strictly. 6 C. L. J. 639. 3 I. C. 330 *Ref.*, 114 I. C. 305, 1929 Oudh 12

——power of attorney authorising the holder to dispose of entire property in any way he thinks fit does not imply an authority to mortgage any property. 14 B 590, 5 M. I. A. 27, 41 P. C.

——to do all works with respect to an execution proceeding, is a general power of attorney. 38 M. 134.

——when one joint power of attorney is executed and one principal dies, whether the power of atorney will come to an end or not will depend on each case. 21 C. W. N. 620.

——power of attorney to present a document for registration is revoked by the death of the principal 23 A. 233, 28 I. A 15 P. C.

——when authority to register a document is revoked without the knowledge of the grantee or the Registrar before registration, the registration is valid 30 C. 265

——when the endorsement of the Registrar bears that the person presenting the document had a special power of attorney it must be presumed that the power of attorney was a proper one, 40 C L. J. 1 P. C

——where an agent holding an invalid power of attorney presents a document for registration and gets it registered, the registration is nullity as there is no proper presentation 50 B 628. 1926 Bom. 479 28 Bom L R. 949.

PRACTICE AND PROCEDURE.

Rule of practice

——even of the rule of practice be statutory it can, when found to be inconvenient be altered by competent authority. 52 B. 597: 30 Bom L R. 1242 . 32 C. W. N. 953 48 C. L. J. 451 : 1928 P. C. 203 : 111 I. C. 413 : 1928 M. W. N 893 P. C.

Appellant should get the benefit of doubt

——when a matter relates to entailment of a right of appeal, if there is the slightest doubt in one's mind the benefit of doubt should go to the appellant 44 C. L. J. 414 : 30 C. W. N. 850 : 1926 Cal 1113 : 97 I C 1038.

Effect of lower court's decision being reversed on some of the grounds only

——where the lower court's decision is reversed on some of the grounds when several points are raised by the decision thereof the decision of the lower court as regards other points should not be deemed to be confirmed. 53 C. 533 : 30 C. W. N. 745 : 94 I C. 974 : 24 A. L. J. 761 : 1926 P. C. 41 : 53 I. A. 100 P. C.

Dismissal of appeal from final decree for default does not bar appeal from preliminary decree.

——if an appeal from final decree is dismissed for want of prosecution it does not bar the appeal from the preliminary decree 48 A. 611 : 1926 All. 665 ; 96 I. C. 1 : 24 A. L. J. 769.

Practice and Procedure—*contd.*

If new plea can be raised in appeal

——new plea relating to fact cannot be raised for the first time in appeal 1926 Cal 665: 91 I. C. 642, 8 Lah. L. J. 482 : 27 Punj. L R. 727, 91 I. C. 784 1925 Lah 571, 53 C. 88. 28 Bom. L. R. 211; 92 I. C. 760. 39 C W. N. 577: 1925 P. C 290 **P. C**, 97 I C. 292: 24 A. L. J. 920, 94 I. C. 188: 1926 Oudh 427, 44 C. L J 282: *1927 Cal. 86, 44 C. L. J. 263 : 1927 Cal. 56, 97 I. C. 570 ; 24 L. W.* 842, 5 Pat. 441 1926 Pat. 192· 92 I C. 177 7 Pat. L. T. 393, 55 C. 1231: 32 C. W. N. 515: 1928 Cal 743, 30 Bom L R 852 32 C. W. N 1149: 109 I. C 574 1928 P. C 165 **P. C.**, 49 C L. J. 383. 33 C. W. N. 684, 33 C. W. N. 250. 1929 Cal 292, 33 C. W. N. 626.

——new plea of limitation which depends on fact cannot be raised for the first time in appeal. 26 A L. J. 505. 108 I C 14: 30 Bom L. R 765· 1922 P. C. 47. 54 M L J. 651 **P. C.**

——no new point can be raised in Letters Patent Appeal. 49 A. 162: 97 I O. 594. 1927 All 28: 24 A. L J. 102, 98 I C. 291 1926 Mad. 1167: 24 L. W. 460: 50 M. 10.

before the Privy Council 32 C. L R. 849: 47 C. L. J 542 109 J. 692 **P. C.** 47 C L. J. 222: 30 I C 113 **P. C.**

——a question of law can be raised for the first time in appeal, 51 M. 462· 109 I C 548, 1927 M W. N 87: 38 M. L T. 46; 28 Punj. L. R 117; 29 Bom L R 782: 8 Pat L T 377: 45 C L J 297: 31 C. W. N. 444: 29 Bom L R 782: 100 I C 22; 1927 **P. C.** 25: 8 Lah. 253 **P. C**, 51 B 37: 100 I C 582: 1927 Bom 93, and before the Privy Council 51 B. 450: 25 A. L. J 319. 31 C W N 570: 1927 P O. 56: 45 C L J 504 8 Pat. L T 462· 101 I C 44: 25 A. L J. 319 **P. C.**

Concurrent findings of fact should not be interfered.

be ir
427,
38 [illegible]
C. 1
L. J
31 Bom L R [illegible]

Findings of fact by trial Court.

——the appellate court should not lightly interfere with the findings of fact of the lower Court which is in a better position to consider the oral evidence. 47 C L J. 576: 1927 P. C 266: 107 I. C. 349 **P. C**, 30 Bom L. R 833: 1928 P. C. 122· 108 I. C. 727: 29 Punj. L. R. 439 **P. C.**

Appeal may be treated as revision.

——when no appeal lies from an order the memorandum of appeal may be treated as an application for revision of the order. 1927 Cal. 850: 103 I. C. 864, 1927 M. W. N. 286: 102 I. C. 28.

Principal and surety—contd.

by which the items of disbursements are supported 52 C 766: I. C. 766 : 1925 Cal 1069.

——where the agent lends his own money to the principal representing that the loan was from a certain person, a suit for money due on that loan is maintainable without accounting 48 C L J. 266 1928 Cal 727 : 112 I. C. 369.

——what constitutes relationship. 1925 Cal. 541.

——where an agent contracts in his own name for a principal the person with whom the agent contracts may sue either the agent or the principal but after recovering judgment against the agent cannot sue the principal again. 1926 M. W. N. 832 : 99 I C 742 1927 P C 136.

For other cases see. "Contract Act, Principal and Agent" an. "Account"

Principal and surety.

——if a person is only a surety he can be indemnified in an appropriate case, by an anticipatory action, before he actually makes the payment. 1926 Mad. 1035 : 97 I. C. 491 : 1926 M. W. N. 657.

——granting of time to the judgment-debtor by way of compromise discharges the surety. 98 I. C. 988 : 1927 Cal. 239

For other cases, see under Contract Act.

PROBATE AND ADMINISTRATION ACT.

Ss. 4-47 (grant of probate and letters of administration).

——where a testator appoints a person as executor on behalf of certain minors the latter must be taken to have been appointed executors by necessary implication and probate may be granted to them on attaining majority 1928 Cal. 164 . 105 I C. 626.

——in the absence of the acceptance of office by the executor the property does not vest in him under s 4, 43 M L J 496 · 1922 Mad. 457.

——an executor may dispose of immoveable property without a grant of probate under s. 90. An executor derives his title from the will and not under the probate which is only an authenticated evidence of the will itself 47 B 231 . 24 Bom. L R. 753 1922 Bom. 392, 8 B 241, 23 C W N 634, 29 C. L. J. 58 : 28 C L J 271. 36 M. 575, 37 C. 839, 32 I A 244 *Ref.*

——where persons applying for letters of administration allege that the deceased was joint with them and they have taken by survivorship the application must fail as the deceased in that case had no estate 1922 P. 240 : 70 I. C. 155

——a person by becoming a Brahmo does not necessarily cease to be a Hindu 26 C. W. N. 799.

——Ss. 14 and 15 refer to cases where letters of administration have been granted to the estate of an intestate. But where letters of administration have been granted not upon intestacy but with copy of the will annexed the first portion of s. 12 is applicable. 50 C. 49 : 36 C. L J. 35.

Ss. 4-47. (grant of probate and letters of administration— *contd.*

——a co-executor after contesting a will cannot, after granting of probate, withdraw his renunciation and ask for being appointed executor 27 C. W. N. 285.

——the expression "residuary legatee" in s. 21 does not include universal legatees. 94 I. C. 750: 1926 Pat 356 7 Pat, L. T. 631.

——bequest of Rs 50 to priest and the residue to idol,—the shebait and not the priest is the proper person to apply for letters of administration. 5 C. 233 : 27 C. W. N 411 : 36 C. L J 35.

——consanguinity of the administrator as well as safety of the estate should be looked to. 1925 Cal. 178

——no Letters of Administration can be granted unless a citation has been issued calling upon the next of kin to accept or refuse the Letters of Administration. 31 C. W. N. 874 1927 Cal. 654 . 103 I. C. 692.

——when a probate has been granted to the executor of a will the court cannot appoint a common manager unless the grant has been recalled, even though the will provides for the appointment of common manager 1928 Cal 164 . 105 I C. 626.

Ss 48-50. (Alteration and revocation of grant).

——*who can apply for revocation,* 19 *C W. N.* 1108, 10 C C. J. 263.

——person enjoying benefit under a will for a number of years cannot re-open the probate proceeding. 24 C. W. N 540.

——revocation n
of revocation 19 C
13 Bom. L R. 38 . 9
19 C. W. N 366, 14 C

——mal administration is no ground for revocation. 16 C W. N. 880 : 40 C. 50.

——in case of revocation on the ground of false inventory or account false items must be specifically stated. 33 C. L. J. 452, 34 I. C. 435 (M), non-filing of inventory may be ground of revocation. 51 I. C 561 (C).

——revocation cannot be allowed on the ground of certain illegal provision in the will. 23 C. W. N 658 : 29 C. L. J. 38

Ss. 49-50. (Alteration and revocation of grant)—contd

——how a testator himself can revoke a will. 23 C L J. 311 20 C. W. N 304, 7 C. W. N 1 P C., 39 M. 107 : 20 C W. N. 234 P C.

——transferee in good faith from executor will get the property even if the probate is subsequently revoked. 7 I C 9 (C)

——revocation of probate, executor when to file accounts,—account on material particular. 48 C. 1051.

——when immediate reversioner cannot by conduct maintain an application for revocation of grant of probate the application may be made by ultimate reversioner. 35 C. L. J. 66.

——when the immediate reversioner of a Hindu widow after challenging the genuineness of the will withdraws his objection and probate is granted an application by a nephew of the deceased for the revocation of the will is maintainable. 30 C. W. N. 567 : 1926 Cal 792 96 I. C 682

——it is Probate Court and not Civil Court that can set aside a grant of letters of administration. 23 C W. N. 1045, 43 C 691 P. C., 19 C. W N. 1108

——all questions except that of execution of will are beyond probate proceedings The Civil Court is to decide the legal effect of the terms of a will 23 C. W N. 658 : 29 C. L J 37, 23 C W. N 1045, 17 C W. N. 445, 1 P. L. W. 744 : 41 I. C. 279, 35 I. C 854 (B). 43 C 694 . 20 C W N. 738 ; 23 C. L. J. 621 P. C. 19 C. W. N 1108

——a grant of letters of administration was annulled on the petition of a person as the court found that materials had been concealed. In appeal it was argued the petitioner had no interest in the estate and as such the grant should not have been annulled, held the objection should have been taken at an early stage in the court below, after the court had functioned in the matter the objection was of no use 6 Lah 180 : 88 I C. 896 : 1926 Lah. 423.

——application for revocation cannot be dismissed for want of proof throwing doubt upon the genuineness of will Probate without citation to reversioners who, if infants, must be represented by guardians, is defective. 1925 Cal. 223 : 84 I C. 689

——s 50 is exhustive and not merely illustrative but still when the condition on the fulfilment of which grant can be made is not fulfilled the court withholds the grant of probate. 1926 Lah. 351 : 7 Lah: 270 : 94 I. C. 329 : 27 Punj L. R 384.

——revocation of will on the grounds that (1) citations were not served (2) will was a forgery,—burden of proof 55 I A. 18 : 47 C L. J. 171 : 107 I. C 14 : 32 C. W. N 402 ; 26 A. L. J. 385 : 9 Pat. L. T. 97 : 1928 P C. 2 · 1928 M. W. N. 282 P. C.

Ss 51-67 (Practice and procedure of grant and revocation)

——an Additional District Judge cannot grant probate unless he is appointed a District Delegate by the H C or exercises power as a District Judge 1923 Nag. 41 : 68 I. C 940

——a will may be probated long after its execution. 23 C. W. N. 424, 23 C. L. J. 82.

——caveat, what is. 20 C. W N. 787.

Ss. 51-87. (practice and procedure of grant and revocation) —*contd.*

——how to prove a will, presumption is in favour of genuineness. 39 C. 245, 16 C. W N 265, 33 C L. J 34 · 24 C. W. N. 860, 20 C W. N. 192.

——an application for the grant of letters of administration with the will annexed relating to one particular item of property need not contain an inventory of the property and can be granted, and court fees cannot be levied on the value of the whole property; 26 Punj. L. R 608 : 7 Lah L. J. 288 90 I C. 620.

——formalities required by law to be ovserved in the execution and attestation of a will must not be confused with the question of proof of fact. 22 C W. N 315.

——probate proceeding may be transferred to a jurisdiction where the testator died, 33 C L J. 386.

——the provisions of s 67 as to verification are directory and not mandatory and so the omission can be cured. 68 I. C. 940 : 1923 Nag 41.

——a person having a right to claim maintenance from the estate of the deceased has "an interest in the estate of the deceased" so as to be entitled to enter caveat In order to enable a person to oppose the grant of a will, it is not necessary that he should claim through the testator 98 I C. 259 1926 M. W. N 785 . 1926 Mad. 1193 : 51 M L. J 563.

——when question of paramount title can be gone into. 17 C. W. N. 613 : 1 P L. T 19 : 54 I. C 807.

——a private case cannot be compromised under Or. 23, r. 3 C. P. C .20 C. W. N 986, 14 C. W. N 1068, 23 C L J. 82.

——probate cannot be refused on the ground that there is no estate. 21 C W. N. 1129, 3 C W N 635, 14 C W. N 463, 17 C. L J. 65 *contra* 9 C L J 116, 28 C L J 271, 17 C L J. 66

——where there is a will propounded and the attesting witnesses and the writer support it and where their testimoney is not seriously impared in cross-examination, it behoves the Court of Probate to listen with the greatest caution to the caveator whose case rests for the most part on mere suspicion. 1925 Pat. 363, 86 I. C. 642 . 1925 P H C 33.

——withdrawal of the pleader of the opposite party does not make a contentious suit a non-contentious one 84 I. C 65 · 1925 Cal. 75.

——the date of grant of probate is the day on which the order granting it is passed and not the date of the order that probate should issue 27 C W. N 285.

——creditor and reversioner when can come in probate proceeding. 21 C L. J 557 : 19 C W. N. 882.

——grand father's daughter's son's son is entitled to appear. 31 C. L J. 81.

——the citation must be issued and properly served on all persons whose interests may be adversely affected. When the probate affects the interest of a minor the will must be proved in the presence of an independent guardian *ad litem* of the minor.

Ss. 51-87. (practice and procedure of grant and revocation —contd.

55 I. A 18 32 C. W. N 402. 47 C. L. J. 171: 7 Pat 221: 30 Bom L. R. 227: 26 A. L. J. 385: 1928 P. C. 2: 107 I. C 14 P. C.

——probate cannot ordinarily be granted with respect to a portion of the property 3 P L J. 415: 46 I. C. 117. But separate probate may be granted to joint executors. 45 I. C. 336 (C)

——where no executor is appointed under the will only letters of administration with the will annexed can be granted 63 I. C 940

——letters can be granted to a corporation such as an university 22 C. L. J 513, to a minor, 1 P. L. T. 304: 57 I. C 583, 44 I. C. 138: 10 Bur. L. T. 184, to a person not interested in the property. 1 P. L. T 304 · 57 I C. 583

——substitution cannot be ordered in probate proceeding as the right is personal. 45 C 862.

——in case of breach of an administration bond whole of the amount of the bond is not recoverable but only reasonable compensation 64 I C 366

——although there is no provision as to what is to be done or what the court can do in the event of the death of the surety or his discharge, the probate court is competent in such cases to require a new bond or additional security. 66 I. C. 367.

——a probate may be revoked for not filing fresh security. 23 C. W. N. 663: 29 C. L J 496

——under s. 78, Probate Court is bound to take a bond in case of administrator and not executor. 23 C W. N. 663, 29 C. L. J. 496.

——surety cannot get discharge by merely alleging misconduct on the part of administrator. 1925 Cal 158.

——under s. 83 the court decides the question of representation of the estate and not the distribution thereof and so the decision is not *res judicata*. 1923 Rang 9: 68 I. C 671, 48 C 694. *Dist.* 5 L. B. R. 78, 1918 P. R. 6, *fol.* 3 P. L. J 415: 46 I. C 117, 10 Bur L. T. 184: 44 I. C. 138: 25 C. 354, 369.

——the dismissal for default of an application for probate of a will would not debar an application by another person claiming an interest under the will and therefore necessarily by the executor himself and an executor presenting an application for probate of a will cannot be regarded as a pltf. who brings a suit in respect of a cause of action. 87 I. C. 621: 1925 M. W. N. 285: 1925 Mad 851. 14 C. W. N. 924. *Ref*

——an order that a certain person has a *locus standi* to oppose an application for letters of administration is not appealable. 90 I. C. 729: 1926 Cal 180.

Ss. 88—117. (powers, duties and liabilities of executor and payment and management of legacies).

——the expression "personal injuries not causing the death of the party" in s. 89 does not mean injuries to the body merely but a injuries which do not necessarily cause damage to the estate of the person wronged. 47 B. 716, 44 M. 357 *fol.* 31 C. 993 *not fol.*

Ss. 88-117. (powers, duties and liabilities of execution and payment and management of legacies)—*contd.*

——prosecution for hurt, abatement on death 30 M. L. T. 349 : 65 I. C 549, *contra*, 1922 Lah. 127.

person
in the
27 Cal.

——executor derives title from will and the administrator from grant, so an administrator cannot administer the estate before
whereas an executor
taking out probate
N. 634, 29 C. L. J

——an administrator has the whole estate vested in him If he is also an heir and conveys the estate without reciting the capacity he must be taken to have sold the greatest 1923 Rang. 69 . 74 I C. 54.

24 Bom L. R 153

——lease by administratrix without permission of the court whether is void or voidable. 83 I. C. 319 . 1924 Cal 636

——where the estate of deceased person is under administration
from a residuary legatee
ch has been or may be
of administration. 29 C.

——a disposal of property by an administrator in contravention. of s. 90 (3) is only voidable and not void. 49 C 626

——under sub-clause (4) of s 90 an administrator is precluded from disposing of property vested in him without the permission of the court and such alienation cannot prejudice the right's of the creditors of the deceased 1927 Bom 16 · 28 Bom L. R 1262.

——an alienation with permission under s. 90 does not operate as an absolute alienation excluding all inquiries into the question whether the permission was obtained by fraud or misrepresentation although such inquiry would not be permissible in the absence of distinct allegation of fraud 98 I C 6 1927 Nag 57, (21 C. L. J. 88, 23 C. W. N. 401) *Rel on.* 23 C. W. N. 1045 *Dist.*

——an alienation with permission obtained by fraud or misrepresentation may be avoided by setting up a defence 43 M. 760 F. B., 16 N L. R 3, 98 I C 6 1927 Nag 57

——an administratrix mortgaging her deceased husband's estate
from
51 B.

28 C.

Ss. 88-117. (powers, duties and liabilities of executor and payment and management of legacies)—*contd.*

——in case of purchase from administratrix who is also a Hindu widow and heiress legal necessity is not to be proved. 23 C. W. N 1045 : 31 C L J. 379, 26 C. 607

——an heir taking out letters of administration is an administrator, so his sale without permission is voidable. 23 C. 446.

——the liability of executor to account to the heir is not discharged by the filing thereof in the testamentary jurisdiction 41 C. 271, 16 C. W. N. 516 : 39 C. 587. The court is not bound to enquire into the correctness of the account. 9 S. L R. 134 : 32 I C 554, 44 I. C. 58 (c).

——s 98 is obligatory. 45 I. C. 336 (c).

——the account shall not cover a period more than one year though time for filing may be extended. 33 C. L. J. 452.

——executor or administrator is not a trustee, when their power comes to an end 17 M. L. T. 61 · 27 I. C. 849, 21 C. W. N. 1043, 23 C L J. 141

—— an executor is not personally liable for the money borrowed for the state. 22 M L. T. 391 : 43 I. C 760, 45 C. 538 : 21 C W. N 1043, nor the heir and representative of a deceased executor are personally liable 41 C. 271.

——one or two executors cannot sue his co-executors for payment of assets but surviving executors can sue the representative of deceased executor. 33 M L. J 195 : 41 I. C. 605

——the word "several" does not mean possessing powers to act severally. 42 M. L J 559 : 67 I. C. 104.

——as a protection to the executor every legatee must obtain the executor's assent to the legacy before his title as legatee can be complete and perfect. It cannot be said that till the executor has signified his assent express or implied, legatee has no interest whatever in the subject matter of legacy. The assent of executor has relation back to the time of the testator's death and confirms an intermediate alienation by the legatee of his legacy. 50 C. 171 : 36 C. L. J. 21.

——administration suit, who can bring. 45 B. 75, 59 I. C. 396 (b).

——administration suit, relief, necessary parties, cost, valuation 21 C W. N 280, 310 : 24 C. L. J. 448, 7 M. L. T. 400 · 6 I. C. 267.

——second probate case, court fee. 20 C. W. N 472

——executor is liable for 6 p. c. interest on uninvested money. 41 I. C 605 (M)

Ss. 118.—145—(payment and management of legacies).

——an executor can retain possession of property until it is taken by the person entitled to it. 33 C. L J 452.

——interest from one year after testator's death on legacies to be paid out of specific property where demonstrative legacy is partly general and partly specific, 1925 *Mad.* 164.

PROCESS, (general)

——when deft. went to distant country, affixing was sufficient. 17 C. W. N. 999.

Process (general)—*contd.*

——summons must be served, only knowledge of the suit will not do. 20 C. W N 173 : 23 C. L J 183, 19 C 201 *Fol.*

——a warrant may be executed before the date of hearing although the returnable date has expired. 40 C. 849.

——service on pardanashin lady by the registered notice approved. 19 C. W. N. 1231

——suit by or against firm—service of summons or execution of decree. 19 C W. N 1008

——every court is bound to render all reasonable assistance to a party to enforce the attendance of the witness 11 C. L. J. 29

——a reasonable latitude should always be given for the convenience of professional men who cannot dance attendance all day on the chance of being called as witness. 11 C L. J. 29.

See other cases under "C. P C. Or 16 Rr. I—21"

PROCESSION

——every sect has the civil right to conduct procession along a high way. Infringement of such right gives rise to cause of action for declaration and injunction without proving special damages 29 C. W. N. 486 27 Bom L. R. 170 6 Pat. L T 115 · 86 I C. 236 : 47 A 151 · 48 M. L J 23 : 52 I A 61 : **P. C** (6 M. 203 **F. B**, 5 M. 304, 26 M. 376, 34 B 571, 24 C. 524) *approved*, 26 M. 554, 2 B 437. 18 B. 693) *disapproved.*

PROMISSORY NOTE, see *"Negotiable Instrument Act"*

PROVINCIAL INSOLVENCY ACT (NO. V OF 1920)

S. 1 (Extent).

——a statute will not be construed to take away a vested right of action acquired before it was passed unless it is specifically provided. 18 C L J. 274, 18 C. W. N 804 . 41 C 1125 . 19 C L. J. 549, 24 C. W N 1011.

——the provisions of this Act will not apply to the applications made under the Act of 1907. 41 M L. J. 126 1921 M. W. N. 381 : 46 Ind. C 270, 1928 Cal 221 but they will apply to appeals and rivisions of all orders made after the commencement of this Act 21 P. W. R. 1916 · 38 I C 995.

——notification under the old Act s. 3 is valid even under the new Act. 1925 Cal 335.

S. 2 (Definitions)

——"creditor" means one that can compel the performance of an obligation by another person who is called the debtor A surety is contingent creditor 32 I C 795

——it does not include a benamder of the creditor. 20 C.W.N. 995.

——a D Hr may be creditor. 42 M 684 36 M L. J. 453 : 52 I C. 44

——a D. Hr. under the Agra Tenancy Act is not a "creditor" under this Act. 20 A. L. J 147

——"debt" is a sum payable in respect of a money demand recoverable by action. 40 M 31 : 1917 M. W. N 353 : 32 M. L. J. 422

S. 2. Definition—contd.

——ancestral property which may be sold for paying antecedent debts is liable 85 I. C. 88 : 1925 Pat. 127.

Ss. 3-5. (Jurisdiction of court).

——what is property under s. 2, 19 C. L. J. 83 : 18 C W. N. 1052 28 M. L. J 403 . 29 I C 37, 2 Pat 724, 75 I. C. 497, 54 I. C. 934 : 158 P. R 1919, 39 A 437 P. C.

——an Additional District Judge is not subordinate to the District Judge and can discharge any function of the District Judge assigned by the latter. 34 A. 382, 36 A. 8.

——a District Judge acting under this Act can interfere with execution of decree of other court and not otherwise 39 A 547.

——an appeal does not lie against the order of the Subordinate Judge declining to take action against the insolvent under s 69, 22 C W N. 958 48 I C. 333

——a Small Cause Court Judge may be invested with insolvency jurisdiction 6 A L J, 483 : 2 I. C. 223

——under s. 2 a District Judge cannot transfer a petition for disposal to subordinate court 45 M. L. J. 689 : 1923 M. W. N 751

——s. 4 is new and is very wide empowering the court to decide any question necessary for the purpose of doing complete justice or making complete distribution. 42 M. L. J. 185, 40 M. L. J. 219 : 52 I C 495, 26 C W. N 921, 66 I. C. 863 (A), 71 I C. 979 (A) this sec. enables the court to decide questions of title affecting third parties 31 C. W. N 502 1927 Cal. 474, 102 I. C. 115 It can allow a party to prove his secured claims. 55 C 1053 : 32 C. W. N. 427 : 1928 Cal 609.

——the sec. has set at rest the conflicting decisions reported in. 22 C W N. 700, 702, 704. 17 A. L. J. 374 : 49 I. C. 590, 37 A. 65, 252, 41 M 440

——no fresh jurisdiction has been conferred by s. 4 (2). 47 A 263 : 84 I C. 790 : 1925 All. 221.

——the power of the Insolvency Court under s. 4 is subject to the provisions of s. 56 (3) which is in the way of the court to remove any person from the possession of property whom the insolvent has no present right to remove. 49 M. 762 : 1926 M. W. N. 121 : 92 I C. 573 1926 Mad 363

[illegible] questions of title and interest what-

[illegible] roceedings leading [illegible] esult of bona fide

——a judgment declining to adjudicate upon a matter will not operate as *res judicata*. 64 I. C 523

[illegible] claimant must be heard on [illegible] be 66 I. C. 863 (A). [illegible] W. N 172. [illegible] to defraud and delay [illegible] 71, 19 A. L J. 662 :

[illegible]

Ss. 3-5. Jurisdiction of court—*contd.*

the question whether
ıcy Court for the an-
two years prior to the
. 53 T. P Act. 48 A.

——where a stranger has gone to an Insolvency Court and invited its decision on " afterwards turn round and questi have been determined after an en

——"claimants against debtor's estate" in s. 4 (2) includes strangers interested in the result of the Insolvency proceedings 24 A. L. J. 897 : 49 A. 71 1927 All. 66 · 98 I. C 1001

——certain persons set up their title to property in the hands of the Official Receiver, but the court without investigating into the question of title directed their sale subject to any claim which the objectors might have, held the order was not in accordance with law and was appealable. 52 C 662 89 I. C. 761 . 1925 Cal. 932.

——it is not binding upon the Insolvency Court to decide under s. 4 every claim which is brought up before it 42 M. L J. 185 : 1922 M W N. 110

that their shares do not rom their father should shares. 1926 M W. N. on's shares are concern- ıt entitled to apply for being by going to the ordinary courts and filing regular suits. 51 M. 567 1928 Mad. 531 : 109 I. C. 516

——the decision is not binding on third person. 1924 A. 40.

——onus to prove title is not on the claimant but on the Receiver. 19 A L. J 497.

——the court has no summary power to release debt due to the insolvent 9 N. L. R 182 It has power to enquire into claims against the estate and not by the estate 44 I. C 537

——a claimant may apply to the Dt Judge under s 4 for an order to prevent the sale of the properties. 46 M. L J 80.

——fresh application is not barred by Or 21 r 4 or 20 of the C. P C 49 I C 229

——the Insolvency Court should apprise the intending bidders that the question of insolvent's title is *subjudice* If the purchasers are misled the sale shall be set aside, the purchase money refunded. 1927 Cal. 834 103 I. C 695, 36 C 323 *applied.*

——under s. 5 the auction purchaser can apply for delivery of possession 45 M. 434 · 42 M. L. J. 185.

——under s 5 the names of the legal representative of the deceased insolvent may be brought on the record. 9 P. L R. 192 : 59 I. C 51.

——*s. 5 gives a Dt. Judge when sitting as an apellate* court the same power as in ordinary appeal. 44 A. 605 : 67 I. C. 317.

S. 6. (Acts of Insolvency).

——the Dt. Judge has inherent power to grant interim protection. 85 I. C. 677 : 47 M. L. J. 783 : 1925 M. W. N. 272.

——an insolvency court can review its own order. 45 M. 472.

——nominal transfer of property 25. M. L. J. 12 : 30 I. C. [illegible] fraudulent intention to defeat or delay creditors. 29 M. 325, 2 C. W. N. 335. 26 B. 476 765, collusive suit and compromise thereof 13 A. L. J. 434 are acts of insolvency.

——what is "fraudulent preference." 20 C. W. N. 421, 19 C. W. N. 157, 16 M. 394, 499, 30 M. 6, 3 A. L. J. 614, 23 I. C. 255, 15 C. W. N. 541, 11 C. W. N. 869. 34 C. 99.

——as regards "secluding" in cl. (d) (iii) intention with which the debtor actually departs from his place of business is material. 56 I. C. 158.

——where the creditor applied for the adjudication of his debtor and the acts of insolvency alleged in the petition were (1) that the insolvent was removing properties to avoid payment of debts, (2) that the deft. had not been keeping his accounts and had ceased to carry on business which were not proved, held that none of these acts constituted an act of insolvency within cl. (d) (iii) of s. 6. 88 I. C. 443. 23 A. L. J. 536 : 1925 All. 564.

——a declaration to pay debt is an act of insolvency. 15 C. W. N. 990. 13 C. W. N. 213 : 12 C. L. J. 403, 23 M. L. J. 445 : 21 I. C. 265.

——notice to a creditor by the debtor of his intention to suspend payment is an act of insolvency, 29 M. 250, but such notice by one of the partners is not. 55 I. C. 185.

——an oral notice under sub-sec. (g) of s. 6 is valid and sufficient but it must be in an unambiguous language. 49 A. 221 : 1927 All. 256 : 102 I. C. 191 : 25 A. L. J. 219.

——a debtor can be adjudicated insolvent by the acts of the agent. 31 C. 761 : 8 C. W. N. 553, 2 C. W. N. 305, 33 M. 655, 23 C. 25 P. C., 5 C. 605.

——where a creditor applying under the Insolvency Law is not the only person entitled to the benefit of a particular debt on the basis of which adjudication is sought his petition is not maintainable. The fact that a debtor is jointly and severally liable for a debt is sufficient to support a petition for adjudication. 87 I. C. [illegible] : 1926 Cal. 234.

——the fact that a suit has been commenced to recover the debt is no bar to the petition for adjudication being based on that debt. 87 I. C. 751 : 1926 Cal 234.

——where the debtor denies owing anything to the petitioning creditor, it is for the Insolvency Court to decide about it. 7 Lah. L. J. 201 : 90 I. C. 254 : 1925 Lah. 455.

——the attachment and sale of separate property of one in execution of a decree against a partnership is no act of insolvency on the part of other partner. 97 I. C. 393 : 1926 Mad. 976 : 51 M. L. J. 5[illegible].

Ss. 7-26 (Petition).

——petition filed before Act V. of 1920 came into force was to be governed by the provisions of the old Act III of 1907. 45 B. 7[illegible].

Ss. 7-26. Petition—*contd.*

——a declaration of insolvency cannot be asked by a single petition against several joint debtors 24 C. W. N. 461 : 31 C. L. J. 206 : 2 C L J 318, *contra* 41 M. 810.

——any person who is jointly and severally liable under a decree for over Rs. 500, can apply under s 10 (a), 1926 Lah 235 : 27 Punj. L. R. 49

——a son cannot be adjudicated an insolvent for the debts of his father at the instance of the decree-holder of his father's debt as the liability is not personal. 50 M. 981 . 104 I C. 642 : 1927 Mad 922 41 M 824 Ref. 49 M. 217 *Dist.*

——it is competent to an Insolvency Court to be moved on the petition of a creditor where no Receiver is appointed 83 I. C. 246 : 1925 Nag. 225.

——it is not necessary that the petitioning creditor should be a creditor on the date of the adjudication, it is sufficient if he be so on the date of petition 50 M. 396 1927 Mad 153 : 1926 M. W. N. 946 : 99 I. C 536

——the Act entitles the debtor to an order of adjudication when its conditions are satisfied This does not depend upon the court's discretion but is a statutory right 21 C W N 497 P. C , 44 C. 535 · 25 C L J. 215, 57 I C. 977, 15 C W. N. 244, 15 C W. N 218

——if the conditions of s 10 are fulfilled by the debtor then the court has no discretion. 69 I. C 622.

——when an application is dismissed for default a fresh application is not barred, 2 P L T. 335 : 61 I. C 870

——it is implied by s. 10(2) that apart from annulment a second petition lies 1927 M W. N 176 · 101 I C. 349 . 1927 Mad. 579 . 39 M. L. T 118, 61 I. C 870 *Rel on.*

——procedure to be followed under s 10 (1) and 24. 1928 Pat. 477: 7 Pat. 771 : 111 I. C 647 : 9 Pat. L T. 444

——no petition can be presented against a minor partner or against minor 42 C 225, 42 A 515, 20 C. W. N. 140

——if the debtor has made a fraudulent disposal of property the court is not justified in holding that the debtor can pay but should admit his petition so that the interest of the creditors may be benefitted by the special powers of the court under this Act. 46 B. 757.

——when the petition for adjudication shows that the debtor has debts for more than Rs 500 which are more than his means, he is to be adjudged an insolvent The fact that shortly before the presentation of the petition he transferred his property is no ground to reject the petition although it may be open to the Official Receiver to apply under s. 53 to avoid the transfer. 1926 Cal. 955 ; 95 I. C. 297.

——the petition to be adjudicated insolvent is itself treated as an act of bankruptcy. An enquiry into petitioner's *bona fides* should be held only when he applies for discharge and not before. What the court is to do is to see whether *prima facie* he is unable to pay his debts. 92 I. C. 541 : 1926 Mad. 494 : 24 L. W. 219.

Ss. 7-26. Petition—contd.

——the court need not make an elaborate enquiry as to the validity or otherwise of the debts. If there are grounds for thinking that *the debtor is* unable to pay his debts that is sufficient 1927 Cal. 69 : 97 I. C. 463.

——*when* a debtor applies for adjudication on the ground of inablity to pay debts he need furnish *only* such proof as is sufficient to satisfy the court that there are *prima facie* grounds to believe the allegation 45 M. L. J. 129 : 73 I. C. 74, 101 I. C. 445 : 1927 Pat. 188.

——where a transfer by debtor is the act of insolvency the *applying* creditor must be the creditor before the transfer. 61 I. C. 756 (M).

——an application in the insolvency court is not the creditor's only remedy and it is discretionary with the court to administer the estate in Testamentary and Intestate jurisdiction or in its *insolvency* jurisdiction. 15 C. W. N. 350.

——applying creditor is to prove debts. 1 Bur. L. J. 239. 63 I. C 885

——it is to be decided whether debtor has committed acts of insolvency. 15 C. W. N. 990, 36 M. 402, 36 A. 250, 15 C. W. N. 244

——it is only a debtor against whose property an *order* of attachment is actually subsisting that can apply. 25 A. 234

——if a person who applies to be adjudicated insolvent *has on* his own showing marketable property of an infinitely greater *value* than his outstanding debts, a court can dismiss his petition 89 I. C 585 1925 Lah. 630

——where a petition is filed in insolvency and the *debtor is* adjudicated, he automatically gets a protection order under *s.* 16 (2) (b). Such right should not be taken away from him *without* good ground, and in deciding it, the exercise of *jurisdiction must* be judicial 1945 M. W. N. 612 : 1925 Mad 915 F. B.

——whether the petitioner has made a true and full *disclosure* of his property is not to be determined before *adjudication* 46 B. 757

——*when* the property of the insolvent vests in the *Receiver* he must be made a party in a foreclosure suit, 54 C 595 : 101 I C. 442 : 31 C. W N. 741 . 29 Bom. L. R. 883 ; 45 C L. J. 544 . 1927 P. C. 108 : 25 A. L J 621 P. C.

——the object of s. 16 is to prevent other creditors *from being* injured by the action of the *creditor* who by reason of *collusion or* otherwise may not diligently prosecute the petition. 51 M. 334 : *1928 Mad* 608 . 110 I. C. 611 ; 55 M. L J. 168.

——under s 17 the court has power to adjudicate a person as an insolvent after his death 51 M. 344 : 109 I. C. 84 : *1928 Mad.* 476 27 L. W. 437, 51 M 495 . 110 I. C. 167 : 1928 Mad 480.

——but an appeal preferred against the adjudication *of an in*solvent abates on his death. 1928 *Lah.* 119 : 107 I. C. 281 ; 9 Lah 306.

——the term "residence" is an elastic word of which no exhaustive definition can be given. 32 C. L. J. 314. It is not *defined* in the

Ss. 7-26. Petition—*contd.*

sta... ...lained in 38 C. 394: 13 ...

... to have resided for a ...ion

——where a merchant was residing at different places and was ... diction he ... is not by a ...

... t will not ... has been ...

... bable. 18 C. L. J. 564.

——a Railway Provident fund is not attachable. 24 C. W. N. 288.

——the debtor must specify all the debts including those of the foreigners. 35 P R 1888.

——any private arrangement between creditors cannot be recognised in Insolvency Proceedings. 25 C. W. N. 137, 6 B. L R. 558, 19 Bom L. R 365 40 I. C. 207.

——Insolvency Proceeding does not abate. 59 I. C. 51, 7 B. 438. 57 I. C. 810.

——... vitiates the proceed... 268.

—— ... C W. N. 319: 29 C. L. ...

——a receiver appointed after adjudication stands on a very much different footing than an *ad interim* receiver. 58 I. C. 783, 83 I. C. 360 : 1924 Cal 849.

——an *interim* Receiver has under s. 20 only the powers of Receiver appointed under the C. P. C, 93 I C. 877. 1926 Mad. 432. 50 M. L. J. 665.

... Govt but should ... an action upon ...

——a secured creditor is entitled to deal with his security as though there is no vesting in the court or the receiver in insolvency. 41 C. L. J 290 : 29 C W. N. 771 86 I C 1042 : 1925 Cal. 785

——an insolvent may be directed to appear for his examination although he resides more than two hundred miles off. 32 B. 198, 34 B. 462, 13 B 114

——the provisions of sec 24 (2) as to the examination of the debtor are mandatory depending on the debtor being present at the ... s on the debtor to show, he ...

... ourt they must be examined, ... will be vitiated. 97 I. C. 792 : ...

Ss. 7-26. Petition—contd.

——the debtor should be allowed possible facilities to prove that the books of account called for were not in existence or were not under his control 34 C L J 351.

——the only things that are necessary to be decided by a court before adjudication are (1) whether the creditor or the debtor is entitled to present the petition (2) whether the required notices have been served (3) whether the debtor has committed the alleged acts of insolvency. 36 M 402.

——in case of application on the ground of debtor's inability to pay the debts, the court must enquire into the present value of the property 72 I C. 60 ( ).

——*payment to creditor of insolvent, liability to Receiver.* 1925 Mad 328

——on the death of an insolvent, whose property was vested in the Receiver, the Receiver is not divested of that property. 26 Punj L. R. 186 7 Lah L J 131 : 88 I C. 558 : 1925 Lah 366.

——sufficient grounds for dismissal of the petition 15 C. L J. 631, 990, 16 C W. N. 853, 19 A 125, 2 Pat. L. T. 166.

——the appellate court will not generally in exercising discretion under s. 25 set aside an order of adjudication 50 M 396 , 1928 M. W. N 946 1927 Mad. 153 : 99 I. C. 536.

——what is abuse of process 14 M. L. T. 355, 5 Bur. L T. 217 , 18 I. C 500, 30 I C 943.

——"*frivolous*" implies that the accusation was of a trivial nature but it may or may not be false, and "*vexatious*" implies that accusation is one which ought not to have been made and which is intended to harass the accused 30 C 123 ; 6 C. W. N. 799

——the discharge contemplated by s. 24 (3) of the New Provincial Insolvency Act is the final discharge and not the conditional discharge of the insolvent, the effect of such conditional discharge being that the insolvency proceedings are not terminated and creditors can prove their debts before final dividend is declared. 6 Pat. L. T. 410 : 4 Pat 128 · 85 I. C 543 : 1925 Pat. 438, 75 I C. 571.

Ss. 27-40. (Adjudication and amendment thereof)

——by filing the petition under the old Act the petitioner did not acquire a vested right to an unconditional order of discharge and the court had jurisdiction to impose a condition that discharge must be applied for within an year *under s. 27* of the New Act. 49 M. L J 595: 22 L W. 542.

——s. 27 is imperative. The period within which the debtor should apply for discharge must be mentioned in the order of adjudication 107 I. C. 830 : 1928 Pat. 338 . 9 Pat. L. T. 529.

——the court has the power to extend the time of adjudication, 107 I C 830 : 1928 Pat. 338 ; 9 Pat. L T. 329, 107 I C. 394 : 1925 Lah. 82 10 Lab. L J. 156, 1929 Lah. 399, 1925 Lah. 416, 1927 Lah 763 1924 Cal 777, 1928 Pat. 338 F. B., 51 M. 839. *not fol.*

——there is no appeal against an order under s. 27 refusing to extend the time of discharge. 89 I. C. 959.

Ss. 27-40. *Adjudication and amendment thereof—contd.*

——under s 27 of this new Act, no composition is allowed. 10 A L. J 703 : 47 I C 733, 52 P. R 1918 : 47 I. C. 435.

——where a Jt Dr is adjudicated an insolvent, the rights of a decree-holder against the insolvent are divested and he becomes an ordinary creditor 20 C W. N. 739 31 M L T. 38 P. C.

——taking proceedings in execution without impleading the Receiver does not affect the interest of the insolvent. *above case.*

——a suit by the creditor of an insolvent against a certain person *alleged to be in possession of the assets of the insolvent without* impleading the Receiver is misconceived and unsustainable. 49 C. 560 : 26 C W. N 954 35 C L J. 498 : 24 Bom. L R 700 : 20 A. L. J 409, P. C

——the whole property of the insolvent vests in the Receiver as if he is the owner until discharge 30 C. L. J. 515, but not until the court has made an order to that effect. 85 I. C 439 47 M. L J. 749 · 1925 Mad. 249

——when a firm is adjudicated an insolvent all its property is vested in the Receiver 49 C 560 26 C. W. N. 954 35 C. L. J. 498, 1922 M W N. 717, 5 N L. J 144 65 I C 941

——the estate of the son of the insolvent cannot be dealt with by the Receiver 2 Lah L J 401 : 68 I C. 179.

——when the father of the joint Hindu family becomes insolvent [illegible] Receiver who is [illegible] insolvent and his [illegible] *oral and the sons* [illegible] ion to dispute the [illegible] t 476, 49 M, 849 . [illegible] 6 Lah. 1 : 47 M. L. [illegible] 5 1928 Mad 479, [illegible] nt family property [illegible] adjudication *of* a [illegible] All. 262 : 92 I. C. [illegible] as been held that [illegible] ntitled to sell not only the share of the father but the entire property belonging to the father and his sons 48 A, 400 : 1926 All. 447 : 24 A. L. J. 417. But the Bombay H C. is of opposite view. 49 B. 785.

——*suit by Official Receiver, leave of the court.* 45 M. 167, 43 M 869

——after the passing of an order of adjudication all properties vest in the Court or Receiver 44 A. 617.

[illegible] insolvent before discharge is *bonafide* and for value of the Official assignee.

——the Receiver of insolvent Hindu debtor's estate is *entitled* to take possession of property obtained by his sons at partition 84 I. C. 790 : 47 A. 263 : 1925 All 221.

Ss 27-40. Adjudication and amendment thereof—contd.

——an order of adjudication shall relate back to and shall take effect from the presentation of the petition on which it is made but it cannot mean that for all purposes that date is to be taken as indentical with the date of presentation of the petition. 72 I. C 433, 42 A 533

——an insolvent cannot make a valid alienation of his property between the dates of the presentation of petition and the order of adjudication 42 A 433.

——after adjudication a D Hr. cannot attach property without the leave of the court 49 I C 421.

——it is not that a creditor cannot go on with a suit or other proceeding already pending at the date of adjudication but after the order of adjudication a creditor shall not during the pendency commence a suit or other legal proceeding. 61 I. C. 534, 42 M. 31; 3 P L J 456 1918 Pat 303 · 45 I C. 234.

——s 28 contemplates the institution of a suit with the permission of the Insolvency Court. It has no reference to the continuance of a suit already instituted. 21 N L. R. 9 : 1924 Nag 300

——no suit may be brought after adjudication without obtaining the permission of the court. 102 I C 37 . 28 Punj. L. R 634, 8 Lah 593 Leave obtained subsequent to the institution of the suit does not cure the defect 40 B 235, 1927 Mad. 925 . 105 I. C. 109.

——the grant of permission to institute a suit does not necessarily cover permission to execute the decree therein 1926 All 640 · 24 A L J 755

——an insolvent has right to maintain a suit for the recovery of "after acquired" property subject to the right of the Receiver to intervene at any stage 45 M. L J. 827

——an insolvency court cannot issue injunction upon a person who is not a party before it 3 P. L. J. 456 ; 1918 Pat 303 : 45 I C 224

——leave contemplated by s. 28 must be obtained before commencement of a suit. 17 Bom L R. 925

——s. 28 protects the secured creditor in respect of his security but it does not protect the insolvent in respect of a voluntary transfer of his property. 87 I. C. 957 ; 1925 Nag 418.

——remedies open to the secured creditor considered 2 Pat 72;

——s 28 is not to be read subject to the provision of s ... Insolvency of a debtor does not bar a secured creditor from suing to enforce his rights 48 M. 750 · 1925 M. W. N. 672 : 88 I. C 93 49 M L J 203

——s 28 does not provide protection from arrest in execution of a decree, the insolvent is to apply for a protection order under s. 31 The decree holder can arrest the J t. Dr who has been adjudicated an insolvent and has not obtained protection order 49 A 201 · 1 I C 320 1927 All 418 : 25 A. L. J. 152, 72 I. C. 911 *Rel on.*

——where a mortgage executed prior to insolvency was satisfied by a mortgage executed after insolvency, the latter was held to be protected 90 I. C 349.

Ss. 27-40. Adjudication and amendment thereof—contd.

——when the mortgagor becomes an insolvent within two years of his executing a mortgage the onus is on the mortgagee to prove that the mortgage was effected in good faith and for valuable consideration 1926 Lah. 307 . 91 I. C 4 · 26 Punj L. R 812

——under s 28 vesting takes place only upon adjudication, so a [illegible] gs against a debtor only [illegible] I. C. 877 · 50 M. L. J 665. [illegible] not render it incompetent [illegible] ay of appeal. 1921 M W.

——if the mortgaged goods are allowed by the mortgagee to be possessed by the mortgagor they pass to the trustee. 1923 Cal. 532: 72 I C 467

——in view of the words "in the same manner" in s 28 (b) it was doubted whether the Receiver was a necessary party in suit by a secured creditor. 63 I. C 91, 43 A. 555, 42 M L. J. 426.

——insolvent's equity of redemption vests in the Receiver who is empowered to administer the encumbered estate 42 M L J 426

[illegible]

——the words "other proceedings" referred to in s 29 is a proceeding in the nature of a suit or a proceeding in a suit itself 38 C. W. N 15 48 C L. J 298 1928 Cal 782 F B

——private arrangements after adjudication are not acceptable. 25 C W N. 137.

——a gaming debt is not provable nor barred debts are provable. 34 C. L J. 169

——deferred dower is not provable 21 P. L. R. 1919 . 50 I. C. 774

[illegible] after the date of adjudication are not

[illegible] or remove a name [illegible] judicially in the [illegible] rs on the validity

——the court must enquire as to the genuineness of a debt [illegible] family when it is

[illegible] a judgment

——the court is to frame the schedule and not the Receiver. 25 C. W N 137.

——a person who has already proved one or more debts and has been a scheduled creditor, can, if be wishes, prove a further debt subsequently The words "any creditor" used in s. 33 (3) is not

Ss 27-40. Adjudication and amendment thereof—*contd.*

limited to "*any unscheduled creditor*" 44 C. L. J. 103 : 1926 Cal. 1210 97 I C 1013.

——there is no provision in the Act to enable the court to pass *orders to prevent the arrest of a petitioner pending the hearing of the* insolvency petition. 30 C. W. N 834 : 1926 Cal. 1011 : 96 I. C 131

——an adjudication order may be annulled (1) when it ought not *to have been made,* (2) where the debts have been paid in full (3) when a composition has been accepted. 18 C. W. N. 1052, 19 C L. J 83, *or* where a *minor* has been declared an insolvent. 42 C 225, 42 A 515

——an order of discharge releases the insolvent from all debts provable under the Act whether they have been entered in the schedule or not 1926 Lah. 489 . 27 Punj L. R 588 95 I. C 204.

——*when dealing with the questions of* anulling on adjudication the cases reported in 44 C. 535 **P. C.**, must be *followed* 108 I. C. 208 1928 Mad. 394 . 1928 M. W N. 62.

——the procedure prescribed by s. 38 *should be* strictly *followed* before a valid composition can be effected. *Notice must be issued to* all creditors 89 I. C 740.

——the annulment by way of compromise should not be detrimental to commercial morality. 21 C. W. N. 936 : 23 C. L J 120

——part payment by *way of compromise* is no ground of annulment 43 M 71, full payment though *not made* through the Receiver is ground for annulment. 26 M. L. T. 139 : 52 I. C. 689, 25 C W. N. 137

——undue preference of one creditor is *not* a ground for annulment 21 C W. N. 298

——a vesting order passed subsequently to an order in insolvency court at another place has the effect of vesting the property in *the official assignee of the latter place* 37 C. 418 : 11 C. L. J. 413

——proceeds of an execution sale *before adjudication* are exempted from the operation of s 34. 1925 Mad. 224.

——*Art. 181 L. Act, does not govern* an application under s 36 of the Provincial Insolvency Act by the Official Receiver to set aside an alienation by the insolvent. 1925 Mad. 172.

——a suit instituted by a Receiver against the debtor of the insolvent is not rendered *unmaintainable* on the annulment of adjudication 41 A. 200.

——where the insolvent enters into a composition with the creditors after the passing *of the vesting* order and the insolvency petition is afterwards dismissed, such composition is valid 37 M. 7.

——*consent of all the creditors is* not by *itself necessarily* sufficient to justify an order of annulment 23 C. L. J 220.

——an unconditional release by a creditor cannot amount to a payment in full within s. 35 48 A. 272 : 1926 All. 233 : 93 I. C. 314 : 24 A L J, 244

——the creditor must prove his debt in some of the ways

Ss. 27-40. Adjudication and amendment thereof—*contd.*

——s. 36 gives no power to the court to cancel a transfer made by a transferee of the insolvent 7 Lah. L J 160 · 88 I. C 89: 1925 Lah. 295.

——when an order of adjudication is annulled the property of the debtor cannot be distributed by the Official Receiver among the creditors. 1926 M. W. N. 950.

——*a decree against the Jt. Dr is not binding against the* Receiver in Insolvency as there can be such decrees collusively obtained 84 I C 1008 ; 1923 All 33.

——s 39 is not binding on unscheduled creditors 87 I C. 348 : 7 Lah L J. 158 . 1925 Lah 376.

the court it is it a creditor who ting his decree.

Ss. 41-44. Discharge.

——a creditor receiving money under a conditional order of discharge is not deprived of his right to appeal against the order of discharge 91 I C. 760 · 1926 Cal 529

——whether the debtor has or has not committed acts of bad faith is to be determined by the court at the final stage when application is made for final discharge 15 C. W. N 213 : 12 C. L. J. 400, 15 C. W. N 244 12 C L J. 445.

——without an order of the Court the insolvent is not discharged automatically at the end of the period fixed 49 A. 201, 1927 All. 418 : 25 A L J 152, 51 C 337 *fol*

nd to refuse to grant an unless the assets of the the rupee as the amount

——there is nothing in s. 44 to warrant the suggestion that an application for discharge once refused bars a fresh application or an application to renew the prior one 1925 M. W. N 612 ; 1925 Mad. 915 . 22 L. W. 202 F B

which the insol- e order there is an bin two years that 7 Lah. L J. 553:

Ss 45.68. Proof of debts, release and distribution of property.

——s. 49 only specifies a simple mode of proof of debt not excluding any other mode of proof. 48 C. L. J. 574 : 1923 Cal. 159 : 114 I C. 415

——an Insolvency Court cannot allow interest at a rate higher than six p c after the date of adjudication. 67 I. C. 556 · 1920 All. 361 . 24 A L J 441.

... a separate debt 23 ... different from ... 592, 21 A. 237, ...

7 B 455

——a mortgagee may get his name entered in schedule of creditors from the unsatisfied amount of an unsecured creditor. 34 C. L. J 167.

——there is no provision giving power to the Official Receiver to expunge a debt entered in the Schedule, his only power being to ... expunge entries improperly made ... M. W. N. 935 ; 51 M. L. J. 287.

... to the executing court to deliver ... valid if the Receiver has got the ... insolvent's property. 84 I C. 126.

——the right of a secured creditor either to commence a suit or to proceed with the suit and to proceed with the execution of his mortgage decree is not taken away by the admission of an insolvency ... the mortgagor as an insolvent ... 72.

... holder, and money ... of the properties ... D. Hrs. ... secured creditors covered by such securities must also be treated as ... for the proposes of the sec. 1925 M. W. N. 307 : 49 M. L. J. 613

——"assets" include any assets held by the Court 35 C. L. J 327. ... longer moneys of ... paid. 42 M L. J.

... rty though made ... the property vests

... insolvent to any ... 62 I. C 924 ... and two years of ... two years of the ... void by reason ... 1925 Bom 480 ... side in the absence

... 30 C. L. J. 429.

——gift or transfer to wife, whether ... 20 C W. N. 554, 42 M. 322. 28 C. L. J. 536, 67 I. C 887.

Ss. 45-68. Proof of debts, release and distribution of property—*contd.*

——transfer in good faith though in favour of relation is valid. 24 C L. N. 418, otherwise not. 23 C. W. N 769.

——the purchaser is to prove that he is a purchaser in good faith and for valuable consideration. 1926 All. 29 · L. R 6 A 397.

——the Receiver is to file a written statement similar to plaint and the transferee is to put in a written reply and the proceedings continue like a suit. It cannot be disposed of summarily 39 A. 391.

——the case cannot be sent to a munsiff 32 I C. 188, 12 A. L. J. 889, 37 A. 252, and the court must take evidence. 35 I C. 906, 41 I. C. 411.

——it is the Receiver who is to bring the case to set aside transfer. 15 C. W. N. 253 . 12 C. L J. 452, 58 I. C 783, 41 M. L. J. 606, 62 I. C. 924, when the Receiver refuses or neglects to act, any creditor can bring such suit. 75 I. C. 995.

——the Receiver referred to in ss 51 and 52 is the Receiver appointed upon adjudication 93 I. C. 877 : 1926 Mad 432 50 M. L J. 665

——the report of an Official Receiver in connection with an inquiry under s 53 or 54 is not by itself legal evidence 1926 All 29 ; L. R. 6 A. 397.

683 : 1927 Mad 412

er was in good), 2 P. L J. 101, therwise 1921 Cal. 766.

——to save a transaction from the mischief of s 53 three conditions are required (1) that the transferee is a purchaser or encumbrancer, (2) that he acted in good faith, and (3, that there was valuable consideration 50 M. 815 105 I. C 138 1927 Mad 869.

——s. 53 is not controlled by s. 28 (7) 29 Punj. L R 446 · 111 I. C 8 : 1928 Lah. 361 F. B.

——a

comes wit
172, 39 I.
M. W. N
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under the

Ss. 45-68. Proof of debts, release and distribution of property—*contd.*

——the insolvency court can try a question of title raised on the basis of a transfer which took place more than 2 years prior to the adjudication 113 I C. 819 : 1929 All 105 : 27 A L. J 155 F. B

——after adjudication an insolvent court is the only court to set aside a transfer 42 M 322

——a mere lapse of seven years after the order for adjudication, is not ground for refusing to appoint a person a receiver to the insolvent's property. 30 C L. J 432.

——a receiver in framing schedule of creditors does not decree judicially or finally upon contested claims 41 M. 30.

——the transferee should have notice. 44 I C 168, 33 I. C 188

——in determining the inability of the debtor to pay debts the fact that he has money locked up which may be at a later period available, is immaterial 20 C W. N. 420.

——cases of fraudulent preference. 19 C. W. N. 157, 20 C. W N 420, 41 I C 399

——the Official Receiver is only to make out the intention of the insolvent The intention or motive of the creditor preferred is not material Even if he takes a *bona fide* sale in discharge of his real dues that does not make the transaction valid if the intention of the debtor be to prefer that creditor to others. Undervaluation of the property is also no question 92 I. C. 726 : 1926 Mad 338 1927 M W. N 124 107 I C. 210.

——mere effect of the transfer being to give one creditor preference over other creditors does not affect the transfer. Intention of the debtor must be the dominant factor. 92 I. C. 296 . 1926 Lah 231 : 42 M 510, 1928 Mad 860

——meaning of the word "preference" in s 54 1928 Lah 744 : 110 I. C 824, 1928 Bom. 341 : 30 Bom L R 893.

——if real pressure is brought to bear by the particular creditor who is given preference and if the preference is the direct result of the pressure the preference is not voluntary. 1929 M W. N 327 : 1929 Mad 471. (43 C 640, 42 M. 510, 1924 Mad. 180) *Rel on*

——it is necessary that the facts should be considered in relation to each other and weighed as a whole. 23 C. W. N. 817 P C

——a transfer is void when the effect is to leave the debtor without the means of paying his present debts. 18 C. W. N. 841 P. C.

——intention to give preference must be proved by the receiver or the creditor 37 M. L. J 246 ; 1919 M. W. N. 576, 1919 M. W. N 293, 43 C 640 20 C. W N. 420, 63 I C. 916.

——mind of the debtor is of paramount consideration 19 C. W. N. 157

——*bonafide* transactions for value are protected by s 55. 19 A L. J 240 . 62 I C 732.

——when an Official Receiver does not take action the creditor can under s 53 and 54 18 L. W. 857.

——a surety of the debtor is his creditor within the s. 40 M. 153.

Ss. 49-68. Proof of debts, release and distribution of property—*contd*

——without order of appointment of Receiver the property does not vest in him. 43 M 869, 40 M L J. 209, 62 I. C. 346, 30 M. L. J. 415 : 35 I. C. 602

——before the court takes any action under s. 56 cl. 3 in the way of realisation of property a Receiver in insolvency must be appointed 1926 Pat. 291 : 94 I C 506.

——there is distinction between an *interim* Receiver and a Receiver appointed after adjudication 42 C. 259, 30 C. L. J. 515 and there is distinction between a Receiver appointed in action and a Receiver appointed under I Act. 30 C. L. J. 615.

——the Receiver is an officer of the court and his possession is the possession of the court, 18 C W N. 866, he is a public officer and in action against him notice under s. 80 C P C. must be served. 22 Bom. L. R 987 58 I C 411, but he is not a judicial officer and cannot make judicial inquiry. 22 C. W. N 704, 47 I C. 308 (M). 34 C L J 123, he can take possession of the property of the insolvent 42 C. 225 : 20 M. L. T 334 : 35 I. C 610.

——when a Receiver acts in excess of his authority a stranger also may bring that fact to the notice of the Court 18 C W. N. 366, and the court may dismiss the Receiver. 17 C W. N. 1045

——the Court may remove an Official Receiver at any stage 46 M. 405.

——*cl.* 3 to s. 56 is not limited to the case of an application by the Receiver. 42 M L. J 185, 1922 M W N. 110.

——the insolvency court cannot under s 56 (3) direct a person in possession of the property claiming adversely to the insolvent to deliver it to the Official Receiver 49 M. 762. 1926 M W N. 121 · 92 I. C 573 1926 Mad. 363

——attachment before judgment in a suit, adjudication subsequent to attachment, Official Receiver 45 M. 70

——a Receiver cannot enquire into the title of the claimant. 34 C. L. J 123

——a Receiver can sue for annulment of sale 44 M. 524, he can sell property 18 C. L. J 64, 30 B. 515, 24 C W. N 1072

——a Receiver cannot prosecute an appeal which relates to a claim for damages only and does not effect the property of the insolvent. 1926 Mad. 1133 1926 M W. N 797

——a Receiver cannot purchase property belonging to the insolvent 5 C. W. N 91, and cannot enter into secret agreements. 22 C. 648.

——the court is to determine the Receiver's remuneration. 30 C. 696, 36 C 990, 21 A. 227, 7 B 455

——it is discretionary to the court to allow reasonable allowance to the insolvent 45 A. 364.

——absence of leave of court is not valid defence as it is a matter between the Receiver and the court. 1921 M. W. N 858, 89 I. C. 419.

Ss. 45-68. Proof of debts, release and distribution of property—*contd*

——permission given by an insolvency court to the Receiver to institute suits need not be in writing. It is a matter between the Receiver and the Court 89 I. C 419.

——the rule that a suit should not be instituted against a Receiver without the sanction of the Court does not apply to a Receiver under this Act. 22 Bom. L. R. 987 : 58 I. C. 411

——a Receiver can sue in his own name. 5 C. L. J 270, 25 C. 642 2 C. W N 469.

——a land-holder who has obtained a rent decree is not a creditor under this Act. 44 A. 269.

——if the parties to the proceedings be secured creditors the order of adjudication does not bind them. 48 A. 475 : 95 I. C. 416 : 192[illegible] All 501 24 A L J. 480.

——scheduled creditor is entitled to be paid his dividend out of the assets of the insolvent and no succession certificate is necessary 97 I C 411 . 1926 Mad. 899 : 1926 M. W. N. 560.

——cultivation of coffee is an agricultural purpose. 24 M 621, cultivation of indigo is an agricultural purpose but not manufacturing of indigo cakes. 31 C 174, cultivation of potatoes, grains, vegetable is an agricultural purpose. 25 M. 627, *contra* growing vegetable and *sunesunda* is not an agricultural purpose. 27 C 205, 4 C W. N. 76

——there is no second appeal from an order under s 53 67 I. C. 887.

——s 68 provides a speedy remedy to an aggrieved person if he choses to seek it. But it is not the only remedy 21 A L J 737 : 1924 A. 40.

——the District Judge cannot confirm the Receiver's report except by consent of parties until expiration of 21 days within which period the aggrieved creditor can apply for reversal or modification 1925 Cal. 826 : 94 I. C 332.

——all the grounds upon which the decision of the Receiver is challenged need not be stated in the application, they may be supplemented or amplified later on. 103 I. C. 695 : 1925 Cal 634

——claim disallowed by Official Receiver, application to the District Judge, without making Official Receiver party. 49 M L J 242.

——an *ad interim* Receiver cannot pass a final order in claim under s. 68. 1926 Pat. 291 : 94 I C 506.

Ss 69. 73. Penalties.

——proceeding against the debtor under s. 69 is a criminal proceeding 18 C. W. N. 602, 19 C. W. N. 430, 27 B 299.

——the court cannot take penal action against the insolvent where there is little more than suspicion only. 1926 Mad 1139 9[illegible] I C 390

——s 69 embraces acts whether before or after making an order of adjudication 100 I. C. 550 : 1927 All 352 : 25 A. L. J 331

Ss. 69-73. Penalties—*contd.*

——the word 'may'' in cl (2) I shows that the insolvency Court only has a discretion in referring the case to the Magistrate and not that there may be punishment on the private complaint 53 C 929; 98 I. C 116 · 1927 Cal. 149 : 44 C. L J 350

——as the sec 70 stands at present the court may pass an order exparte and in the absence of the insolvent The Judge may or may not hold a preliminary inquiry. 55 C. 783 · 47 C L J 250 · 111 I C. 372 : 1928 Cal 211.

——the Receiver may be authorised to make enquiry 23 C. L. J. 553.

——a creditor cannot appeal as he is not aggrieved. 22 C. W N 958, 1920 M. W N. 135 . 54 I. C 740, 55 I. C 717.

——in case insolvent is charged with purposely withholding documents the prosecutor must prove that such books did in fact exist 24 C. W. N 418

——prosecutor must prove the offences, mere suspicion cannot be allowed. 24 C. W. N. 418

——no error or irregularity in a charge will call for a reversal of an order unless it has occasioned a failure of justice. 31 C. L J 209 : 24 C W N 625

S. 75. Appeal

——in dealing with appeals under s 75 (3) the provisions of C P. C. ought to guide the court. 44 A. 605.

——where a creditor's petition, to take action under s. 43 is dismissed he is a person aggrieved and has a right of appeal 45 M. L. J. 804 : 1923 M. W N 838.

——an "aggrieved person" is one who is affected by the order appealed against 1928 Mad 981, (33 M L. J 612, 36 I. C 771) *Dist* 107 I. C. 467 : 1928 Cal. 263

——if the Official Receiver inspite of funds being placed at his disposal refuses to appeal it is open to the creditor to appeal. 18 L. W. 857

——a dismissed Official Receiver is a person aggrieved, 46 M. 405.

——where at the instance of certain creditors a person was adjudicated an insolvent and subsequently the adjudication was annulled, held that the creditors have a right of appeal against the order annulling the adjudication. 7 Lah L. J. 553 . 92 I C. 235 : 1926 Lah 24.

——appeal from Deputy Commissioner's order lies to the Dt. Judge 1925 Cal. 335

——an order in insolvency releasing from attachment certain crops which had been attached by the Receiver at the instance of a creditor can be appealed against by him. He is a person aggrieved for the purpose of sec. 75 (2). 47 A. 849 . 23 A L J. 503 : 1925 All 549.

——non services of notice upon the legal representative of one of the deceased creditor does not vitiate the appeal but the heir

S. 75 Appeal—*contd.*

has the right to open the proceeding 44 C. L. J. 108 : 1926 Cal 1210 . 97 I C 1013.

——leave to appeal may be obtained even after the filing of the appeal 50 M. 815 : 105 I. C. 138 . 1927 Mad 869

——the appellate court can alter hearing the entire case grant the appellant leave to appeal. 1928 Pat. 338 : 107 I C. 830 : 7 Pat 375 9 Pat. L T. 329.

PROVINCIAL SMALL CAUSE COURTS ACT.

(1) Applicability and scope of the Act.

——in the present Act suits excluded from the jurisdiction of S C C are detailed whereas in the earlier Acts suits, jurisdiction over which was given to it, were set forth. 23 C. 884 F. B 25 I C 826, 23 M 547 F. B. 37 B. 675 F. B. 15 B. 400.

(2) Appeal and Revision.

(A) Appeal.

——the fact that a case was tried by the munsiff in the ordinary jurisdiction does not take away the prohibition of an appeal contained in the S C C. Act. 39 C. L. J. 532, 25 B. 417, 40 C. 537 Ref 55 I. C 642 (c) 46 C. L J 552 : 1928 Cal 153 : 106 I. C. 859. But it is open to an appellant to ask the Court to treat his memo of appeal as an application in revision and to set aside the order made without jurisdiction. 39 C. L. J 532, 38 C 421.

——the character of Small Cause suit though tried in the ordinary manner as a regular suit is not altered and the decree therein is therefore not appealable. 40 C. 537 : 21 I. C. 120.

——when a small cause suit is transferred to the original side an appeal lies from the decision thereof but not a second appeal as the nature of the suit is not changed 94 I. C. 77 : 1926 Mad. 622

——the decision of a munsiff on an application for execution of a decree of S. C. C. is appealable as not being a decree of a S. C. C udge 39 A. 357 : 38 I C 103 : 15 A. L. J. 305.

——appeal in case of succession by munsiff having no jurisdiction 44 A. 59.

(2) (A) Appeal—*contd.*

——when S C. C. decree is transferred for execution to an ordinary court the order made by him is appealable. 11 C W. N. 861 27 I. C. 10, 33 I. C 523. 31 A. 11 M 130, 12 I C 959, 32 I. C. 484 but not second appeal lies 25 C 872, 30 B 113, 12 A 579

——an order in execution of a decree of the S C C. is final but when it is transferred to the ordinary court the order is appealable. 34 C L. J 477.

——s 27 bars an appeal against the order in execution on the Sm Cause suit and a revision petition lies under s. 25 19 M L. T 146 : 1916 M. W. N 76 32 I. C 484.

——no appeal is allowed from an order in execution proceedings of S C. C. decree. 42 I C. 467 : 3 Pat L W. 146.

——although the H. C is very reluctant to interfere on pure questions of fact it must not be understood that the H. C has no such power 45 B 292, 1 Pat. L. T 199

——when a decree is being reversed in revision as illegal the H. C. has power to reverse it as regards those portions of the decree which is against parties who have not applied in revision 4 Pat. L T. 606 74 I. C. 938

——though with very great reluctance yet there are occasions when the H C interferes with the findings of Small Cause Court 1 Pat L. T. 199

——where a Small Cause Suit was instituted in a court having no power to try S. C. suits but the suit was eventually tried by a Judge who was invested with such power, an appeal lay to the Dt Judge. 25 Bom L R. 516 . 78 I. C 1020.

——an order under s 95 C. P C passed by S C C dismissing an interim attachment issued by itself is valid and such an order cannot be questioned in appeal. 26 I C 359

——a suit to receive *Katihari* regarding a tax for homestead paid by the followers of certain trades is a Small Cause suit and a second appeal therefore is barred under s. 102 C P. C. 1 Pat L W. 541 · 39 I. C. 979 1917 Pat 250

——s 102 C. P C does not bar a second appeal in the case of a suit for arrears of rent of a holding, such a suit not being within the cognizance of S C. C. 1917 Pat. 287 . 2 Pat L W 270 : 37 I. C 980, 23 M. 547 *Dist.*

——a decree in suit of the nature of a Small Cause, transferred to original jurisdiction, is appealable. 45 I. C 645 (c).

(B) Revision.

——under s. 23 the H. C. has wider powers of interference than under s. *115 C. P. C. 54 I. C. 436 : 20 P. L. R. 1920.*

(B) Revision—*contd.*

——the H C may treat an appeal as a *revision* under s 115 C P C, or s 25 S C C Act, when the appeal is not maintainable. 97 I C. 1025 1926 Rang 205 : 4 R 221

——a S C C judgment is open to revision if it (1) assumes facts (2) refuses to receive and consider pleas of the parties (3) does not decide meterial points of dispute 54 P. W. R. 1914 : 25 I. C 26 146 P L R, 1914

——the interference of the H, C under s. 25 is a matter of discretion 1916 M W N 79 · 34 I C. 6, 30 M. L. J. 492 and it does not interfere if substantial justice has been done by the lower Court. 1912 M W N 1227 · 17 I. C 748

——the H C will not interfere on a question of fact unless there is obvious injustice or obvious perversity in the decision upon a finding of fact 51 B 814 : 104 I C 294 : 1927 Bom 454, 21 B 239 considered 105 I. C 351 1927 Mad 960 : 39 M. L T. 331, 45 B. 292, 53 B 770 1928 Bom 504 30 Bom L. R. 1104.

——the S C C Judge must place on record enough materials to make it clear to the H C what the grounds really are on which his decision proceeds Otherwise the H C. will interfere in revision 41 I C 874 15 A L J. 680

——a Small C. C. being a Court subordinate to the Dt Court the Dt Judge is competent to make a reference of cases tried by that Court to the H C under Or XLVI r 7 C. P. C. 34 I C. 527 (C)

——where an award in a S C C suit is set aside the order is no capable of revision as no case, has been decided at that stage 86 I C 788 1925 All 393

——"decided" in s 25 does not mean decided on merits but simply means "disposed of" and a High Court's power of Revision is not restricted to cases where there is a decision on the merits. 16 M L. T 502 25 I C 643 27 M L. J. 494, 14 C. L. J. 118 *fol.* 13 C W N 403 *Diss*

——the H C. will not interfere in revision with a finding of fact, wilful negligence is a finding of fact 47 A. 136 : 85 I. C. 474.

Quaere

——whether a suit which has been allowed to be withdrawn with liberty to sue afresh is a case "decided" within s 25 The H C will interfere under s 107 of the Govt of India Act in case where leave has been given without adequate reasons. 2 Pat. L J. 655 · 43 I C 455

——where without any special reasons or notice to parties the court took up a fresh case after 5 P. M. and dismissed it for pltf's default, the H. C. could interfere 44 A 325 : 1922 A. 72.

——whether a notice was served upon the manager of a Railway Company is not a question of law but one of fact. 99 I. C. 622 ; 1927 All 215

——the H C. will not usually under s. 25 interfere in revision merely for correcting error of procedure where substantial justice has been done 11 I. C. 259 : 8 A. L. J. 929, 47 A. 136 . 85 I. C 474

(B) Revision—*contd.*

——no revision lies unless the finding is perverse or impossible 84 I C. 794 : 1923 All 172

——when a court dismisses a suit for failure to prove consideration of the bond in suit, when the deft. admits the claim but pleads for instalments, it is error of procedure and is subject to revision. 41 I. C. 393 (C)

——where a security bond was given and accepted by the court but not registered it was held that an *exparte* decree could not be set aside under s 17, if set aside, the order would be revised under s 25 26 C L J 315 : 42 I C. 751

——the H C. can revise the S C Court's order returning plaint if the S C Court has thereby refuesd to exercise jurisdiction vested in it by law 15 C. W N 666 14 C L. J. 118 : 10 I. C 8

——a decision which though wrong in law does substantial justice will not be interfered with in revision 93 P R 1911 : 11 I. C. 445 . 151 P W R. 1911.

——the H C will not ordinarily interfere merely because of a mistake in the application of a law. But it will do so where there has been a complete wrong done. 63 I C. 435 19 A L J 555, 29 I C 1008 13 A L J 563.

——in the absence of error of law the H. C will not interfere in revision under s 25 67 I C 851 (C)

——doubting a receipt is not error of law 32 I C 793 73 P. W R. 1916

——the omission to determine a material issue as to the genuineness of the mortgage, amounts to an error in law and the H C may interfere in revision 5 Pat L J 248 57 I C 653 1 Pat L T 225

——under s 25 the H C though averse to interfere on pure question of fact, yet has the power to interfere with a decision on a question of fact 22 Bom L R 1199 : 45 B 292 59 I C 267, 1 Pat L T 199

——a finding of fact based on extremely meagre evidence can be set aside in revision. 173 P L R 1914 24 I C. 683 , 70 P W R. 1924, 35 I C 754 38 M. L J 360.

——when a S C. C arrives at a finding entirely opposed to the evidence in the record, the decision will be set aside in revision on the ground of miscarriage of justice 42 I C 198 165 P. W. R 1917.

——a finding of suit should not be interfered with in revision simply on the ground that the court misdirected itself as to the burden of proof 35 I C 204 4 L W 611

——disallowing costs to a successful party without reasonable [illegible] . 1911 : 10 I C. 847 .

[illegible] revision 27 C L [illegible] jurisdiction is taken [illegible] 18 : 101 I C 688 : [illegible] the lower court the

(B) Revision—contd.

H. C. can interfere in revision. 3 Lah. L. J. 380, 101 I. C. 338 · 29 Bom. L. R. 273, 34 B. 171, 28 Bom. L. R. 540.

——the H. C. can interfere where the question of limitation arises. 20 A. L. J. 89 : 65 I. C. 107, 28 I. C. 969 · 13 A. L. J. 394, 20 I. C. 178, 19 I. C. 782 · 11 A. L. J. 295, 46 I. C. 804 · 20 O. C. 139.

——the powers of the H. C. in cases where review is refused by the lower court are much wider in case when the lower court exercises Small Cause jurisdiction. 140 P. W. R. 1911 : 11 I. C. 15 · 195 P. L. R. 1911.

——although Or. 47, r. 7 C. P. C. is not applicable to S. C. C. its provisions may well guide the H. C. in revising the order of the lower court granting a review. 53 I. C. 44.

(3) Attachment of moveable and immoveable properties.

——a Provincial S. C. Court has power to attach moveable before judgment. 31 C. L. J. 179, so also the immoveables. 43 I. C. 123, 20 C. W. N. 178n.

——a Small Cause Court cannot attach immoveable property in execution of its decree 28 C. W. N. 16, 31 A. 1, 23 I. C. 156 unless the decree is formally transferred 3 P. L. R. 1905, 8 B. 230, 31 A. 1, 11 M. 130. A S. C. C. can attach immoveable property before judgment. 70 I. C. 841 · 20 C. W. N. 178 n. 43 I. C. 123, 49 C. 994 : 1923 Cal. 176. so also the moveable. 31 C. L. J. 179.

——but the point has been set at rest by a Full Bench ruling which ennunciates that a Small Cause Court has jurisdiction *to order an attachment* (but not to make attachment) of any property including immoveable property before judgment and thus it practically *overrules* the contrary cases reported in 49 C. 994 and 28 C. W. N. 16. 40 C. L. J. 199 F. B.

——standing timber, trees, growing crops and huts being immoveable properties cannot be taken in execution of S. C. C. 5 A. 564 F. B., 11 M. 163, 9 I. C. 133. 10 W. R. 416, 17 W. R. 409 F. B. 20 W. R. 8, 9 I. C. 1.

(4) Deposit and security in case of review

——it is the option of the applicant either to deposit the money or to give security. 28 A. 470, 35 I. C. 625 but the security must be to the satisfaction of the court. 28 A. 470, 33 I. C. 133, 9 Bom. L. R. 883.

——the deposit or security must be furnished within the time prescribed for the application, otherwise the application for review or setting aside the *exparte* decree will be rejected. 32 C. 339, 28 A. 470, 29 P. R. 1894, 43 M. 579 F. B., 1 Bur. L. J. 75 *fol.* 13 M. 173 *not fol.* 38 I. C. 139.

——the words "the amount due from him under the decree" mean due under the decree at the date it was given and not as due under the decree at the time of presenting the application 57 I. C. 370 · 47 A. 523 · 23 A. L. J. 296

(4) Deposit and security in case of review—*contd*

——the provision is mandatory, so if a security-bond is subsequently found to be invalid the application should be rejected although the bond was at first accepted, 42 M 577, 1923 Mad 594 : 32 M. L. T. 316, 43 M. 579, 1923 Mad. 83 · 31 M L. T. 320, 1922 M. 330 : 15 L. W 186, 62 I. C. 108. (Pat) and the court has no power to extend the time. L. R. 3 A 327 : 1922 All. 265, 42 A 751, 1922 M. 320, 43 M. 579 F. B., 20 A. L. J. 209 1922 A. 29 : 65 I C 596 ; 20 A. L. J. 657 ; 1922 All 265, 24 C W. N. 380 : 31 C. L. J. 197 56 I. C. 551, 84 I. C. 538 · 1923 All. 319

——although the sec is mandatory it is sufficiently complied with if the deposit is made or the security is given before the time prescribed. 38 M. L J. 539 . 55 I. C. 977 · 1920 M. W. N. 375 F. B, 32 C 339 *fol.*

——the deposit may be made and security given within the period prescribed by Art. 164 L. Act, 50 A. 254, 1928 All. 111 : 108 I. C. 464 : 25 A. L. J. 1032

——where the deposit is made within 30 days but by *bonafide* mistake it falls deficit which is made good after 30 days the court has power under s 5, L. Act to excuse the delay 45 M. 628 42 M. L. J. 484 1922 M. W. N 266, 1922 Mad. 186

——filing of a draft of the security bond within 30 days but filing the bond after 30 days is not sufficient as the sec. is mandatory. 1922 Mad 330 : 15 L. W. 186.

——application for review of judgment without depositing the security in time is barred 24 C. W. N. 380 : 31 C. L J. 197 . 56 I. C 551, 26 C L. J. 315, 32 C 339, 43 M 579 F. B, 1 Pat L T. 23 56 I. C. 810 : 1920 Pat 203.

——if an exparte decree is set aside in the absence of deposit it is *ultra vires*. 1923 Mad 83 31 M. L. T. 320.

[illegible] deposit is made within [illegible], the challan, deposit is [illegible] extend the time under [illegible] amounted to deposit. [illegible] 220, 45 M 628, 37 A. [illegible] *ref.*

——furnishing invalid security within time but deposit in cash after time is not sufficient compliance under s. 17, 21 A L. J. 173, 71 I. C. 474 : 1923 A. 270 *contra.* it may be held to be substantial compliance. 47 A. 728 . 88 I. C. 581.

——after refusing to accept the security as being insufficient the court cannot extend the time of deposit 20 A L J. 657 ; 1922 All. 265.

——when time is granted by a court for the performance of any act till a certain date, it includes that date 39 M 583 : 18 M. L T. 199 ; 30 I. C. 544.

——when the deposit was tendered on the last date but the deposit was in fact made one day after there was substantial compliance with the provision of the law. 48 A. 342 : 1926 All. 602 . 24 A. L. J. 328 : 92 I. C. 522.

(4) Deposit and security in case of review—*contd.*

——where an exparte decree was incorrectly drawn up, held that the deft. in applying for re-hearing, had sufficiently complied with s. 17 proviso (1) when he deposited the sum which was in fact named in the decree 43 A. 438 : 62 I. C. 689 : 19 A. L. J. 245.

——*exparte* decree cannot be set aside if the deposit is short. No deposit is necessary when the plff. applies to set aside order of dismissal 33 I C. 133 (c)

——a miscellaneous application for the restoration of an application under Or 9 RR. 4 and 9 dismissed for default of the applicant is not covered by s. 17. 44 C. 950 : 21 C. W. N. 30 : 24 C L. J 446

——even a plaintiff applying for review of judgment must give security of cost. 54 P. R 1910. *contra*. below.

——the proviso to s. 17 does not apply to an order setting aside a dismissal for default and neither costs nor security therefor need be deposited The words 'in pursuance of the judgment' must be read distributively and applied to words "for a review of judgment" which precede 45 A. 569 : 21 A. L. J 522 : 1923 A 605 23 C L J 147 35 I C. 45.

——it is the duty of the court to enter correct figures in its decree and if a deft deposits the amount as stated therein he must be deemed to have complied with the law. 43 A. 438

——a strict compliance with the provisions of the proviso is necessary Where owing to mistake in calculation the compliance is only substantial the defect cannot be condoned. 33 I. C. 133 (C).

——the surety's liability can be enforced against him in execution proceedings 38 I C 90

——surety's liability extends to the whole of the decretal amount 38 I. C. 90 (P).

(5) Judgment of S C. C.

——reason for decision need not be stated. 31 B. 314 F. B. b[illegible] the judgment must specifically set out all the points for determination and the decision thereon. 6 I. C. 682, 12 I. C. 740, 40 I. C. 8[illegible] 6 M. L. J 50, 15 M. L J 233.

——judgment of the S. C. C. is not bad for not fully setting o[illegible] the reasons for finding 6 C L. J 527.

——judgment of S. C. C. must contain reasons for the decision [illegible] satisfy the H C. that the Judge did apply his mind to the matt[illegible] before him 59 I C. 906 : 12 L. W. 285 (M).

(6) Jurisdiction of S. C. C.

(A) General

——plff. cannot evade the jurisdiction of the S. C. C [illegible] designedly exaggerating his claim or by false allegation. 24 C. [illegible] 25 W. R. 76, 19 I C. 870, 21 B 248, 8 B. 31, 37 I. C. 665, 24 M 158.

——plaint may be amended to bring it within jurisdicti[illegible] 37 I. C. 665, 19 M. 329, 12 W. R. 367, 24 A. 457, 20 C. W. N. 1[illegible] 37 I. C. 665.

(6) (A) General—*contd*

——several causes of action may be joined in a single suit or separated in several suits by the plff to give jurisdiction to S. C. C. 100 P. R. 1915, 4 M. H C. 334, 5 M. H C. 287, 7 B. 134, 2 B. 570, and the plff. may abandon any part of the claim for the same purpose. 23 B. 266.

——s. 16 bars the jurisdiction of the Dt Court in cases of a nature cognizable by S. C. C. The S C. C. is itself the principal court of original jurisdiction with regard to matters cognizable only by such courts 2 P. L. J. 1 38 I. C. 745.

——a suit was filed in the H. C for a sum which was beyond the jurisdiction of the Presidency Small C C, but the decree was an amount which the S. C. C can award, held, s. 22 did not apply and the H. C. was competent to award costs. 28 C. W N. 6 : 51 C. 62. 1924 Cal. 405

——jurisdiction depends upon the original nature of the suit 24 A. 457 n., 20 B. 675, 33 I. C. 768, 24 P. R 1890, 40 C 537 and the relief prayed for, 37 B. 675 20 I. C 974 F. B, 40 I. C. 655, 31 I. C. 1001, 91 P. R 1886, 1888 W N 43 38 P R. 1882

——jurisdiction depends upon the allegations in the plaint and not upon the allegation of the deft. 97 I C. 129 · 1926 All 760 : 24 A. L J. 1017.

——objection to jurisdiction must be taken by any court at any stage whenever it is manifest that there is a defect of jurisdiction. 49 A. 686 . 101 I. C 524 . 25 A L. J 421.

——entire claim must be triable by the S. C C. 31 M. L. J. 839, 21 B. 121

[illegible] C is in existence a small [illegible] 58 P R 1897, 11 I C. 410, [illegible] arises in two districts the [illegible] *contra*, 13 I C. 244.

——the plff. cannot select the forum of jurisdiction by a state- [illegible] it as [illegible] hout [illegible] but [illegible] d as [illegible] 431,

——if a small cause suit is instituted in the court of a Munsiff not then vested with the powers of a small cause court it should be tried as a regular suit and not as a small cause even though after its institution the former Munsiff is replaced by another vested with small cause powers 49 I. C. 208 : 4 Pat L. J. 13

——where suit of a small cause nature is tried on the original side and confirmed on appeal, the H. C will not interfere and order a new trial as there was no prejudice to the deft. 66 I. C. 207 : 14 L W 349 (M)

——where a suit was instituted on the small cause side where a Munsiff had small cause jurisdictions but he was succeeded by a

(6) (A) General—*contd.*

Munsiff who had no such jurisdiction and who tried it as a regular suit, held that it was rightly tried. 64 I. C. 573 : 19 A. L. J. 833, 23 A. L. J. 327. 88 I. C. 661 1925 All. 569, in the last case the evidence was heard by the predecessor of the trying Judge

——the court to which a suit of small cause nature is transferred from a small cause court must under s. 24 (4) C. P. C. be deemed to be a court of small causes as regards that suit and its decision is therefore not appealable 40 A. 525 : 46 I. C. 893 : 16 A. L J 518

——a suit filed in a court invested with small cause court powers continues to be small cause suit though the officer of that court is transferred and is succeeded by another who has no small cause powers or be transferred to a court having no small cause power Therefore no appeal lies to the Dt. Judge from its decision 36 I C 317 · 14 A L J. 705, 13 A 325, 38 M. 25 *fol.*

——where the court has ruled that it has no jurisdiction over the suit, it has no power to act under s. 23. 1922 Mad 300: 15 L. W 35.

——a court subsequently invested with power cannot try S C. C suit. 20 A, L, J, 257 ; 66 I C. 816

——it is not necessary to invest the powers by reference to the name of the particular Judge. 30 Bom. L R. 741 : 111 I. C 911 : 1928 Bom. 265

——deft's plea does not affect jurisdiction 20 I. C. 278, 26 I. C 128, 5 Bom L, R. 398, 3 M. 192, 32 I. C. 998, 15 B. 400, 31 C. 1001, *contra*, 6 C L. J 218.

——no previous objection as to jurisdiction need be taken 5 I C 322, 4 I. C 493.

——order for injunction or interlocutory order cannot be passed by S. C C., 31 C. L. J. 179.

(B) Subheadings of suits relating to different matters.

(1) **Account, suit for money on,**
(2) **Act done by Govt. officer, suit relating to,**
(3) **Award, suit on,**
(4) **Barga crop, suit for,**
(5) **Cess and toll, suit for,**
(6) **Compensation or damages, suit for,**
(7) **Consideration money paid or unpaid, suit for the recovery of,**
(8) **Contribution, suit for,**
(9) **Counter claim and set off, trial of,**
(10) **Customary dues, suit for,**
(11) **Maintenance and annuity, suit for,**
(12) **Mesne profits, suit for,**
(13) **Misappropriated sum, suit for,**
(14) **Money due on acknowledgment, suit for,**
(15) **Mortgage of moveables, suit for,**
(16) **Moveable property, suit for, by heirs,**
(17) **Price of crops or trees, suit for,**
(18) **Refund of money, suit for,**

(B) Subheadings of suits relating to different matters—*contd*

(19) Rent, suit for,
(20) Share of money, suit for,
(21) Trust, suit relating to,

(B) (1) Account, suit for money on.

——suit to recover specific sum of money on examination of accounts if necessary, is a S C. C. suit. 27 C L J. 96, 21 C. W. N. 784 : 41 I. C 929

——the mere fact that accounts are taken in a suit does not make it a suit for accounts 57 I. C. 951.

——a suit in which accounting is involved is not necessarily a suit for accounts. 32 C W. N. 400 : 1928 Cal 424 107 I. C. 722

simply because accounts C. L J 96 21 C. W. N. W N. 47n., 48 I. C. 94 : 55 . 43 I. C. 755.

the plff it is necessary to take accounts the suit is one for accounts and the S. C. C has no jurisdiction to try it as it comes under Art 31 24 C L J. 187 10 I. C. 883

——a suit based on an agreement is not a suit for account and is triable by S. C C 64 I C. 327 (c). 21 C. W. N 784 *fol.*

——a suit for specific sum as a half-share of the profits of land in which no accounts are asked for is a suit of S C. nature. 52 I C 631 . 26 M L. T 245

——a suit for recovery of Rs 40 advanced by plff. to a partnership business and Rs. 9 being the profits thereon is cognizable by a S. C. C. not being one for the balance of partnership accounts 51 I C. 435 (C)

——a suit on a book entry after settling accounts of a dissolved partnership is cognisable by the S C C., 140 P. W R. 1911 11 I. C 15

——suit for recovery of money not precisely ascertainable unless the accounts are ascertained is cognizable by S C C as it is not a suit for accounts. 23 I C 424 12 A L. J 230

(B) (2) Act done by Govt. officer, suit relating to.

——Art. 3 is applicable to suits relating to some distinct act done by an officer of Govt and mere failure to carry out a contract cannot be regarded as such an act. A suit for recovery of the contract amount due from the Govt. for the repair of a tank by a contractor is a suit of small cause nature. The expression "an act purporting to be done" in s. 80 C P C. was not applicable to the failure to perform a contract. 37 M. 533 16 I. C. 400 : 12 M L. T. 299, 35 B 42 Expl 20 B 697, 17 C 290, 28 M 213 *Ref.*

(B) (3) Award, suit on,

22 C W. N. 66 : 27 (c). (33 C. 881, 13 s thereof is triable

(B) (3) Award, suits on—*contd.*

——a suit to enforce an award is not cognizable by S. C.
22 C. W N. 66 27 C L J 486

(B) (4) Barga crop, suit for.

——suit for bhag paddy and straw is maintainable in S. C.
28 C W N 848

——a suit for price of half the produce of crops against *bargadc* is maintainable in the S. C C; whether the deft. is a tenant depen upon the contract between the parties 40 C. L. J. 198, 14 C. W N. 629 *Ref*

——*bhagchasis, bargadars, bataidars, adhiars,* are not laboure or hired servants, they may or may not have interest in the land 21 C. W N. 505

——one cultivating as a labourer is not tenant and a su against him is not rent suit. 20 C. W. N. 1110, 23 C. W. N 61 50 I. C 285, 32 C L. J. 37, 14 C. W. N. 629.

——suit for damages is not rent suit. 19 C. W. N. 204n.

——suit for recovery of a share of the produce payable by *bargadar* 84 I. C. 685 : 1924 Cal. 1036.

(B) (5) Cess and toll, suit for.

——Art. 13 does not apply to a suit for local cess or village ces 36 M. 126 : 12 I. C. 171 : 10 M L T. 282 : 1912 M. W. N. 251.

——suit for recovery of land cess is of a small cause natu and no second appeal lies from a decree. 36 M. 18 : 1911 M W N 139 11 I C 760

——a suit to recover ferry toll is not cognizable by small caus court. 35 A. 156 . 18 I. C. 282

(B) (6) Compensation or damages, suit for

——suit for damages for breach of contract of marriage is triabl by S. C C. 38 M. 274

——a suit for the return of ornaments and cloth presented b custom by the prospective bridegroom at the time of betrothal is no a suit for compensation for breach of promise of marriage an therefore the S C C. has no jurisdiction. 1923 Bom. 393.

——a suit for damages for non-certifying payments is triable b S. C. C , 1923 Rang. 88 : 70 I. C. 115.

——a suit for damages for illegal attachment is excepted fro the cognizance of S C. C 11 A. L. J. 91 : 18 I. C. 695

——assault with a shoe is an injury to the person and suit fo damages is not cognizable by S. C. C. 36 B. 443 : 15 I. C 505

——where the suit was upon a *chit* executed by deft. and wa not one for damages either for theft of coal or for the conversion o the coal in any sense it was cognizable by the S. C C. 27 C. W. N 549 : 37 C L J. 399.

——a suit for damages for preventing irrigation is triable b S. C. C. 5 Lah. L. J. 91 : 69 I C. 283, 5 Lah. L. J. 92 : 69 I. C 330.

——a suit for value of paddy wrongfully and maliciously cu and taken by the deft. from the possession of plff. is not triable by S C C. 45 I. C. 15.

(B) (6) Compensation or damages, suits for—*contd.*

——a suit for wrongful destruction of a house and the removal of its materials is triable by S C. C. although question of title may incidentally arise. 2 Pat. L T. 739.

——a suit for damages for the illegal removal of goat's head by a shebait lies in S. C. C. though the title of the shebait is incidentally in issue. 14 C. L. J 118 ; 15 C. W. N. 666 : 10 I C. 8.

——a suit for damages against a Railway Company for failure to insure safe carriage of articles consigned for transit does not fall under Art. 34 and is cognizable by S. C. C. 86 I. C. 1046 ; 1926 Cal 100.

——a suit by lessees of *lac* produce, to recover value of *lac* illegally removed is cognizable by a S. C. C. 50 I. C. 629.

——a suit for damages for breach of covenant for title is not excluded from the cognizance of S. C C. 1922 Mad. 300 : 15 L W. 35.

a suit for damages for and allowing the fish s out an offence against

——suit involving a claim for damages for use and occupation does not fall under Art 31, 1926 Mad. 622 94 I. C. 77.

——a suit for the recovery of excess of decretal amount paid to the decree-holder under fraud and cheating is not a suit of small cause nature and a second appeal lies. 1928 Cal. 776

(B) (7) Consideration money, paid or unpaid, suit for the recovery of

——a suit by the vendor to recover ... se money paid after is fallen through, is 15 bars such trial,

——a suit by a mortgagee for recovery of part of the considera- 1923 Cal.

itances to sue in the S C. C. for damages for breach of contract. 43 C 59 : 19 C W. N 1332 : 21 C. L. J. 532 29 I. C. 621.

——suit for unpaid purchase money lies in the S C. C 19 C. W N. 1332 : 21 C. L J. 532, 55 I. C. 541 : 11 L. W 211, 10 I C. 267, 9 M. L T 372, 1924 L. 314.

——but where a vendor suing for recovery of the unpaid purchase money expresses his readiness to perform his part of the contract and execute a conveyance, the suit is one for specific performance and is not cognizable by S. C. C. 35 M L. J. 89 : 49 I. C 385 : 1918 M. W N. 896

(B) (8) Contribution, suit for.

——a suit by some several persons bound by a common liability who have discharged the joint obligation to compel their co-sharers to make good their shares falls within Art 41. 20 C. L. J. 200 : 19 C. W. N. 458 : 27 I C. 56.

(D) (8) Contribution, suit for—*contd.*

——where portions of mortgaged property were sold at various times to various persons including the plff. and the defts and the plff after the payment of the entire mortgage amount to save the property from sale sued the deft. for contribution without claiming any relief against any immoveable property, the suit did not fall within Art 41 or 42, 55 C. 1193 1928 Cal. 593 : 109 I. C. 247.

——where the plffs deny that they were liable to satisfy the judgment debt which they satisfied and which was recoverable only from the defts, a suit for recovery of money paid by them is not a "suit for contribution" and is therefore cognizable by S. C C 13 C. W. N 1308 . 20 C L. J. 196 : 16 C W. N. 1308.

——a suit for contribution by a co-sharer against another co-sharer whose name appears as recorded tenant though he has sold away his share in respect of money paid by the plff. towards a decree passed against the deft. as recorded tenant, comes under Art. 41 as the deft. fills a representative capacity in suit. 16 C. W. N. 975. 17 C L. J. 179 : 17 I. C. 90.

——where an *exparte* decree was obtained against the plff for rent of certain lands of which he was the registered tenant but in which he had an interest at the time of suit and the plff. paid off the decree and sued for contribution against the persons who had an interest in the land and the suit amount did not exceed Rs 500, the suit was not excluded by Art. 41 and second appeal lay. 14 I C 735 (C).

——a suit for contribution against co-jt-dr does not lie in the S C C 2 Lah L. J 387.

——the words "money due from a co-sharer" in Art. 41 mean money due from him as such When one of the makers of a promissory note sued the other for the share he had paid over in excess, the suit does not fall under Art. 41, 86 I C. 597 : 1925 Mad 970

——a suit for contribution under ss. 69 and 70 of the Contract Act is triable by S C. C. 3 Pat. L. T. 122 · 64 I C 226, 45 I C 236. 5 O L J 109 24 I C. 28 : 1 O. L. J. 244, 28 A. 392.

——a suit by one of the heirs of a deceased Mahamedan for recovery from the other heirs the share of deft. due by the deceased and paid off by the plff is cognizable by S. C. C 41 A 51 : 47 I C 842 16 A. L J. 787.

——when contribution suit lies in S C. C. 40 A. 135

——contribution suit by co-mortgagor does not lie in S C. C. 13 A L J 694 29 I C. 247.

——where a decree for maintenance is passed against three brothers and one of them is made to pay the whole amount and sues his brothers for contribution, the suit is maintainable in S C C 40 A 135 . 45 I C. 560 : 16 A. L J. 44, 30 M. 212 : 14 M. L. J 490, *Ref*

——a suit for contribution by one tort-feasor against joint tort-feasor is a suit of a S C. C nature. 62 I. C. 504 (C). So also a suit for contributions of damages and mesne profits and no second appeal lies 62 I. C. 651 (C).

(B) (8) Contribution, suit for—*contd.*

——suit for contribution against co-jt-drs is of small cause nature. 62 I. C 651 (C)

——a suit for contribution based on an implied contract for reimbursement in respect of a mortgage transaction was not one brought under any of the provisions of the T. P Act and Art. 42 was not applicable 50 A 428 : 1928 All 298 26 A L J 164

(B) (9) Counter claim and set off, trial of

——in a suit for small cause a counter claim of rent may be tried 1923 A 202.

——when the parties are adverse claimants of moveable property the suit is not cognizable by S C C, but where the deft only denies the plff's. title, it is so triable 19 C W N 614.

——no set-off can be allowed exceeding the pecuniary jurisdiction of the S. C C, Judge though within the jurisdiction of his ordinary power 14 B 371, 3 M H C 339 *contra* 12 B. 31

——in a suit for the price of goods sold and delivered the plff., in order to bring his claim within the period of limitation, credited the rent due from him to the deft, in respect of the latter's shop. The deft pleaded that the rent had been grossly under-estimated and that a much higher amount was due to him, held that the Court could try the whole suit and give a decree for the balance found due to the deft and that the claim of the deft was not barred by Art 31 83 I C 745 1923 All 202

(B) (10) Customary dues, suit for

——suit for customary dues is not triable by S C C 1923 A 378 ; 71 I C 432

——a claim to grazing rights under a village custom is a claim to an interest in immoveable property not to be dealt with in S C C and it admits of record appeal 34 I C 695 12 N L R 83.

——suit by zemindar for customary dues does not come under this Act 1923 A 378, but when the claim is based on contract it is triable by the S C C 1923 A 420 · 73 I C 217, 55 I C 950 . 18 A. L J. 561

——a suit to recover the price of skins of certain animals alleged to belong to the plff by custom is cognizable by S C. C, 10 I. C. 35 · 159 P L R 1911 · 174 P W. R 1911

——a suit for moveable property by the heir of the deceased is not triable by the S C C 70 I C. 316 (c).

(B) (11) Maintenance and annuity, suit for,

——suit for annuity is not triable by S. C C, 15 C. L J. 857

——a suit for the value of the paddy by the maintenance holder is cognizable by a S C C., such a suit does not fall under Art. 38, 38 M. 553 : 22 I C 39 : 1 L W 19

——suit for maintenance is not triable by S C C 40 A 52 : 42 I. C. 963 · 15 A L. J 857, 16 I. C 13 : 10 A. L J. 185, 53 I. C 665 : 37 M. L. J 402

(8) (11) Maintenance and annuity, suit for—contd.

——maintenance is a sum of money payable by a person under an obligation either by law or specific contract A suit by the guardian of the person of a minor against the guardian of the property to recover the money ordered by the Court is not for maintenance 32 I C. 547.

——where the suit was not by the maintenance-holder, i.e. the mother herself but her son with whom she used to live under the contract between the plff. and the deft. it was not a suit relating to maintenance within Art. 38, 27 I. C 824 : 2 L. W. 103, 20 M 29 . 14 M. L J. 480 *fol.* 26 M. 321, *Dist.*

(8) (12) Mesne profits, suit for

——suit for mesne profits is triable by S. C. C. 23 C 884 F. B

——a suit for mesne profits is not triable by S C. C 66 I C 368, 40 A 142 : 44 I C. 689 : 16 A L J. 55, 11 A. L J 233 : 19 I C 427

——suit for damages for use and occupation is triable by S C C 16 C W N 89, 1928 Cal 405 : 107 I C. 721.

——suit for damages or mesne profits after the order of redemption lies in S. C C 14 C. W. N 1001 : 12 C L. J. 620, 11 A L. J 233 19 I. C 427.

(13) Misappropriated sums or property, suit for,

——suit to recover a sum deposited to be paid to the plff's creditor but not paid, is a suit for sum misappropriated, so it is not triable by the S C. C 25 C W N. 258.

——suit for money misappropriated is not triable by S. C C 25 C. W N 256.

——on a suit for recovery of certain ornaments or their value it was not alleged that the defts had committed any criminal offence in respect of the ornaments but certain other persons were said to have misappropriated them and pledged them with the defts held that Art 35 (ii) and 43 were not applicable. 18 A. L J 334 : 58 I. C 663.

——a suit by a Union Board employee against the chairman for his pay and allowance which he alleged was being wrongly witheld by the latter is not taken out of the cognizance of small cause court, where the plaint does not contain any allegation of misappropriation on the part of the chairman. 86 I. C. 325 : 1925 Mad 942.

(8) (14) Money due on acknowledgment, suit for,

——a suit for recovery of money due on acknowledgment is not debarred from the cognizance of S C. C. 67 I. C. 851 (C).

(8) (15) Mortgage of moveables, suit for,

——a mortgage of fruits of trees is a mortgage of moveable property 11 M. L. J. 340, 343.

(B) (16) Moveable property, suit for,

——a suit for the recovery of specific moveable property falls within Art. 15 and is therefore exempted from cognizance of S. C. C. 61 I. C. 803.

——suit for recovering jewels &c. given for marriage arranged, which had fallen through, is not cognizable by S. C. C. 1925 All. 51.

——a suit for specific moveable property by an heir of a deceased is not cognizable by S C C. 1924 Cal. 536 *contra*. below.

tertain a suit by an heir to the deceased, the denial of the jurisdiction 19 C W.

——when jewels are presented to bride, a suit for the return of them does not fall within Art. 28., 37 M 538 : 23 M. L. J 282 : 1912 M. W N. 887.

(B) (17) Price of crops or trees, suit for,

——standing crops are immoveable property within Art. 6 14 A. 30, 9 I. C. 133 (C), 5 A. 564.

——suit for compensation for cutting and removal of crops is not cognizable by S C. C under Art 35 Cl. 2 Pr. S. C. C Act, 20 C W N 216n., 21 C. W N 108n, 21C W. N. 147n, 21 A L. J. 357 : 1923 A. 543. 45 I. C. 15 (C)

——standing trees are immoveable property for the purpose of S. C. C Act 9 I. C 133.

——where the tenant cuts some tree in breach of the terms of a kabulyat and thereby injures the landlord, commits theft and is liable for compensation 27 C. L J. 228, but it has been subsequently held that where a tenant in possession appropriates a tree it cannot be a fit subject of criminal case and so a suit for damage is cognizable by S. C. C, 23 C W. N 135n. 1923 All 428. 21 A. L J. 213.

——a suit by a landlord against a tenant for damages for cutting trees on his holding is not cognizable by S C. C. as the relief claimed depends upon the determination of the status of the tenant. 41 I. C. 494 (C), *contra*. 46 C. L. J 552 : 1928 Cal 153 : 106 I. C. 859

——a suit for recovery of the price of certain trees alleged to have been wrongfully cut and misappropriated by the defts. [illegible] C., 27 C. W. N 469 : 956, 73 I. C 33, 41 I. 41 I. C. 276.

[illegible] it and misappropriated [illegible] y criminal offence was [illegible] C. L. J. 190 : 37 I. C.

(8) (17) Price of crops or trees, suit for—*contd.*

——where the allegation made out an offence of theft and mis chief the suit was excluded from the jurisdiction of the court of small causes 97 I. C 129 - 1926 All. 760 . 24 A. L. J. 1017.

——when the allegation in the plaint discloses no allegation of crime Art 35 (ii) does not apply 49 A. 440 : 25 A. L. J. 287 100 I. C. 38 1927 All 288.

(8) (18) Refund of money, suit for.

——the suit for refund of money advanced as marriage pan 19 C W. N 28n. and suit for breach of contract of marriage comes under S C C. 38 M. 274.

——suit by execution purchaser against D. Hr. for refund of the purchase money is S C. suit. I C. W. N. 140, 8 Bom L. R. 369 But see 28 C. 235.

——suit to recover a sum of money from the deft. police officer on the ground that it was a bribe extorted by him from the plff is cognizable by S C C , 15 C. L. J. 219 : 9 I. C. 623.

(8) (19) Rent, suit for.

——the authorisation under cl 8 is entirely personal to the presiding Judge 19 C W. N 1236 : 22 C. L. J. 249 : 31 I. C 177.

——money payable in respect of a forest right is rent and a suit for its recovery is not cognizable by S. C C. 19 C W. N 415. 20 C L J 227: 26 I. C 380.

——plff. attached deft's rent due in execution of his decree against deft's landlord He then brought a suit for recovery of the money, held that the suit was not a suit for rent and the Small Cause Court has jurisdiction to try it 10 I. C. 569.

——there is no definition of the rent in the Small Cause Court Act It is therefore to be taken in the ordinary sense as including compensation paid to the owner of immoveable property for its use and occupation. A suit for the recovery of an amount agreed to be paid to the plff. by the defts. in consideration of their being allowed to catch fish in the village river is not cognizable by the S C C. 43 I. C. 962: 14 N. L. R. 35

——when *murtafa* rent is house rent it is cognizable by the S C C 1919 Pat 439 : 51 I C 961 but not when it is ground rent. 44 I C 887 : 4 Pat L. W. 218.

——a suit to recover ferry toll is not cognizable by S C C. 35 A 156 18 I C. 282 : 11 A. L. J. 133.

——a suit for rent of homestead land is excluded from the jurisdiction of the S C. C. 1925 Cal 423. 42 C. 638, *fol* 23 M. 547 F. B *Dist*

——rent suit other than that of houses are exempted 1922 Pat. 154 1922 P. 184.

——suit for rent other than house rent is not triable by S C C 42 C 638: 19 C. W. N. 1030. 20 C. L. J. 494. 27 I. C. 258, 20 A. L. J. 494 27 I C. 258.

(B) (19) Rent, suit for—*contd.*

——a suit for the rent of a portion of a demised land is a suit for apportionment of rent and is not cognizable by the S C. C. 41 M. 370 43 I C. 78.

——suit for assignee of rent is not S. C. C 27 C. 827 F. B.

——a suit for price of rent in kind is triable only by Revenue Court. 45, A, 7, 1923 All. 50 . 20 A. L J 771.

——where the plaint alleged that the defts.-tenants agreed to cultivate lands and afterwards did not raise crops and that the plff, were deprived of crops, the suit was for rent and was not cognizable by S. C. C. 16 C W. N 89 13 I C. 29.

——a suit for rent by any one partner in the tenancy against another partner in the tenancy is not a suit for rent under Art. 8 and is maintainable in S. C C , 40 A. 51: 45 I. C. 323.

——a suit for assessment and realisation of rent for the excess land is not to be cognizable by a Small Cause Court 91 I. C. 846: 1926 Cal. 541.

(B) (20) Share of money, suit for.

——a suit to recover a share of rent realised by a joint co-owner is a suit for money had and received and is triable by a S C C. 40 A 666 46 I C. 647. 16 A. L J. 979.

——suit for the share of money taken by deft is triable by the S. C C. where the deft. only disputes the shares. 37 B 700.

——a suit for the share of the income of Durbar Sahib as well as for a share of jaghir attached thereto is cognizable by the Court of Small Causes 9 I. C 579 54 P W. R 191, 93 P L R. 1911, (188 P. R. 1888, 81 P R. 1889, 84 P R 1892, 21 B. 218, 80 P. R 1898), *Const*

——a suit for participation in the income of an endowment though a part of the regular income, is cognizable by S C C 19 I C 628.

——suit to recover share of offerings of a shrine is cognizable by the S C C 11 I C 410 92 P. W. R. 1911

——a suit for payment of the dues accruing to the plff by reason of his hereditary office as purveyor of *ghee* to a temple for a fixed annual allowance, is not cognizable by the S C C. 30 I C 351 . 18 M. L. T. 163: 1915 M. W. N 640. similar case 1911 M. W. N. 589 13 I C 183

(B) (21) Trust, suit relating to.

——a suit by a trustee for the recovery of a specified amount agreed to be paid to him by the deft. for being used as a trust, is not a suit relating to trust within Art 18, 15 I C 273, 26 M 200, 26 M. L J. 146 *Ref*

——a suit to recover property entrusted by the owner to a gold-smith, for work to be done on it is not a suit relating to a trust within Art. 18 1923 Rang 129 : 4 U B. R 154.

(7) Mistake of jurisdiction.

——when S. C. C suit is tried as money suit by consent of parties neither party can object to the legality. 40 A. 666, 1 P. L. W. 232 . 37 I. C. 991.

(7) Mistake of jurisdiction—contd.

——a money suit should not be tried as S. C. C. suit, but when it is so tried no retrial is necessary. 19 C. W. N. 900.

(8) Procedure.

——when a small cause suit is tried by a munsiff in the original suit without returning the plaint to himself the irregularity is simply in form 64 I C 436.

and memoran- ld be made 15

le case, it may

mean a particular branch of a case. *above case.*

——where the judge decided the case on the statements of parties confronted in the witness box after the case was heard and judgmnet reserved, the procedure was held irregular and retrial was ordered 25 C W. N. 599.

——when one of two alternative reliefs sought in the S. C. C. is not cognizable by that court and is not also grantable *in law*, a direction to strike it out and thus amend the plaint would be the proper course of action. 20 C. W. N. 1920 : 37 I. C. 665.

(9) Question of title, if can be gone into.

——a S. C C. has power to return the plaint *for presenting to* the proper court when a question of title is raised even though it is alleged to be *res judicata*. 48 I. C. 612 (C).

——when question of title is involved instead of returning the plaint it may be transferred to the ordinary file 45 I. C. 645 (C)

——it is discretionary with the court to return the plaint 1883 W. N. 193, 17 B. 42, 43 P. R. 1902, 29 M. 329, 37 I. C 129, it can determine question of title, 12 I. C. 2, 10 I. C. 117.

——when the suit involves questions of title it may return the plaint 23 C. 557, 29 M. 329, 10 M. L. J. 313, 25 I. C 81, 28 C. 425, 10 I C 267, 37 I. C. 129. 23 I. C. 799, but a suit, of small cause nature cannot at the first instance be filed with *ordinary court*, 23 C 425, 10 M L J. 313.

——where the suit is in form one for the payment of a sum of money ... though the principal purpose ... oveable property. 37 B 673:

moveable property should be W. N. 966 : 14 C. L. J 118:

——although the decision of a S. C. C. on a question of title to land in a suit for damages for trespass thereon may not be conclusive the court is not precluded from trying and deciding that question in such suit 23 C. W N 647 : 52 I. C. 265 : 21 C. 244

——in a suit of small causes, the court can incidentally determine question of title to immoveable property. 16 C. W. N. 243, 37 B 675 F B , 2 Pat L. T. 730 : 61 I. C. 496 : 85 I. C. 1002 (C)

(9) Question of title, if can be gone into—*contd.*

——when in a small cause suit an intricate question of title to property arises and the plaint is returned for presentation to a civil court, the small cause nature of the suit is not altered. 87 I. C. 659 : 1925 All. 821, 85 I. C. 1002 (C).

——when question of title is not raised on the pleadings the court cannot return a plaint merely on the ground that some questions relating to value and profits of land may arise. 15 L W 35 : 1922 Mad 300

——when question of title is not raised on the pleadings the court cannot return a plaint merely on the ground that some questions relating to value and profits of land may arise. 15 L W 35 : 1922 Mad 300.

——suit by a person as preferential heir is not triable by S. C C. 70 I C. 316 (C).

(10) Resjudicata

——decision of title by S C. Court is not *resjudicata* 3 M. H. C. 101, 12 W R 290, 18 W. R. 104, 15 W. R. 166, 7 W. R. 73, 37 B. 675 F B, 9 B. 75, 25 B. 625.

——decision of a suit in an *ordinary* court may operate as *resjudicata* in a subsequent suit brought in a S. C Court, 27 M 63, 30 I. C 522, 28 B 338

(11) Return of plaint.

——when a S C. C. returns a plaint for presentation to proper court the latter cannot refuse to entertain it but can refer it to H. C, 21 C. W N 784 ; 27 C. L J 97, 18 C W N. 318, 13 C. W N. 19n.

——when a S C Court passes an order of return of plaint it is not open to the ordinary court to disregard the order. 27 I C. 751, 29 M 329, 18 I. C 325, 10 M. L J. 313, 18 C. W. N. 380

——when a S. C. C returns a plaint for presentation to a regular civil court the latter cannot refuse to entertain it. 18 C W N 380 18 I. C. 325.

——a S. C C. can return a plaint on the ground that the relief claimed involves a question of title. 25 I. C. 81 12 A L J 334, 48 I C 612 (C), 22 I C. 799 . 26 M. L. J 225.

——the proper course for a S C C, when it finds that a suit is not cognizable by it, is to return the plaint and not to dismiss the suit ; s 23 sets out a especial case and does not stand on the way of such return. 11 A L J. 238 19 I C 427

——when plaint is returned by one munsiff as involving a question of title it cannot be tried subsequently by another munsiff as small cause suit. 27 I. C 751 (C)

——when a court has ruled out that it has no jurisdiction over the suit, it has no power to act under s 23. 1922 Mad. 300 15 L. W. 35

——s. 23 (1) is designed to meet the cases in which a S. C. C. Judge is satisfied that the question of title raised is so intricate

(11) Return of plaint—*contd.*

that it should not be decided summarily but in a court in which evidence is recorded in full and the decision is open to appeal the matter is one of discretion. 20 C. W. N. 1080, 1 Pat L. J 465 : 37 I. C 129 3 Pat. L. W 55.

——the plaint should not be returned after evidence is heard 1 I C 288, 20 C W. N. 1080.

——the H C can revive a S C. Court's order returning plaint if the S C court has thereby refused to exercise jurisdiction vested in it by law. 15 C W. N 666 : 14 C. L. J 118 ; 10 I. C. 8.

——the H. C. can revive an order returning a plaint under s 23 60 I C 319 3 Lah L J. 335, 57 I. C. 602, but objection can be taken for the first time in revision. 60 I. C. 145 : 12 L W. 423

(12) Review.

——the proviso to s 17 does not apply to an order setting aside a dismissal for default. The words "in pursuance of the judgment" must be read distributively and applied to words "for a review of judgment" which precede. 45 A. 569 . 21 A. L. J. 523 : 1923 A. 605

——an application for an order to set aside an order of dismissal for default is not an application for an order to set aside a decree *exparte* and therefore the applicant need not make deposit as under s. 17 (1) Proviso , 23 C L J. 147 : 37 I. C. 45, 44 C. 950 : 21 C. W. N 30 . 24 C. L. J. 436.

——the period of limitation for an application to set aside an *exparte* decree is 30 days and this period cannot be extended on the ground that the applicant was *bonafide* prosecuting an application in wrong court 45 A. 332 , 21 A. L. J. 205 : 1923 A. 319

——setting aside of *exparte* decree without deposit or security is *ultra vires.* 31 M. L T. 320, 43 M. 579 **F. B.**, 69 I. C 178, 1923 Mad 83, 32 M L T 316 ; 72 I C 900 : 42 M. 577.

As regards deposit and security see "deposit and securities"

(13) Setting aside decree.

——a S C C. decree may be set aside by separate suit if it was obtained by perjured evidence and the claim was a false one 48 C 298 · 63 I. C 712.

(14) Transfer of file.

——transfer of case from S. C. C. file to rent file, is valid 22 C W. N. 48.

——where a Judge having both small cause and regular jurisdiction transferred a suit instituted as small cause on to the regular line, he rightly exercised the power under s 23 and he need not return the plaint as he himself had jurisdiction. 38 B. 190 . 21 I. C 832

——a small cause suit was tried by the munsiff on the regular side without an order returning the plaint to himself under s 23, held that though there was an irregularity in the form of the proceedings there was none in substance affecting his jurisdiction and an appeal lay against the decision. 64 I. C. 436 (C).

(14) Transfer of file—*contd.*

——where a suit was originally filed as a Small Cause Court suit by the plff and on the application of the deft. it was transferred to the regular list and became a regular suit until the record was closed and where without stating reasons in writing the Judge retransferred the case back to the Small Cause Court list, held that it had no power to do so. 27 Bom L. R. 246. 87 I. C. 820 : 1925 Bom. 246.

PUBLIC DEMANDS RECOVERY ACT (Bengal)

——the 'public demand' mentioned in s 4 of the Act, includes demand payable to the Collector by a person holding any interest in land when such demand is a condition of the use and enjoyment of the land 35 C L J 304 : 49 C. 1026 67 I. C. 375. 1922 Cal 101.

——s. 4 does not authorise the issue of more than one certificate with regard to a single demand broken into fragments. 35 C. L. J. 304 : 49 C 1026 67 I C. 375

——a certificate cannot be held to be invalid on the ground that the blank spaces in the certificate portion were not filled up before the certificate officer signed it 31 C W N 299 45 C. L. J. 73 : 100 I C. 997. 1927 Cal 315, 19 C W N 1159 *Dist*

——lithographic signature in the notice is sufficient and valid. 31 C. W. N. 299 45 C. L J 73 : 100 I C 997. 1927 Cal 315.

——a certificate which contains no entry in that part of it which is really the certificate in the prescribed form giving any of the particulars in the handwriting of the officer having jurisdiction to issue such a certificate, is invalid because the form under s. 4 should be strictly complied with 82 I C 1013 1925 Cal. 383

——when a demand has been made and complied with for a very long time it must be referred to some legal origin 50 C 208

——in a sale under P D R Act, only the right, title and interest of the Jt. Dr. pass 16 C W N 351 14 C L J 292 : 11 I. C. 465 13 C W N 750. 10 C L J 201, even if it be in execution of a decree against recorded tenant. 6 C. W N 302, 19 C 713. *Ref.* (10 C 996, 26 C 677) *Dist*, 36 C 753

——the amount due on account of cesses (such as roadcess under the P. D R Act) is only a personal debt. 36 C 783.

——a certificate cannot be issued for a claim for damages as it does not fall under s 7 A tenant cannot get refund of money recovered as damages for use and occupation for certain non-agricultural lands when he had notice of the increase in demand by the settlement officer 22 I C 626 (c)

——the deficiency made by purchaser in payment of price is to be certified to the Collector and not to the Court passing the decree if the sale is under the P. D. R Act. 1919 Pat. 210 : 50 I C. 59.

——the amount due on account of cesses (such as roadcess under the P. D R Act) is only a personal debt 36 C. 753.

——service of notice can be made by registered post 32 C. 691, 1 C. L J. 360.

——the mere entry in the order sheet of the certificate case that notice had been served is no proof that service was effected

Public Demands Recovery Act, (Bengal)—*contd.*

and a sale without such service is void. 19 C. W. N. 1159 : 31 I. C. 664.

——failure to serve notice under s. 37 Bengal Drainage Act *vitiates proceedings under this Act. 87 I. C. 399 (c)*

——want of notice under sec 19 of the Act vitiates the sale 36 C L J 208 : 72 I C 698 : 1923 Cal. 13, 34 C. 811 : 11 C. W N. 756 5 C L. J. 696 : 2 M. L. T. 371, F. B., 60 I. C. 759 (c).

——where amount, for which certificate was issued was deposi *ted two days later, the sale for the amount must be set aside* 13 C. W. N. 710.

——s 66 of the C. P. C. is applicable to the purchaser at a sale under this Act. 16 C. L. J. 412, 34 C. 787. *Fol.* 1 C. L J 550, *Expl*

——the mere fact that a greater sum than was *due*, is claimed does not make the certificate and notice bad 33 C. 84 . 10 C W N. 130 : 1 C L. J 538

——if at the time when the certificate is signed by the certificate officer no public demand is due from the certificate debtor the certificate is *ultra vires* and all the proceedings are *null and void.* 33 C W N 385 · 115 I C. 45 : 1928 Cal 808, 25 C. 833 P C. *Rel. on*

——*in serving notice the provision* of sec 81 must be strictly followed. 33 C 84 : 10 C. W. N. 130 : 1 C. L. J. 538, 5, C L J 555, *Fol* Onus is on auction-purchaser. 45 C. 496.

——s 47 C. P. C. applies to a sale, *33 C. 84* : 10 C. W. N. 130 . 1 C L J. 538, 5 C L J. 240 F B , *Rel.* 32 C 1130 : 1 C L J 542, *Dist.*, 34 C. 787 . 11 C. W. N. 745, *not Fol*, 25 C. 775 P. C , so also s 66, 16 C. L J. 412.

——in a suit to set aside a sale, the Secretary of State is a necessary party. 8 C. W. N. 657 ; 31 C 159, *limitation is 1 year,* 34 C. 811 . 11 C. W. N. 756 F. B and in case of *recovery of possession 12 years. 18 C. W. N. 766 :* 18 C. L. J 628 *But see* 13 C W N. 710.

——when the action of the Revenue authority is wholly no authorised s 37 does not oust jurisdiction of the *civil court* to make a declaration, issue an injunction and to grant other adequate *relief.* 35 C L J 304 ; 49 C. 1026 . 67 I. C 375 : 1922 Cal 101.

——suit in the civil court to set aside sale is maintainable when all the remedies under this Act are exhausted 33 C. W. N 535 *1929 Cal 469.*

——limitation in suits under s. 15 is six months *from the date of disposal of appeal* 51 I. C 832 (C)

——when one of the sharers is dead before the *service* of notice the sale is not wholly void. 1 Pat. 273, 1 Pat. L. R 196.

——s. 36 of Act II of 1913 *controls s. 3 (1)* ; sec. 37 of the Act III of 1913 is not retrospective. 36 C. L J. 208, 27 C W. N 356 · 70 I C. 869 1923 Cal. 428

——when an application was made to set aside a sale under s 23, a subsequent suit to have it declared that the sale is void on *the same ground is barred by s. 36 (b),* 30 C. W. N. 35.

Public Demands Recovery Act, (Bengal)—*contd.*

——in a suit to set aside a sale on the ground of irregularity by virtue of sec. 23 the alleged irregularities should be such as to cause substantial injury, and a suit to set aside a sale on the ground of fraud the suit is governed by s. 37 and not by s. 23. 31 C. W. N. 299 : 45 C. L. J. 73 : 1927 Cal. 315 : 100 I. C. 997.

——when in 1907 the Revenue authorities proceeded to sell the property in dispute for an imaginary arrears of Revenue the sale is a nullity and without jurisdiction and a suit for possession lay. 27 C. W. N. 386.

not treat the arrear under the certificate as an arrear of land revenue without notice to the party under s 5, 42 C 765 · 19 C W. N 507 29 I C. 290 P. C.

——duty of certificate officer defined. 19 C. W N. 1159 : 31 I C 664

——a certificate officer who has issued a warrant for the arrest of the Jt. Drs is not debarred from trying the rescuers of the Jt Drs *from custody 43 C. L J 234 . 93 I C. 1049 · 1926 Cal 605*

——a suit for setting aside a sale under P D R Act, should be valued for the purpose of jurisdiction and courtfees at the value of the whole property. 50 C 892

——sale held after the death of Jt. Dr is a nullity, 18 C W N 1266, 20 C L J 341, so also in case of certificate against wrong person 38 I C. 483, 1 P. L W. 319

——where a suit is instituted for having a sale under the Act declared null and void and not affecting the plff's. title, the deft must have proper service of the notice under sec. 10 as required by the law 45 C 496 46 I C 741

——where one of the sharers was dead prior to the serving of the notice, the sale is not wholly void. 69 I C 700, 1 Pat L R 196 : 1922 P 546

——the expression "and also in some conspicuous part of the lands" in sec 31 refers only to cases in which the service is effected by fixing a copy in some conspicuous place in the office of the certificate officer and not to cases in which the notice is served by fixing a copy in the outer door of the house in which the Jt Dr ordinarily dwells or carries on business 1 Pat. 273 : 69 I. C. 700 : 1922 Pat 545

RAILWAYS ACT (IX of 1890)

S. 3. (Definitions).

——"Railway" includes all stations, offices, warehouses, etc. constructed for the purpose or in connection with a Railway Company 116 P L. R. 1911 . 36 P. R 1911 : 9 I. C. 1011 . 102 P. W. R 1911

S. 41. (Bar of jurisdiction of ordinary courts in certain matters cognizable by Ry. Co.)—contd.

limitation imposed by the statute and it is not open to a civil court to consider the question whether such reservation is an undue or unreasonable preference to a particular class 23 Bom L R 809: 62 I. C 1004.

——ordinary courts cannot in view of the provisions of ss 26 to 41 of this Act consider whether there has been any undue or unreasonable preference within s. 42 21 I. C 499 : 7 S L. R 42

S. 42. (Duty of Railway administration to arrange for receiving and forwarding traffic without delay and partiality).

——the word "traffic" in s 42 (2) is not restricted to conveyance of animals and goods and the fixing of charges therefor. 45 M 215 · 42 M L J 21 · 1922 Mad 35

——this sec applies both to goods traffic as well as passenger traffic. 23 Bom L R 809 : 62 I. C. 1004

——a by-law or rule providing for special accommodation or for the special convenience of a particular individual or a particular section of individuals and for the general convenience of the travelling public is legal under s 47 The "preference forbidden by ss 42 and 43 refers to goods traffic and rates charged upon traders and does not apply to passengers 42 A 327 : 18 A L J. 254 . 55 I C 342, 45 M. 215 · 1922 M. W. N 34 : 30 M. L T 134 : 1922 Mad 35

——a person who enters a compartment reserved for the use of a particular class of passengers to which he does not belong and refuses to leave the compartment, is liable to be punished under s 109 of this Act 42 A. 327 . 18 A. L. J. 254 : 55 I. C. 342.

——it is lawful for a Railway Company to reserve a compartment for the use of Europeans and Anglo-Indians only How a compartment can be reserved discussed 45 M. 215 · 1922 M W. N 34 : 1922 Mad 35, 47 B 465 . 25 Bom. L. R 26 : 1923 Bom I, 51 C 168 28 C W. N 388 : 39 C. L. J. 107 : 81 I. C. 788

——a penal provision ought to be strictly construed 47 B 465 : 25 Bom L R. 26 : 1923 Bom. I.

——delivery of railway waggons to colliery—Allotment of excess waggons by a Ry. Co's servant—Injury to reputation of the Ry Co is an offence. 51 C 250.

S. 47. (General rules).

——the object of making rules under s 47 is to regulate the traffic, 45 M. 215 : 42 M. L. J. 21 : 1922 M. W. N. 34 : 1922 M 35 and to make their breach an offence punishable by the courts. *Same case*

——but the Railway Company cannot avoid or unduly restrict its liability under this Act, by framing its own rules for the purpose The rules inconsistent with the Act, are *ultra vires*. 1929 Pat. 296, 10 Pat. L. T. 235

S. 47. (General rules)—*contd*

——rules controlling or limiting statutory liability of railway under s. 72 of the Act is illegal 44 A. 218 : 1922 A. 9 : 20 A. L. J 31.

——the rules imposed on all Railways by Govt by a notification [illegible] Co, till they are [illegible]ovided by s 47. 15

[illegible] les framed under Railway Act, the guard of a train sends a message asking for assistance, it is the duty of the driver to ascertain the terms of the message His omission to do so would make him liable under s. 101 (C) of the Act, if it results in endangering the safety of any person 54 I C 988 : 21 C L J. 204

——tariff Rule No 464 (V) of N. W. Ry, is a rule passed under sec 47 (1) (f) and has the force of law. The rule is wide enough to include a loss due to the negligence of Railway or the servants. 17 I. C 37 : 6 S L. R. 103.

——a Rule by Railway Company that the interval between the time of issue of a return ticket and the midnight of the same day shall be counted as one day is neither unreasonable nor *ultra vires* and a specification of the day on the ticket itself is sufficient notice of the rule 25 I. C 801 : 8 S L R 14.

——a "delivery to be carried by Railway" means something more than a mere depositing of goods on the Railway premises, it means some sort of acceptance by Railway, a taking as well as giving. 39 B. 485 29 I. C. 545 17 Bom. L R. 496.

——a Ry. Co, has an inherent right to regulate its own traffic in its own way and the reservation of a compartment for a particular class of persons is not undue preference 51 C 168 1924 Cal. 687 · 28 C. W. N 383 · 39 C. L. J 107 : 81 I C. 788.

S. 53. (Lien for rates, terminals and other charges)

——s 53 does not apply where the plffs at the request of the Ry. Co wanted to remove the goods but were not allowed to do it. 47 A 549 : 23 A. L J 398 . 87 I C 579 1925 All 656

S. 54

——where the right of remeasurement, reweighment, reclassification and recalculation of the rates is reserved by the Railway Company in the Railway receipt it has the right to reclassify and recalculate the rates and charge an additional sum of money 1929 All. 848, 29 A 228 F. B. *Dist*

S. 55

——a notice under s 55 is not invalid merely because the sum claimable is not mentioned therein 97 I C 318 : 1926 Lah 651

S. 56. (Disposal of unclaimed things on Railway).

——a Railway company has by sec 55 power to detain goods consigned, for the recovery of some other amount than that due by the consignor on that consignment. 19 I. C. 370 : 11 A. L J. 335.

S. 56. (Disposal of unclaimed things on Railway)—*contd*

——a consignee has no right to demand that the goods shall be opened and inspected on the Railway premises before he can be called upon to take delivery There is no provision of law which obliges a Railway Company to make or allow to be made in its delivery register any note alleging that goods are in damaged condition 20 A L J 761. 44 A. 76, 1922 All 514, 11 A L J 771 *Ref.*

——there is no provision of law requiring a Railway official to make a note of the condition or weight of goods at the time of delivery or to re-weigh the goods. 29 Punj L R 344: 1923 Lah 166, 108 I C 177 10 Lah L J 1

——Art 62 of the L. Act, governs a suit to recover the surplus proceeds of sale held by the Railway Company under s 56 as the proceeds are received for plff's. use. 44 M. 823, 63 I C 742: 1921, M W N 422

S. 57. (Power of Railway administration to require indemnity on delivery of goods in certain cases).

——payment of freight alone does not put an end to the transit 14 B 57

——a station master is not competent to deliver goods unless the Railway receipt is produced but demurrage cannot be charged for the period taken in inquiry as to the identity of the person entitled to take delivery. 63 I C. 256 : 1 Pat. L T. 523

——a railway receipt is binding and operates as an estoppel against the Railway issuing it either as an instrument of title or otherwise. 3 Bom L R 260, *contra.* A railway receipt is not an instrument of title within the meaning of s 103 of the Contract Act 14 B 57.

——"an advance made specifically upon it" in sec. 103 Contract Act plainly requires that the pledge of a bill of lading, in order to defeat the right of stoppage in transit should be as a security for a new advance, and not as security for an pre-exiting debt 11 C 740.

——when demand for delivery is made by two sets of consignees the Railway Company may institute a suit as an interpleader entitling them to costs 18 B. 231.

S. 58 (Requisition for written accounts of description of goods)

——where the plff erroneously declared bags which contained sugarcandy as containing alum for which a lower freight was charged and the bags and their contents were destroyed by fire, he was held entitled to the value of alum only, while the deft company were held not entitled to charge freight as for sugarcandy 3 B 120

S. 59. (Dangerous or offensive goods)

——it is not the duty of a Railway administration to search every parcel which every passenger may carry with him, and where a plff, sues a railway for damages for injury caused to a passenger

S. 59. (dangerous or offensive goods)—*contd.*

through introduction of fireworks into a railway carriage, the onus is on the plff. to show that the parcels containing the fireworks suggested danger. 28 C 401 : 5 C. W. N 449, P. C., 26 C 465 *overruled*.

S. 63. (Maximum number of passengers for each compartment).

——to prevent any danger to the health and life of passengers s. 63 provides that the limit of passengers to occupy a compartment must be fixed and must be exhibited in some conspicuous place inside or outside the compartment on pains of penalty A corresponding obligation has been cast under s 109 of the Act, upon passengers to obviate entering a compartment which already contains the maximum number of passsengers exhibited therein. The provisions of the Act thefore confer a right upon the occupants of the compartment to resist the entry of passengers when the compartment had already contained the maximum number allowed under the rules 1 Pat. 260 · 3 Pat. L T 195 1922 Pat 63 : 1922 P 8.

S. 64 (Reservation of compartments for females).

——a "compartment" to be within the meaning of this sec [illegible] rriage separated from the other [illegible] the roof of a carriage, each [illegible] screened off from its adjoining

S 66 (Supply of tickets on payment of fares)

[illegible] o be conveyed by the [illegible] pay the usual fare is [illegible] as a passenger at a

——under s 29 a Railway Administration has the right to exclude from platform any person not having business on the Railway premises, such right is not repugnant to s 66 or 68. 1911 P. W R 102 : 1911 P L. R 116 : 36 P R 1911 9 I C 1011

——*quaere*, assuming that the demand of payment for a platform ticket is unlawful, whether a suit for the recovery of the amount paid lies 36 P R 1911 9 I. C 1011 1911 P W R 102

S. 68. Prohibition against travelling without pass or ticket)

——it is not a criminal offence to travel in a train without a pass or ticket when there is no intent to defraud the company, but a person so travelling is liable under s 113 to pay on demand an excess charge in the nature of a penalty. 44 C. 279 : 52 C. L. J. 610 : 40 I C. 295.

——if a person is allowed to enter a carriage without having a ticket, such permission, if it amounts at all to leave and license to the passenger to proceed without a ticket, can only operate as such until the train stops at the next station 1 B. 52

S. 69. (Exhibition and surrender of passes and tickets)

——season tickets must be produced as well as ordinary tickets 12 C 192

S. 70. (Return tickets available only between stations specified)

——a return ticket only entitles the passenger to travel to and from the stations named on the ticket 28 W. R 49.

S 72. (Measure of the general responsibility of a Railway administration as a carrier of animals and goods)

——property in the goods entrusted to a carrier remaining with the owner he is bound to take delivery of the goods even if they are damaged, he can claim compensation for that 27 Punj L R 590; 1926 Lab. 512 : 96 I. C 454, 27 Punj. L. R. 572 : 1926 Lah 575 - 96 I C 323 If the consignee does not take delivery of the goods which have not become valueless and the Railway sells them in auction the consigne is entitled only to the prices fetched at the auction sale minus any demurrage due to the company. 27 Punj L R. 572, 96 I C 323 1926 Lah 575, (42 A 655, 1922 All 514) *fol*

——a risk-note in form A is simply an indemnity bond by the sender for the Company. It cannot by itself affect the rights of the consignee who is entitled to receive the consigments as ordered by him and to claim compensation in the event of the consigment suffering loss or damage 29 I. C. 207 : 13 A. L. J. 417

——where certain goods are despatched by railway but there is no proof that they were despatched under a risk note in Form A, the Ry. Co, is liable in damages for the delay in the delivery of the goods at the proper time The liability of the Ry. Co, is under s 161 Contract Act 20 A. L J. 114 : 1922 A 63.

——it cannot be said that the consignor should have packed his goods in water-proof cloth when the goods are despatched under a stipulation in risk note form A. 1927 All. 514 . 101 I. C 698

——in a suit for compensation for loss of goods consigned under a Risk-note Form B, the Ry. Co, would not be liable if the plff fail to prove that the loss was due to the wilful nglect of the Ry. Co. or to theft by, or to the wilful neglect of its servants The cases will be guided by the special contract embodied in the Risk-note form B and not by ss 151, 152 and 161 of the Contract Act 22 C W N 622 - 44 I. C. 691 : 16 C W. N. 766 : 15 I. C. 56, 1925 Cal. 915 : 86 I C 558, 97 I C 452 : 1927 Pat 22, 1923 Pat. 285, 1925 Pat 190, 1926 Pat. 165.

——where goods were consigned under the special terms of Risk-note form B. and goods were lost by Railway servants while on strike held that although the liability of the company could not be limited by the special contract it could not be enhanced by agreement between the parties as it would be opposed to the general law. 32 C W. N 805 : 48 C. L. J. 37 - 1928 Cal. 491

——the expression "wilful neglect" means that the act is done deliberately and intentionally and not by accident or inadvertence The plff is to prove "wilful neglect." 47 C. L. J. 611 : 1928 Cal. 697 - 112

S. 72. (Measure of the general responsibility of a Railway administration as a carrier of animals and goods)—*contd.*

I. C. 197. 1928 Pat. 247 : 106 I. C. 529, 111 I C. 795, 111 I. C. 523 : 1928 Lab. 837.

——"wilful neglect" is not a concrete fact that can bo proved by d[illegible]

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—— where the goods are not delivered by the Railway Company at the place of destination the initial burden is on the company to prove the "loss" of the goods It is only after the campany prove the loss

Cal. 697

——the word "loss" as used in Risk-note Form B does not mean pecuniary or other loss suffered by the owner of goods through being wrongfully deprived of the possession, use or enjoyment [illegible] insit.

the

——the Railway Company must prove that they took such care as is laid down in s 151 of the Contract Act. Under s 76 of the Railway Act the burden is on the Railwav Company to account for the loss. 43 C. L. J 211 . 1926 Cal 983 . 93 I C 1021

——where the loss of the goods is admitted by the plff in the plaint and the neglect of the Railway Company is not proved by the plaintiff, the deft company can without the proof of loss in transit taken benefit of the exception under Risk-note B. 6 Pat 718 . 102 I. C 673 : 1927 Pat 234 F B.

——where the Railway Company is sued for compensation for non-delivery of goods and the plff does not admit the loss of goods [illegible] i on such proof [illegible] the part of the [illegible] note 1928 Cal [illegible] 1928 Pat. 95, 45 [illegible] ag. 223, 8 Lab. [illegible] 40) *Dist.* [illegible] proving "loss" it [illegible] lue to theft by

——the liability of a Railway Company is not that of a common carrier but that of a bailee as under ss 152 and 162 of the Contract Act. 32 C. W. N. 76, 46 C. L. J. 428.

S. 72. (Measure of the general responsibility of a Railway administration as a carrier of animals and goods)—*contd.*

——to claim exception from liability the Risk Notes must be ... 8 344. ... the first ... here was ... to claim exception from responsibility and when that is done the onus shifts to the consignor to prove that the loss was due to the wilful neglect of the Administration or their servants within the proviso, 4 P. 442, 1923 *Pat.* 285, 45 B. 1201 *Dist.* 66 *I. C.* 162 : 1925 All. 384, 33 C. W. N. 76, 46 C. L. J. 428, 1928 Lah. 166, 29 Punj. L. R. 344 : 109 I. C. 177.

——where the plff. who consigned goods under a Risk-note in form B brought a suit for non-delivery of the goods, the deft. Company could not escape liability by having recourse to the Risk-note unless they have pleaded loss or destruction in their written statement. Presumption will be in favour of the plff. 4 Pat. L. T 443 1924 P 25

——damage suffered by the consignor owing to delay during transit entitles him to sue the Company for damages. Risk note B does not protect the Company in such cases 45 A 534 : 1923 All. 8 21 A. L. J. 448, 45 A. 530 : 1924 All. 7 *Ref.* 20 A. L. J. 972, 1923 *All.* 426 *Dist. Contra.* 45 A. 380 : 1923 *All.* 426.

... short delivery of goods consigned ... not protect the Company ... absence of evidence of loss. ... see below.

——the agreement known as Risk-note form B is not contrary to public policy and absolves a Ry. Co., from all liability for short delivery of goods provided there is no loss of whole consignment or of one or more complete packages of consignment. 17 C. W. N. 529 · 18 I. C. 216.

——when portion of goods consigned under Risk Note form B is damaged by fire during transit the consignee cannot recover damages. 104 I. C. 773 : 1927 Bom. 465 : 29 Bom. L. R. 911

——where the plff. had signed the Risk-note B. and there was theft of goods in running train. burden of proof that the loss was due to theft by or to the wilful neglect of the company's servants etc. was on the plff. 25 Bom. L. R. 350 : 1923 B. 339.

——where there is a risk-note in Form B it protects the Company ... running train. It is open to the consignee ... occur in the running train ... the Company's servants ... L. T. 185 : 1923 P. 325.

——Form B is one form of ... contract. 19 N. L. R. 35 : 1923 Nag. 223.

——an agent can execute a Risk-note in form B on behalf of the sender and bind him thereby. 96 I. C. 236 : 1926 *Pat.* 335 : 5 Pat

S. 72. (Measure of the general responsibility of a Railway administration as a carrier of animals and goods—*contd*

221, 1928 Lab 899, 32 I. C 393 *Dist.* but signature by servant is not sufficient. 108 I C 177 . 1923 Lah. 166 · 29 Punj L. R 344

——where a Ry Co, carries goods covered by the risk-note in Form B otherwise than by the agreed route to suit its own convenience without giving any notice to the consignor, the Company's liability could not be shaken off by the Risk-note 46 B. 830 : 24 Bom. L. R. 316 ; 1922 Bom. 74, 8 Pat. L T. 651 . 1927 Pat. 354, 1928 Lab 899.

——owner's Risk note on Form B does not exempt Ry., when the goods were taken off the route indicated by the term of the note 47 A 234 1925 All 10 . 85 I C. 114

——the protection offered by the Risk-note extends to damages caused to the goods after they had been unloaded. 97 I. C. 318 : 1926 Lah 651, (30 C 257, 10 C 210, 1924 All. 605) *Fol.*

——a Railway Company is liable for the loss of goods consigned even though the Company has not granted receipt and even before the g ods are actually in transit 96 I C 293 50 B 284 : 28 Bom. L. R 718 1926 Bom 390

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——whe·e certain goods was stolen from a sealed wagon in a goods yard which was very large in extent and not accessible to the public at night time the Company was guilty of wilful neglect. 1927 All 348 100 I C 558.

——so long as it is established that the Risk-note, the Forwarding note and Railway receipt refer to the consignment in question [illegible] do not bear the same date.

nd robbery pointed out, and
glect" discussed. 48 C L J.

bery" in risk note form B is not the same thing as theft without implying any idea of force or fear 96 I C 1039 · 1926 All 369 ; 24 A L. J 825 F. B , 1297 Pat 9 · 97 I C 714

——the effect of risk notes A and B is to limit the ordinary liability of the Ry. Co., under ss 72 to 76. 3 Pat. L T 222 . 1922 Pat. 17.

——the intention of the Risk Note is to protect the Railway Company from loss of any kind caused by fire through accident or wilful neglect of the Company's servant. 98 I C 329 1926 Lah. 341 : 27 Punj. L R 507 . 7 Lah 319.

——Risk note form H — meaning of the word "loss" 33 C. W. N. 989 ; 50 C. L J. 24 ; 1929 Cal. 700

——where a consignor signs a risk note in form H. which frees the Company from all responsibility for any loss, the Company can-

S. 72 (Measure of the general responsibility of a Railway administration as a carrier of animals and goods)—*contd.*

13 I. C. 237, 39 I. C
not be held liable for compensation for loss.
130 : 39 A 418, 15 A. L. J 321

——when a risk note in form H is signed by the representative of the consignor and attested in his own name it is sufficient The attestation is not essential for the validity of the note. The word "fire" in the Risk note form H should not be construed *ejusdem generis* with the words "any other unforseen events or accidents." 50 B 284 96 I. C. 293 : 28 Bom. L. R. 718 : 1926 Bom 390, 52 B 169 47 C. L. J. 214 : 107 I. C. 124 : 9 Pat L. T. 171 : 28 A. L J 545 P C

——the effect of the new Risk Note H introduced in 1924 is that the Railway is liable for the non-delivery of the entire consignment but is protected from the liability of loss of part of a consignment 48 A 584 95 I C 450 · 1926 All 565 : 24 A. L. J. 697.

——the Railway Company cannot be expected to make an inquest as to the authority and the signature of the agent of the consignor 32 C W N. 53, 55 C. 142 : 47 C L. J. 32 : 1928 Cal 170

——a person suing for damages for loss of goods consigned under the risk note in the form H is required to show that the loss was due to the wilful neglect on the part of the Company. It is only after showing the wilful neglect on the part of the Company that the liability is thrown on the Company of proving that the loss was due to a theft in the running train. 23 Bom. L. R. 583 : 64 I C 39 A 418, 15 A L J 321, 41 C. 576 : 19 C. L. J. 142 : 19 C W. 95, 24 Bom L R 272, 1922 Bom 46, 43 M. L. J. 90. 1922 M W. 328, 31 M L T 470 1922 M 231, 1922 Pat. 919.

——if the article in respect of which a risk note in form X was given, was not one of the excepted articles, the mere giving of the risk note X would take away the liability of the Ry. Co, 45 A. 453. 1923 All 538 21 A L. J. 351.

——the signing of the name of the principal by the agent without signing his name as agent in a risk note is not "a going" and therefore the Company is not free from liability. Provisions of s 72 must be very scrupulously observed. 20 C. W. N. 685. 32 I C 393

——under sec 72 if a person who delivers the goods to the Company signs the risknote, the consignor is bound and he cannot impugn the authority to sign 1924 Pat. 315, 32 C W N 53

——signature by a carrier who did the carting and was employed as agent by both parties has been held to be sufficient. 21 M 172

——a risk note not signed by the consignor or on his behalf but filled in by the Ry clerk, cannot relieve the Ry. of its responsibility 35 I C 143

——it is sufficient if it is signed by the person who delivers the goods to the Ry 89 I C. 497 1925 All 675, 32 C. W. N. 53

——where goods consigned to Railway Company under the special terms of a risk note are lost and a suit is filed for damages, the plff. has to prove how the loss occurred. 75 I C. 250 ; 18 L W 322

S 72. (Measure of the general responsibility of a Railway administration as a carrier of animals and goods)—*contd.*

——s 72 requires that an agreement limiting the responsibility of the Ry. Co., shall be in writing. To sign a blank paper on which an agreement is afterwards written is not the same thing as executing an agreement in writing 81 I. C, 1 · 46 A. 649, 1924 All 692.

——where goods were carried at owner's risk note over part of the journey and at the ordinary rate over the rest and were destroyed during the latter part of the journey, the Ry. Co., are in the position of bailees and have to prove affirmatively that they took the same decree of care as a prudent man would take over his own property 1924 All. 254 : 22 A L. J 1

——where a certain quantity of wheat flour was despatched by railway under the term of a risk note which held the Ry Co, liable only in case of loss of one or more packages forming part of the consignment and owing to a mistake on the part of the Railway the bags were sent to a wrong station and during the course of the transit the goods deteriorated, held that the consignor had no cause of action against the Railway 20 A L J 973 · 1923 All. 122.

——in a suit for damages for goods consigned to a Railway under Risk-note Form B, naturally the burden of proof lies on the pltfs. consignor to show wilful neglect or theft apart from mere loss of goods Wilful neglect is mostly to be inferred from the circumstances. Where the sealed wagon which contained the goods was kept at a jungle side railway yard for 2 days without taking any care the loss was held to be due to wilful default 46 A 125 21 A. L. J. 896 : 1924 All 177

——when the guard did not stop the train when he observed that a quantity of parcels of goods were falling or being ejected from some wagons there was wilful neglect of duty on his part so as to render the Company liable for the losses. 1927 Pat 9 · 97 I. C. 714 : 1926 P. H. C C 305

——where the wagon containing the goods while passing through a station was not stopped though it was found that the seal was broken on one side, this was no evidence of loss being due to wilful neglect without proof that the goods were still in the wagon after the seal was found to be broken 97 I. C 452 : 1927 Pat 22.

——frequency of thefts and the step or absence of steps to prevent them are matters of consideration. 96 I. C. 1046 : 1926 All. 394 : 24 A. L J 825.

——where there is an original contract to carry goods according to the maund rate the Ry Co. is not authorised to alter that [illegible] such contract the Company can [illegible] n recover the balance. 1924 All,

[illegible] carried" within sec 72 as soon [illegible] shed of the Railway Station and [illegible] .he Railway Company in as much

S. 72. (Measure of the general responsibility of a Railwa administration as a carrier of animals and goods)—contd.

as they do not do their duty in taking all measures for the protection of goods shed when the risk of fire is imminent or has actually occurred 51 I C. 309 ; 21 Bom L. R 406.

——grant of receipt by Railway is not essential to complete delivery, any rule to that effect is *ultra vires*. 44 A. 218, 1922 All. 9

——when delivery of goods was made to company's servant without Ry receipt, the company was held liable for the loss by Ry Act. 44 A. 218 · 1922 All 9 . 20 A. L. J. 31.

——the position of a Railway Company carrying goods for another is that of a bailee and it is bound to carry the goods under ordinary circumstances within reasonable time. 43 A. 623 : 64 I C 868 19 A L J 654

——where the station master never definitely directed the pltf to remove the goods and told the pltf. that the goods were being kept in the railway premises at his own risk and also never definitely accepted the goods at railway risk, held his conduct retaining the goods in the railway shed affords evidence that he accepted the bailment of the goods on behalf of the Ry. Co and Ry. Co was responsible for their custody. 1923, A. 71.

——a consignee of goods cannot make the carriers responsible for any loss if he for his own convenience or by his own laches allows them to remain with them for an unreasonable time after the goods have arrived at their destination and the carriers are ready to deliver them. 42 A. 655 ; 18 A. L. J. 764 : 58 I. C 1000.

——though fire was not due to the negligence of the Company the Company did not take proper precautions to extinguish it, held that pltf. was entitled to the value of the bales at the same rate at which the rescued bales were sold. 37 B. 1 : 14 I. C 793 · 14 Bom L. R. 165

——where the goods consigned at Railway risk are destroyed by fire the Railway Company is absolved from liability on proving that it had done everything that a reasonable and prudent man could have done to save his own property, the Railway Company need not prove the origin of fire or show that it was free from any negligence in the matter 49 A, 884: 1927 All. 774: 102 I C. 433 · 25 A. L J. 730

——in case of loss of goods consigned through a Ry Co'. with a contract providing that the Company would be liable for any loss only if it was due to wilful negligence or theft on the part of the Company's servants, the burden of proving that the loss was due to such causes making the Company liable for it, is on the pltf 16 C W. N 766 : 15 I C. 56

——a Ry. Co, is responsible for the loss or destruction of goods delivered for carriage in the same measure as a bailee The Railway is not in the position of an insurer or common carrier Where goods are not delivered to the consignee at the place of destination the onus lies upon the Railway to prove circumstances exempting it from liability for negligence. 21 C. W. N. 1125 : 43 I. C 265, 1925 Cal. 737 : 85 I. C. 796.

S. 72 (Measure of the general responsibility of a Railway administration as a carrier of animals and goods)—*contd.*

——the liability of a Railway Company for loss of goods is the same as that of a bailee. A plff. suing Ry. Co. for damages for non-delivery of goods consigned to it for carriage need not prove how the loss occurred 25 C L J 37: 38 I C. 702.

——where the case of the loss of goods was the sinking of the flat by carrying the goods, by a cyclone, it was an act of God and not the negligence of the Company. 25 C L J 37: 38 I. C. 702.

——where some of the tins of ghee consigned being lost the owner agreed to take the benefit of reduced frieght under s 72 in lieu of the loss, held that the Company was discharged from the onus *if any, that lay on them and they were not responsible for the* loss. 17 C W N. 635n 19 I. C 242

——Railways in India are common carriers and a Ry Co, has not the liabilities of an insurer but only those of a bailee under ss 151, 152 rnd 161 of the Contract Act It is open to a Ry Co, to limit its liability under a special contract in respect of the minimum care which the Contract Act imposes on bailees. 28 M. L. T 49. 33 M L J. 360 1920 M. W N 198 55 I C 754, 40 C. 716, 18 C. 620 *fol* 32 M. 95 25 M L J 162 *Ref*

——the ordinary law as to the performance of contracts to be found in ss 151 and 162 of the Contract Act applies where the Railway makes a special contract contrary to risk note. 1 Pat L. R. 336 : 1924 Pat. 39.

——under ss. 72 and 80, loss of goods includes loss suffered by the consignor or the owner whether such loss occured by reason of misdelivery or non-delivery 2 Pat 442 1923 Pat 285 4 Pat. L. T. 173, (41 M. 871, 43 M 617, 43 B 386) *fol*

——where a carrier receives goods under a contract of carriage he cannot shake off his statutary liability under s 151 Contrat Act by *pleading pressure of work or avoidable accident. 1925 Cal.* 737 : 85 I C 786.

——the Ry Co, cannot deny the title of the consignor to the goods 47 A 549 87 I. C 579 1925 All 656

——generally speaking a refusal to deliver goods amounts to a conversion though qualified, reasonable, and justifiable refusal do not. 1928 Lah 804, 8 Lah 535, 47 A 549 *Rel*

——title of the consignor can be conveyed to another person by an endorsement on the Ry receipt, such endorsee can maintain a suit for damages against the Ry Co., 46 A 691 22 A. L. J. 663 · *1924 A. 574 38 B, 659 Dist.*

——a stop for a few minutes at a signal station does not mean that the train ceased to be a running train. 47 A. 136. 65 I. C. 474 1925 All 273

——the liability arises under s 72 which specially excludes the operation of the common law as to carriers and the Carriers Act of 1865 to such cases of loss of goods. 13 C. W. N 847.

S. 72. (Measure of the general responsibility of a Railway administration as a carrier of animals and goods—contd

——the words "that responsibility" in sub-sec. (2) refer responsibility for the "loss, destruction or deterioration" mentioned in sub-sec. (1) 21 M. 172

——the word "shawls" in the Ry. Act is used in a special and restricted sense as meaning a costly woollen fabric and does not cover articles of cheap manufacture at home or abroad 24 Bom L R 416 . 1922 B. 416 But see 39 C. 1029 : 14 I. C. 726.

——the word "package" in risk note means both that which is packed and that in which it is packed *i e*, its covering or receptacle 31 C W. N 815 : 40 I. C. 626, 41 C. 576, 4 Pat. L T 392 1923 Pat. 487

——consignee alone can sue for damages for loss of the goods consigned. 1924 M. 517.

——irrespective of the decisions under s 76 of this Act, where loss has been established, it lies on the bailee under s. 151 Contract Act to show that he took the care required by the sec. 2 M 524

——Railway Administration are liable only in case they have been guilty of negligence. 18 C. 427 F. B.

——degree of care necessary on the part of the Company discussed. 26 C 398. P. C., 22 A. 361, 17 B. 723.

——where the Co. failed to account for loss of a large amount of coal entrusted to them they were held liable 22 M. 524.

——a sale contrary to the rules is a nullity and the consignee is entitled to damages 15 C. L. J. 211 . 16 C. W. N 356 : I. C 509

S. 73. (Provisions with respect to liability of the Ry. as a carrier of animals).

——on the death of a certain bird due to the negligence of the Ry Co. it is liable to pay compensation at the rates specified in s 7 if the consignor does not declare the value 38 I. C 143

——when the Ry. Co is liable for cruelty to animals practised by its servants. 26 B. 609 : 4 Bom. L. R. 290.

S. 74. (Provision with respect to the liability of Ry. as carrier of luggage.)

——it is the duty of a Ry. Co. with regard to the luggage of a passenger not under his control, when it has reached its destination to have it ready for delivery upon the platform at the usual place of delivery, until the owner, on the exercise of due diligence, can receive it, and the liability of the Co does not close until a reasonable time has been allowed to owner to do so. 36 W. R. 457

——if a passenger leaves his luggage with a porter, saying he will send for it and walks home, the Ry. Co. is not liable as the transaction amounts to a re-delivery to the party as agent for the passenger 32 W. R. 662.

S. 75. (Provision with respect to liability of Ry. Co, as a carrier of article of special value)

——to avoid liability the Ry. Co. must establish, first, that the articles composing the consignment were articles mentioned in the second Schedule to the Act, and secondly. that the total value of the consignment exceeded Rs 100. 42 A 76 53 I. C. 644: 17 A. L. J. 1031

——there is no Indian authority for the proposition that s 75 does not protect the Ry Company where articles are abstracted b

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Co, liable for the loss Only the signing of a risk note does not bind the Co. The section embraces the cases of thefts of goods. 34 A. 656; 10 A L J 297: 16 I. C 369

——where the contents and their weights were declared but not the value there was no declaration of value within s 75. 24 A. L J 728; 1926 All 552: 96 I C. 193.

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destruction or damage unless the consignor caused its value and contents to be declared 37 A 463 13 A. L J. 658 30 I C. 400

——s. 75 affords protection not only to articles which ought to be insured, but to all articles contained in the package in which the articles protected were placed. 34 A 422 9 A L. J 492. 14 I. C 803, 33 B. 703 *fol.*

——s 75 does not apply when the value of the package does not exceed Rs 100 23 M. L J. 511 17 I C 419.

——s. 75 applies to articles of special value declared by the legislature in the schedule. They must therefore be articles free

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The damages recoverable

property lost and nothing

would be defeated if the consignor could claim consequential damages for the loss of an expected article without insuring it on the ground that its value was over Rs. 100. The word "value" in s 75 does not necessarily mean 'market value". 43 B. 386: 49 I. C. 396: 21 Bom. L. R. 6.

——where a parcel consigned to a Railway Company contains silk with other materials of the value of Rs. 100, the Ry. Co., are not responsible for the loss and for anything contained in it if the parcels [illegible] 19 C W. N 1034:

include the plural.

S. 75. (Provision with respect to liability of Ry. Co. as carrier of article of special value)—*contd.*

——the more careful the Railway arrangement may be the stronger is the inference of misconduct. 26 A. L J. 446 : 1925 All 230.

——where a parcel clerk asked what a box contained and was told that it contained coin and he learned casually that the amount was Rs 6000, it was held by the court of appeal that there was not sufficient declaration under the Act of 1879 of the value and contents of the box 19 B 165, 17 B 723 *overruled*

——if after declaration made by the sender of an excepted article, entitling the Railway Company to receive an increased charge the goods are carried at an ordinary rate, the sender would be entitled to recover in case of loss 19 C. 538

——the term "shwal" in item (m) Sch II refers to valuable Indian Shawls such as alwans. 39 C. 1029: 14 I. C. 726

——s. 75 applies to all articles specified in Sch. II whether they are of any special or exceptional value or not. "Shwals" in Cl (m) of Sch. II should not be interpreted in a restricted sense by reference to the use of the phrase "article of special value" in the marginal note of s 75. 1921 M. W N. 852: 65 I. C. 93: 41 M. L. J. 613 But see 1922 Bom, 416.

——medicine containing gold oxide or sulphite of silver and prepared for professional purposes was held not to come under Cl (a) of Sch II of the Act 1925 Cal. 115 : 84 I C 239

——where gold and silver were used in their metallic form in making certain pills used as medicine it cannot be said that they were "gold and silver coined or uncoined, manufactured or unmanufactured" within s 75. 51 I C. 929 : 1925 Cal. 115

S. 76. (Burden of proof in suits in respect of loss of animals or goods).

——where in a suit for compensation for non-delivery of goods consigned under risk note in Form B the Co admits that the goods were lost it cannot escape the liability but must prove how the goods were lost, by leading evidence. 45 B. 1201 : 63 I. C. 241 23 Bom. L R 525.

——the burden of proof as to when the goods were lost is on the Ry Co, 23 M. L. J. 511 : 17 I. C. 419, 43 C L. J. 211 : 93 I C. 1071 1926 Cal 983

——pltf is only to prove the loss, the Ry. may then either show that the loss occurred in circumstances which exempted a bailee from the responsibility for the loss or they may rely upon a special contract which exempts them from liability. 48 I. C 294 : 14 N L. R 122, 1925 Cal. 306 78 I. C. 449

——the Ry Co, cannot plead in defence the risk note as freeing it from all responsibilities when the loss of the property in question is due to the wilful neglect of the Ry. Administration or theft or neglect of its servants 3 P. L. T 215: 1922 Pat. 145 1922 Pat. 106

——s 76 of the Ry Act does not apply to contracts limiting the liability of the Ry. Co, under s. 72. 1925 Cal. 306: 78 I. C. 449.

S. 76. (Burden of proof in suits in respect of loss of animals or goods)—*contd.*

——in a suit for damages for nondelivery of goods consigned under risk note B where the plff. admits the loss the onus is on him to prove that the loss is due to the neglect of the Ry Administration etc Where loss is not admitted the Ry. Co, is to prove the same 80 I. C. 426 · 1925 Cal. 299.

——the word "deterioration" must be taken in its ordinary sense. When parcel is impaired in value by the abstraction of articles there is deterioration of the parcel 96 I C. 605 : 1926 Pat. 384 · 5 Pat 465

——the word "deterioration" does not include the fall in the market value of the goods due to the delay in delivery. 1929 All. 597 : 27 A L J 859, (21 M. 172 223 P L R. 1912), not fol. 1925 Lah. 255 Ref

S 77 Notification of claims to refunds of overcharges and to compensation for losses)

——in a suit for possession or compensation on account of non-delivery of the goods consigned to the Co s 77 has no application and the Company is not entitled to any notice in case of non-delivery. 3 Pat L T 215 1922 Pat. 145 1922 P 106 . 12 C 477 , 1929 Pat 109 . 115 I C 893 10 Pat L T 88, 7 Pat 192 1928 Pat 270 107 I C 540, 8 Pat L T 767 103 I C 383 1927 Pat. 335, 8 Lah 555 · 1927 Lah 471 103 I C 149, *contra*, the word "loss" used in s 77 is wide enough to include non-delivery 1923 Cal. 397, 6 Pat L. T 565 · 90 I C 374 1925 Pat 727, 47 A 136 85 I C 474 1925 All. 273, 97 I C. 474 1926 All 698 25 A. L J 89 49 A 236

——notice of claim against a State Railway under s 77 of the Act is effective if served on Govt 44 C 16 23 C. L J 547 34 I C 130

——notice on Secretary of State in case of State Railway 109 I. C. 406 1928 Mad 599 1928 M W. N. 218, 30 Bom L R 970.

——under the law enacted by s 77 read with s 3 sub-sec (6) an Agent of a Railway is not viewed as an agent but as principal, consequently the maxim *delegatus non-protest delegate i e*, a delegation by delegate cannot be invoked for the purpose of preventing the principal himself from delegating his power 7 Lah. 238 1926 Lah. 253 95 I. C 808 27 Punj L R 356 F B

——notice of claim in respect of goods delivered in a damaged [illegible], and not on the [illegible] 19 I C 673, 44 A [illegible] 36 M 65, 31 B. 534,

——notice served on the Goods Superintendent which never reached the Agent is bad, and a promise by the Goods Supdt to pay a liquidated sum without the knowledge of the Agent is not binding on the Co, 19 C W. N. 62 · 21 I C 970

——the Agent of the Eastern Bengal Ry. is the manager within the meaning of the Act and the notice under s. 77 must be given to

S 77. (Notification of claims to refunds of overcharges an to compensation for losses)—contd.

the Agent and not to the Traffic Manager. 21 C. W. N. 751: I. C. 844.

——a notice served on the claims Supdt of the Co. who genera settles such claims is not sufficient notice under s 140 unless it proved that he was authorised by the agent to receive such notic 20 C W N 696 38 I C. 502 45 A 355: 21 A. L. J. 223. 19... A. 301

——when the assignment of power to settle claims is proved a notice to the General Traffic Manager is sufficient. 3 Pat L. T 215: 1922 Pat 145 1922 Pat 106, 13 I. C. 297.

——a notice to the Traffic Manager is sufficient 96 I C 141. 1926 Lah 572, 1926 Lah. 253, *fol*

——a notice to the Traffic Manager is sufficient 13 I. C 297, *contra*, 44 A 645 20 A. L. J 664; 1922 A. 280

——notice shall be given in writing to the Agent of Ry Co in India and notice to a subordinate of the Agent is not sufficient 1923 Lah 84 4 Lah 46; 5 L. L. J. 3, 112 I. C. 616 - 10 Pat. L T 24

——a notice served on any officer other than the Agent is sufficient if it is shown that the Agent had knowledge of the claim 10 M. L T. 382 21 M. L. J. 1061; 12 I. C. 169, 14 L. W. 685 F B

——where the suit was against two Railway Companies by whom the goods were lost and notice was duly served on one company but the other company took notices of the pltf's claim and repudiated their liability, no separate notice was necessary. 1923 Lah 438 110 I C 718, (1926 Lah. 253, 1922 Mad 362 F. B 26 B 669) *Dist*

——in every case notice must be given in strict accordance with the sec A letter addressed to the Manager or the Agent in the alternative unless it is proved that the Agent actually receives such letters as a matter of course, is not valid notice. 19 N L. R. 139 1923 Nag 314

——notice of claim against a State Railway is effective if served on the Govt. 44 C. 16 23 C. L. J. 547: 34 I. C. 130.

——in respect of different consignments made on various dates which were all lost in transit, it is open to the consignor to issue one notice in respect of all the claims. But in such case he cannot maintain separate suits. 78 I C. 415; 1925 Pat. 175; 1924 P. 596

——notice must be proved. The fact that an offer was made by the Ry. Co. to pay a certain amount in satisfaction of the pltf's claim would not stop the Co. from raising the plea of notice 33 A. 544 8 A L. J 543; 10 I. C. 122.

——where the notice is not duly served under s 77 the suit against the Co, must fail. 16 C. W. N. 356; 15 C L. J. 211, 13 I C 509

——whether the notice is sufficient or not is a question of fact Where the deft. only denied the service of notice, the quest on of

S. 77. (Notification of claims to refunds of overcharges and to compensation for losses)—*contd.*

adequacy of the notice did not arise. 47 C. L J. 611. 1928 Cal. 697 : 112 I. C 197.

——unless the notice is given within 6 months as prescribed by the sec. the suit is barred by limitation 41 M 871 24 M. L. T 38 : *49 I. C. 69 : 35 M. L J. 35, 1919 Pat 150 49 I C 493, 14 I. C. 684*. 8 N. L R 34, 1924 Pat 315, 64 I C. 390 23 Bom. L R 866

——no notice is necessary for the maintenance of a suit for the refund of overcharge when goods are delivered by the Company after delivery to Railway 97 I C 474 : 1926 All 698.

——the notice of claim must be served under s 140 on the Agent of the Co But the law does not require that the notice should be *physically thrust in the Agent's head* *Knowledge of the Agent* is sufficient 13 C W N. 24

——in the case of notice sent by post ss 141 and 142 show that the notice must be posted and in the ordinary course of post it should have been deliverd to the Railway company within 6 months. 24 A L J 360 : 93 I C. 90 1926 All 214

——if the registered letter containing the notice of claim is posted within six months allowed, it is sufficient, no matter that the letter is actually received after that period. 1927 Pat. 241 : 102 I. C. 607 8 Pat L T 575 6 Pat 256, *contra*, the claim must reach the office within six months 99 I C 622 : 1927 All 215

——notice of claim of goods lost in transit given to a Ry Co A with whom they were originally booked is not sufficient against the Co B on whose line the goods were subsequently lost 12 C. W. N. 165.

——the date of announcing the order to the party is the starting point under this sec 1928 Lah. 409 30 Punj L R 306 11 Lah L. J. 251

——s 77 does not apply to suits for damages when the Railway refuses to deliver goods even after demand, cause of action in such suits arising where the Railway refuses to deliver the goods. 8 Lah. 555 : 1927 Lah. 471 102 I C. 149, 5 Lah 523 *Ref.* 2 Lah 133 *not fol*

S. 80 (Suits for compensation for injury to through booked traffic).

were lost in the
liability on any
the line of that

——where goods were consigned at a station under one Ry Co, and the loss of the goods occurred at a place under another Ry Co, a suit for damages for the loss can be brought against either of the Ry. Co, 25 I. C. 77 · 12 A L. J 339.

——where goods were despatched through several railway ... ways for damage to ... Ry by proving that ... 1922 All. 514 : 20 A.

S. 80 (Suits for compensation for injury to through booked traffic)—*contd*

——"loss" in chap VII includes loss of goods made over to a Ry Co which have been misdelivered and so have been lost to the person entitled thereto 2 Lah. 133: 61 I. C. 926: 3 Lah. L. J. 297 F B

——"deterioration" in s 80 includes decrease in market value consequent on detention Notice of an agreement between two Companies that each is responsible to the other but not to the pub lic would not exonerate the Company with whom the goods were at the time of loss from liability to the public 1912 P. L. R. 233. 111 P R 1912 224 P W. R 1912 15 I. C. 12.

——when goods were booked on one Railway to be sent to a station on another Railway where the invoice was not sent for over six months and the goods were lying there and deteriorated, both the Railways were liable. 96 I. C 1037: 1926 Pat 395

— when open delivery can be demanded. 11 A L. J 772: 21 I. C 448 21 I C 428 11 A L J 775 note

— when goods are handed over to one Ry. Co, and booked through another Ry Co, the latter Ry. Co, is not liable for non-delivery unless the "loss" occurred on its Ry 6 Lah 499 26 Punj L R 853 92 I C 332: 1926 Lah 116

——when the transferee Railway overcharges the goods, a suit to refund does not lie against the transferring Railway. 1926 All 698 97 I C 474

S. 84 (Power to make rules regarding notices of and enquiries into accidents)

——the Ry Act does not empower a Magistrate to make an enquiry as to the true heirs of a deceased Railway servant 35 I. C 673 10 S L R 64

——Rules 26 and 27 of the rules framed under s 87, investigation by sub-inspector under the supervision of Inspector of Police 32 B 338 1918 Bom 162 109 I C 487 30 Bom. L. R. 392

S 93 (Penalty for neglect of provisions of ss 63 or 63 with respect to the carrying capacity of rolling-stock).

——to present any danger to the health and life of passengers s 63 provides that the limit of passengers to occupy a compartment must be fixed and must be exhibited in some conspicuous place inside or outside the compartment on pain of penalty under this sec 1 Pat 260 3 Pat L. T. 195: 1922 Pat 63 - 1922 P. S

S 101 (Endangering the safety of persons).

——the object of sec 101 and rule 200 is to lessen the risk of accidents through shunting on a through line after the line clear has been given The disregard of the rule embraces danger to passengers The breach of the rule will render the culprit liable to punishment although no accident might have occurred The gravity of the offence should be estimated by the risk involved 15 Bom L R 702 37 B 655: 21 I. C. 620

S. 101. (Endangering the safety of persons)—*contd.*

——shunting the train to a wrong line is "endangering" 13 N. L.R. 90 : 41 I C 646

——when an accused by one act endangered the lives of the public and committed an offence under s 101 and s 353 I P C he can be punished under one Act only 38 I. C 433 1 Pat L J. 373 : 1 Pat. L. W 340

S. 108. (Needlessly interfering with means of communication in a train).

——this section is intended for the protection of the personal safety of passengers Leaving a luggage on the platform is not a reasonable and sufficient case within s 108, 95 I. C 58 28 Bom L. R. 486, 1926 Bom 288

——no hard and fast rule can be laid down as to what must constitute reasonable and sufficient cause within this sec and it must depend upon the circumstances of each case whether there was such a cause as to justify a passenger in pulling the communication chain Where the complaints of a passenger as to the overcrowding a compartment were not listened to by the authorities and the compartment was packed to suffocation, pulling the chain was justified 1922 Pat 63 1922 P 8 1 Pat. 260 3 Pat. L. T. 195

——(1) if the risk to the passenger pulling the cord is incommensurate with the risk and discomfort etc to the other passengers he cannot be said to have just and reasonable cause (2) another element is whether the necessity or occasion for pulling the cord has arisen from the fault of the Railway Administration (3) the third thing to be considered is the importance of the line and train 1927 All 647 25 A L J 975 105 I C 679

——where the driver and guard of a Ry Co, assaulted the plff. for stopping a running train by pulling the communication chain, held that the Ry Co itself had no power to arrest and was not liable for the tort of its servants as the assault was outside the scope of their authority 43 B 103 45 I C 715 · 20 Bom L R 126.

S. 109 (Entering compartment reserved or already full or resisting entry into a compartment not full).

——passengers are entitled to claim that a compartment does not contain more than the maximum number 1 P 260 1923 Pat. 63. 3 P L T 195

——the expression "passenger" includes possible passenger. 45 M 215 42 M L J 21 1922 Mad 35

——the Railway authorities cannot remove a passenger from a compartment, which is reserved for another passenger or class of passengers 13 I C 23 5 S L R 140

S. 112 (Fraudulently travelling or attempting to travel without proper pass or ticket).

——a person charged under s 112 for entering a Railway carriage without a ticket pleaded guilty as to entering the carriage but

S. 112. (Fraudulently travelling or attempting to travel without proper pass or ticket)—*contd.*

said that he could not purchase the ticket for want of time, held that the conviction was bad as his statement amounted to a positive denial of an intention to defraud. 57 I. C. 825

——unless there is clear evidence to show that a passenger knew that the ticket he was holding had been used before, an intention on his part to cheat the Railway Company cannot be inferred from the mere fact that the passenger knew that he was committing a breach of the Ry Rules under the Act 35 I. C. 665 17 Cr L J 361

——the essence of an offence under s. 112 is dishonest or fraudulent intention, merely travelling without ticket is not an offence under this sec 11 C W N 100 20 A. 95 *Ref* 33 C W. N. 751

——in the case of an arrest for travelling without ticket it will further have to be shown that there was refusal to pay the sum charged 33 C W N 751

S. 113. (Travelling without pass or ticket or with insufficient pass or ticket or beyond authorised distance).

——where the accused was prosecuted for travelling without ticket and pleaded that he did not travel by the train, the Magistrate could not pass orders issuing distress warrant for the amount of penalty imposed only after taking evidence on the question whether the accused was liable to pay and how much was payable by him 24 C W N 195 . 55 I C. 593 . 21 Cr. L. J 321.

——in a suit to recover the amount paid for the Railway fare and penalty for travelling without ticket the onus is on the plff. to prove that the amount was improperly levied. 101 I C. 158

——the remedy under this sec. is exclusive and not cumulative, claim to recover the excess fare can be entertained only by a Magistrate and by a Civil Court. 50 B 215 : 28 Bom L R. 413 : 94 I C 742 1926 Bom. 266

S 118 (Entering carriage in motion or otherwise improperly travelling on a railway)

——the word "passenger" in this sec is used in a restricted sense and denotes a person who without permission of a Ry servant enters any Railway carriage for the purpose of travelling as a passenger 15 Bom L R 996 . 21 I. C. 894.

S. 120 (Drunkenness or nuisance on a railway.)

——the word "person" in this sec. includes railway official as a railway guard who remove a passenger from a compartment which he is entitled to occupy. 44 I C. 329 : 19 Cr. L. J 313

——travelling without a ticket is not one of the circumstances mentioned in this sec as justifying removal from a Ry. carriage by a railway servant. 1923 Lah. 71 : 23 Cr. L. J 622

——a person who persists in selling the fish in the delivery shed and obstructs the business is guilty of nuisance. 25 C. W. N 673 62 I C 876 33 C. L. J 293.

——this sec does not apply to Railway servants. 118 I C 197

S. 121. (Obstructing railway servant in his duty).

——abuse or insult to Ry authority does not necessarily constitute obstruction or impediment to a railway servant in the discharge of his duty 1923 Lah. 71 23 Cr L. J. 623

——a signaller appointed temporarily to do the duties of a Ticket Collector under the General Rules is a "Railway Servant" within the sec. 1920 M. W. N 156 : 54 I C 414 37 M. L J 656

——before a person can be convicted of wilfully obstructing or impeding a Ry servant in the discharge of his duties, it must be shown that the obstruction or resistance was offered to such railway servant in the discharge of his duties as authorised by law. 6 Lah 467 1925 Lab. 650, 1 C W N 74 *fol* 68 I C. 847 *Dist*

S. 122. (Trespass and refusal to desist from trespass.)

——the word "unlawful" in this sec. means without the leave of the Ry. Co, and a person entering Ry line without such leave is guilty under s 122 24 I C 348 . 4 P R 1914 1914 P L R 155, 11 C. W. N 583 *Rel*

——unlawful entry is the essence of an offence under this sec If the entry was lawful, refusal to leave, on being desired to do so, would not make the original entry unlawful 22 C W N 575: 47 I C 74, 25 A L. J 710 103 I C 104 : 1927 All 646

——subsequent unlawful act does not make the original entry unlawful. 15 N. L R 34 48 I C 896

——s 122 (2) is inapplicable to eject a Ry employee from the staff quarters occupied by him while under service because they are not part of the Ry under s 3 (4) of the Act 1914 M W N. 124 : 23 I C 177

——the word "unlawful" in section 122 means contrary to the law. An intending passenger entering upon a railway platform [illegible] ...ly because he has not ticket ... leave the platform gate open ...n hardly be considered to be ...passers 6 Pat L T 437 88

S. 125. (Cattle trespass).

——the owners of a cattle staying on a Railway line cannot be convicted of an offence under s 125, for the negligence of their keeper 34 A. 91 8 A. L J 1249 12 I. C 990.

S. 130. (Special provisions with respect to the commission of acts endangering safety of persons travelling by railway.)

——an offence punishable under this sec read with s 126 (a) is not exclusively triable by a Court of Sessions but can be tried by a competent Magistrate 43 B 838 : 52 I C 669 21 Bom L R 768.

S. 138, (Procedure for summary delivery to Railway Administration of property detained by a railway servant)

——possession of staff quarters lawfully obtained by a Ry. employee can be determined only by steps taken under s 138 and

S. 138. (Procedure for summary delivery to Railway Administration of property detained by a railway servant)—*contd*

for that possession to become unlawful there must have been an interruption thereof and a re-entry Staff quarters for residence are not part of Railway within s. 3 (4), 23 I. C. 177 : 1914 M W N. 124.

S. 140. (Service of notice on Railway Administration)

——this sec refers not only to notices but to documents which have to be served on the Company. 112 I C 616 : 10 Pat L T. 24 : I C 1929 Pat 31

——notice of suit against a Railway Company can be served only in one of the three ways specified in this sec. 117 I. C 769

——the object of s 140 is to provide a convenient course of action for the parties aggrieved A notice served on the Collector will be treated as equivalent to notice on Govt. 44 C. 16 : 34 I C 130

——a notice to the Dt Tr Supdt of Ry. Co. is not a notice to the Agent 19 C L J 180. 23 I C 142

——notice to the Traffic Manager is good notice when allowed by the Rules of the Company. 17 I. C. 419 23 M L J. 531, or directed by the Agent 7 Lah 238 95 I C 808 . 27 Punj. L R 356. 1926 Lah 254 F B. *contra*, a notice to the Traffic Manager is not sufficient, it must be served on the Agent or the Manager But if the notice served on the Traffic Manager is sent to the Agent within 6 months there is substantial compliance 1926 Pat 413 : 5 Pat. 488

——where a notice sent by post to the manager of a Railway Company is accepted by the manager and is returned to the sender with a request to send it to the proper person the presumption is that he did so with the implied consent of the Agent 1927 All. 915 99 I C 622

——under this sec all notices should be given to the Agent or any officer designated for the purpose or who according to the practice of the Co deals with such claims 36 M. 65 : 10 M. L T 236 12 I. C 76

——the object of the sec is to see that the Co gets notice, the word "may" does not mean "must" 45 M 135 30 M. L T. 112 1922 Mad 262 F B *Contra* 12 C. W N. 415.

——where the claimant addressed his notice of claim to the Agent but the letter was opened by the General Tr Manager, he is entitled to prove that notice was in fact delivered to the Agent and there was service under s 140 (*a*). 1923 Pat 284 : 1924 P 93

——the form in which a Co, is to be sued is given in Sch. I App A , 64 I C 125 . 2 Pat. L T. 679.

S 145. (Representation of Managers and Agents of Railway in courts)

——s 145 (2) contemplates mainly if not exclusively private prosecutions undertaken by the Railway Administration in which the Public Prosecutor does not appear, as distinguished from public prosecutions undertaken or taken over by the State and particular prosecution under the I. P. C 1925 Pat. 755 . 93 I. C 697 : 7 Pat L T 343

RECEIVER.

——appointment of Receiver is discretionary with the court. 15 C. 818, 22 C. 459, and for the protection of property. 23 C L J. 567.

——suit being dismissed the Receiver cannot be given any power 34 C. 336.

——for the purpose of preserving property from loss or injury the court may authorise Receiver to borrow money as a first charge on the property 11 C. W. N. 1

——the court may order the Receiver to account though the suit is no longer pending 22 C 1011, P. C. Receiver is liable to full account. 5 C W. N. 223

——the appointment of Receiver at the instance of D. Hr. is "*equitable execution*" 26 C 772 4 C W N. 27

——a Receiver can be appointed at the instance of mortgagee who holds a simple mortgage. 31 C. L J 385

——in appointing Receiver *prima facie* title to property is to be made out 5 C W. N. 365, 27 C 279 5 C. W N 362, discussion on merit is undesirable 32 C 741

——irregular appointment of Receiver does not make him incompetent to act 22 C. W. N. 520 27 C L J. 395

——a District Judge cannot appoint a Receiver of properties which are the subject of suit or attachment of other courts though subordinate 23 C 517.

——Receiver may be placed in possession of property in partition suit, 17 C. 614, and may be appointed in a mortgage suit. 7 C. W. N 452, 23 C L J 440, 14 C W N 560, 16 C W. N 126, even after sale. 15 C W N. 672

——*ex-parte* appointment of Receiver is bad 20 C W N. 1009

——a Receiver may himself apply for taking proceedings against a party for contempt 28 C 790.

——a Receiver may be authorised to sue in his own name and may be appointed by the Sub Judge before sanction of the District Judge. 34 C. 305 5 C L J 270, 18 C. 477, 25 C 642 : 2 C W N 469

——*the possession of the Receiver is the possession of the true owner.* 2 C L J. 602, (11 C 496, 17 M 501, 20 A 34) *Appld*

——accreted lands vest in the Receiver 14 C W. N 681.

[illegible] under sec 83, Tr. P
P C
[illegible] e Receiver must give
[illegible] 303

——the sale by the Receiver of the subject matter of the suit at the order of the court cannot be challenged by the parties 11 C. W. N 489 : 6 C L J. 404

——the acts of Receiver within authority are the acts of court. 30 C. 937 : 7 C W N 799

——a Receiver is the only person that can sue for rent due prior or subsequent to his appointment. 1 Pat 255 : 1922 P. 480.

——appointment of Receiver does not change the title of the owner of the property. 3 Pat. L T. 316 65 I C 349.

Receiver—*contd*

——leave of the court to sue a Receiver may be obtained after the institution of the suit, 15 C. W. N. 54, 32 C. 270, 9 C W. N 247, *Diss.* 15 C W. N 925, *Fol* 44 M. L J. 427 - 73 I C. 456, 43 M 793, 42 M. L J 339, without such leave the suit will be dismissed 14 C. W N. 653, 10 C. 1014, 30 C. 593 : 7 C. W. N. 390, 30 C. 721, 1926 Cal 1040 : 95 I. C 961.

——absence of objection on the part of the Receiver that no leave was obtained does not matter as the proceedings initiated are invalid 95 I. C. 961 : 1926 Cal. 1040, 30 C. 593 *fol.* 18 C. W. N 546, *Dist.*

——the fact that plff. obtains an *exparte* order from the H C granting him leave to add the Receiver as a party does not in any way affect the question whether the court which hears the suit can grant relief against the Receiver. 90 I. C. 600 : 27 Bom L R. 1147 - 1925 Bom 523

——attachment of money in the hands of Receiver without previous permission of the court is a nullity. 21 C. 85 - 16 B 57, so also against *bona-fide* transferee from the Receiver after such attachment 44 M. L J. 427 : 73 I C. 456.

——where a Receiver is appointed after a decree in a mortgage suit, he should be made a party in execution. 71 I. C 293 : 1923 M 144

——when the Receiver originally appointed ceases to exist and is substituted by the heirs of parties, want of leave does not affect 42 M L. J 339 15 L. W 289.

——the sale of property of which Receiver has been appointed without the leave of the court which appointed him, is not void but is voidable in appropriate proceedings. 27 C W. N. 37 : 37 C L J 265 (29 C L J 424, 11 C. L. J 489, 494), *Ref.*

——the objection cannot be taken by the representative of person who has abandoned it. 27 C W. N 37 : 37 C. L. J 265.

——leave is to be granted by the Judge who appoints the Receiver and not the trial court. 25 Bom. L R 1180

——where a conditional order discharging a Receiver is made but it is not carried out the Receiver continues in office and can bring rent suits. 26 C. W. N. 361.

——in case of joint Receivers, the retirement of one does not make the order appointing Receivers come to an end. 23 C. L. J 217, 20 C. W. N. 789.

——a Receiver cannot be discharged before the completion of administrative decree. 5 C. W. N. 408, 417.

——agreement interfering with the work of the Receiver is void. 16 C W N. 115.

——the Receiver is not a necessary party to a suit for possession of immoveable property in his possession. 5 C W N. 27, but if property is to be affected then he is necessary party. 15 C W. N 54, 14 C. W N. 653

Receiver—*contd.*

——properties in the hands of Receiver can be sold in execution of mortgage decree though not of money decree. 26 C. 127. 3 C W N. 90

——the order appointing a Receiver is for the benefit of the parties and does not affect the persons until the appointment is complete and perfected. 29 C. L. J 424.

——*if a person appointed Receiver accepts to keep account in* a partnership without remuneration he does not thereby forgo his right to remuneration for managing the business 90 I C 492 (C)

——a Receiver appointed by consent of the decree-holder can be discharged only for malfeasance or for futility of the administration. 40 C. L. J. 431.

——an application against the Receiver for his mismanagement is to be made by way of suit and not by way of motion before the Judge on the Original Side of the H C., 53 C. 881 1927 Cal. 175 99 I C. 761, 5 C. W. N 223 *fol.*

——a Receiver is entitled to take charge of all properties included in the decree 40 C. L. J 144 P. C

——the possession of the Receiver is the possession of the court and the possession of the court is the possession of all parties to the action having title 39 C L J 40

——when a Receiver is in possession of property under the process of the court his possession is not to be disturbed even by an ejectment under an adverse title without the leave of the Court, for the Receiver's possession is deemed the possession of the Court and the court will not permit itself to be made suitor in a court of law The proper and usual mode adopted under such circumstance is for the party claiming an adverse interest to apply to the Court to be permitted to come in and to be examined *prointeresse suo* 41 C. L. J. 197 86 I. C. 677 : 1925 Cal. 681.

——an account is vouched by the production of voucher, but if any objection is raised an affidavit or oral evidence of the person who received the money is required and if this cannot be had, proof must be given of his signature to the voucher How management may be questioned. 40 C L J 28 5 C W N. 223.

——a Receiver must furnish details of expenditure 40 C. L. J. 28, 20 C. L. J 112.

——a sale in execution of property in the hands of a Receiver appointed in a partition suit without the consent of the court is not void but at most an irregularity 40 C L J 78

——even the plff being appointed Receiver by court cannot appropriate partnership moneys to his own use 23 A. L J. 1045 : 1925 P. C. 257 92 I. C. 274 1926 M W. N 101 . 7 Pat L. T. 275 P.C.

RECOGNITION.

——In order to decide if a landlord has recognised a transfer made by his tenant, the court must look not at the words used, but whether in fact there has been a recognition. 1925 Cal. 1245 : 87 I.C. 986.

Recognition—*contd*

——where in the rent receipts granted by the gomastha of the landlord to the transferee of a tenancy, it was not stated that the transferee was the possessor of the holdings or that he had any interest therein and it was not stated that the rent was being paid on his own behalf, held that the rent receipts by themselves did not furnish any evidence of recognition of the transfer on the part of the landlord 1925 Cal 761 : 85 I C. 636

——receiving rent from transferee as agent of the transferor is not recognition 23 C. W N. 201, 14 C. W. N. 68, 7 C W. N 132, 12 C W N 539, 17 C W N 156, 15 W. R. 197

——but receipt of rent from transferee on his own account with a statement that he is in possession, is recognition 6 C L J 122 11 C W N 865 : 34 C 902, P. C., 6 C, L J. 601, 17 C W. N. 1088, 13 C W N 1319

——acceptance of rent through mortgagee describing him as such, amounts to recognition 10 C. L. J. 610

——withdrawal of the deposit of the decretal amount of rent made by the purchaser in the name of the tenant does not amount to recognition 17 C W N 70

——suing for compensation for use and occupation and not for ejectment amounts to recognition 13 C W N. 636.

——a purchaser getting recognition from the landlord cannot eject a person settled by ijaradar for time even 10 C L. J. 55

——a demand to pay produce is not recognition 5 C L J 181.

——withdrawal of money deposited by the Jt Dr. on the allegation that he has procured the money by the sale of the holding is not recognition 2 C W N 63.

——recognition by *karta* to joint family is sufficient 21 C W N 744

——where the *gomostha* accepted rent from transferee of a [illegible] and the landlord failed to show that the *gomostha* acted beyond his authority (the burden in the first instance being on the landlord as the matter was peculiarly within his knowledge) it constituted sufficient recognition. 15 C. W N. 953 (25 C. 533, 10 C. W. N 210, 6 C W N 823, 16 W. R 97) *Ref.* 23 C. W. N. 208n, 61 I C 352 (C

——where the plff. demands rent from the deft. with full knowledge that the latter is in posession as purchaser, *prima facie* it is evidence of an intention, unless otherwise explained, to recognise the title of the purchaser and unless repudiated, would constitute the relationship of landlord and tenant. 37 C. L. J. 52.

——when the deft purchased a holding on the assumption that it was transferable, demand by the plff for rent creates tenancy unless such demand be qualified or is differently interpreted 37 C L J. 521

——mere demand for rent is not sufficient to create the relationship of landlord and tenant unless followed by assent in response thereto 34 C. 57 : 5 C L. J. 181.

——the word "*marfat*" in a rent receipt granted to the purchaser of a non-transferable occupancy holding is not sufficient

Recognition—*contd.*

to resist the claim of the purchaser to take objection under s. 47 C. P. C 64 I. C. 124 (C).

——mere mutation of names and acceptance of rent does not operate as an estoppel and create any title 40 C L. J 468 P. C.

REGISTRATION ACT

SS. 17 AND 18, WHICH DOCUMENTS NEED AND WHICH NEED NOT BE REGISTERED.

(1) Applicability of ss. 17 and 18 (General).
(2) Agreement.
(3) Agreement to lease.
(4) Agreement to sell.
(5) Amalnama.
(6) Authority to adopt.
(7) Award.
(8) Bainapatra.
(9) Compromise, documents relating to.
(10) Deed of gift or grant.
(11) Deed of release or surrender
(12) Document between mortgagor and mortgagee.
(13) Document varying the terms of documents.
(14) Family arrangement, deed of
(15) Lease and documents varying the terms of lease.
(16) Letter
(17) Memorandum.
(18) Mortgage debt and mortgage decree.
(19) Partition deed.
(20) Receipt of money.
(21) Sale deed.
(22) Share list
(23) Surety bond.
(24) Trusteenama.

Definition.

——a *nim* tree is a timber tree; a tree which is essentially a timber tree and is intended to be cut down and used as timber is not immovable property within s 2 (6) of the Registration Act. 93 I C. 358 : 1926 All. 350.

——mango trees being fruit bearing trees and standing timber fall within the category of immovable property as defined in s 2. 112 I. C. 335 : 1928 Pat. 652 7 Pat. 646

(1) Applicability of ss. 17 and 18, (General).

——the sec 17 being disabling one must be strictly construed. 4 Lab. L. J. 1 65 I. C. 254.

——s. 17 being a disabling sec. must be construed strictly. 62 I C. 809

——where a document does not purport to declare or create any right in immovable property but states past or existing facts only it does not require registration. *33 M. L. T. 312 · 45 M. L. J. 100* : 72

(1) Applicability of ss. 17 and 18. (General)—*contd*

I. C. 456, 45 A. 140, 50 B. 334 : *96 I. C. 334 ; 1926 B.* 375 · 28 Bom L. R 591.

——a document not intended to be operative does not require to be registered even though it refers to *interest in* immovable property. *111 I. C.* 596 : 1928 Lab. 397 : 10 Lab. L. J. 93

——document creating an *interest in* land amounting to an equitable charge requires registration. 1926 Bom 495 : 28 Bom L R. 939.

——when two documents read together constitute a present demise of the lands they are inadmissible unless registered 1926 Bom 384 ; 96 I. C. 827 : 28 Bom. L. R. 743, *so also* when they purport *to* create charge on immovable property. 1926 M. W N. 804. 1926 *Mad*. 1188, 50 C 338 **P. C.** *fol*. 47 *M*. 398 *Dist*.

——when two documents read together constitute a present demise of lands, all the terms cannot be referred to for the purpose of spelling out a permanent tenancy. 96 I. C. 827 : 1926 Bom. 384 28 Bom. L R. 743.

[illegible] property worth Rs 100 or [illegible] agreement [illegible] (1) if the [illegible] inadmissible [illegible] need not be [illegible] 50 B 505, registered even if it forms part of the same transaction. 1926 *Bom*. 497 : 28 Bom. L. R. 954 **F. B.**

[illegible] of property sold on payment [illegible] 49 B 662 [illegible] tion of pro- [illegible] C. L. J 440 : [illegible] **P. C.** 48 C [illegible] e considered [illegible]

——a document registered without jurisdiction is *nullity*. 11 C. 444, 29 C. 654, 5 C. L. J. 188.

——unregistered document is admissible to prove *the nature* of the occupant's possession. 39 A. 696, 40 C. 801 **P. C.** [illegible] and an unregistered lease is admissible to prove the *nature of* the tenancy. 10 C. W. N 115 n.

——a compulsorily registrable but unregistered document can be admitted in evidence *for* collateral purpose 26 C. 334, 11 C. W. N. 342, 5 C. 215, 611, 9 C 523, 12 C. L J. 25, *11 C* L. J 548, 5 B L. R 18, **F. B.**, 4 B L. R. 1 **F. B.**, *20 W. R.* 107, 5 C. 143 ; 10 C. 315, 46 M. 349, and so far as it affects moveable property 11 C. W. N. 342. The amendment of s. *49* has made it clear

(2) Agreement.

——an agreement creating a right of pre-emption is not compulsorily registrable 47 B. 283.

——a right to execute a partition decree does not appear to be a right in or to immoveable property but merely a right to apply for

(2) Agreement—*contd*

process of the court in execution. Consequently an agreement not to exercise that right cannot be said to fall within the provisions of s. 17. 1925 Mad. 1149 1925 M. W. N. 543 : 49 M. L. J. 675.

(3) Agreement to lease.

——in India a perfectly valid agreement for a lease may be made by parol and a verbal arrangement, though void as a lease, is enforcible as an agreement for a lease. When in pursuance of such an agreement for a lease the intended lessee takes possession, though the requisite documents have not been executed, his position is the same as if the documents have been executed, provided that specific performance can be obtained between the same parties in the same court and at the same time as the subsequent legal question falls to be determined 11 C. L J. 543, 2 C. L. J 343 *foll.*

——unless an unregistered agreement to lease certain premises operate as a present demise, it does not, of itself, create any interest in or charge on the property agreed to be demised and can be given in evidence for the purpose of enforcing specific performance of it. 14 C W. N 65, 17 Mad L. J 218 *fol* 10 B 101, *not fol*

——to require an agreement of lease to be registered there must be an immediate demise of the property. 44 M. 399 40 M. L. J. 161

——an agreement to lease intended to operate as a present demise is a lease and as such is inadmissible in evidence without registration. 49 C 5, 26 C W. N. 329. 1922 Cal. 436, 27 C W. N. 897.

——the question whether an instrument made a present or an agreement to make a future demise must depend upon the paramount intention of the parties 15 C W. N. 536, 10 B. 101, *Ref*

——an agreement to lease must be registered, even if its terms are contained in more than one letter If unregistered, the letters are inadmissible under s 49, nor it is open to the parties to let in oral evidence by reason of s 91 Evi. Act. 52 C 695 1925 Cal 1087.

——agreement to lease creating a right to obtain a subsequent lease is admissible without registration 18 C. W. N. 38, (35 M. 63, 15 C W N 536), *Ref.* in such case suit for specific performance lies 72 I C 98, 42 C. 801, 39 M 509, 19 C L. J. 213, but an agreement to lease only is not admissible without registration. 33 C. 502.

(4) Agreement to sell.

——written agreement evidencing the payment of over Rs 100 as earnest money for a sale requires registration where the buyer has not improperly refused to accept delivery as that agreement does in itself create an interest under s 55 (6) of the T. P. Act. 31 C. W N. 125 ; 44 C L. J 97 · 24 A L J 807 : 28 Bom. L. R 1372 : 1926 P. C 94 7 Pat L. T. 661 : 1926 M. W. N 602 P. C., 51 B. 231 : 29 Bom L R. 269 : 1927 Bom. 157 : 101 I. C. 155, (2 B. 489, 2 A. 354. P. C) *fol. contra.* 49 A. 806 : 103 I. C. 417 : 1927

(4) Agreement to sell—*contd.*

All. 287 : 25 A. L. J. 513 F. B., which after the above P. C. ruling cannot be good law. But the P. C. ruling has been distinguished in a Bombay case where it has been held that where an agreement of sale of immoveable property is entered into but the earnest money is paid subsequently to the vendor under the agreement the agreement need not be registered. 51 B 247 : 101 I. C 229 : 1927 Bom 195; It is to be seen how far the recent amendment of s 49 has affected the P. C. ruling.

——in order to determine whether an instrument is a mere agreement to sell or a conveyance, the court has to look to all the terms of the document. A document creating a right to obtain another document which would, when executed and registered, create a title in the property, does not require registration. 6 Lah. L J 554 · 84 I. C. 865 : 1925 Lah. 284.

——an *agreement* to transfer need not to be registered. 1 L R 1 Lahore 124, 1928 Cal. 751.

——an agreement to sell need not be registered. 33 B 701, 72 ... 25 Bom L. R. 1207.

... e properties pur... agreement requires ... er the agreement ... rcel of the main ... be treated as a ... ment, creates no interest in the property under s. 54 of the T. P. Act and therefore need not be registered; but if it is really a part and parcel of the transaction then the documents which purport to limit the purchaser's interest in the property must be registered 47 Bom. L. R 1465.

... unregistered is admissible to ... perty and is ...

... f sale clearly ... ible property ... 9 M. W. N. ... the document must be registered. 33 C. W. N. ... 676 : 1229 P. C 269 : 30 L W. 451 P. C.

(5) Amalnama.

... registration applies to an amalnama lease ... a lease. The real test is ... lease or an agreement to ... a lease it does not require ...

——an *amalnama* is neither a lease nor an agreement to lease and is admissible in evidence without registration But when it ... the grantee to take possession of property and intends ... admissible to affect the ... 39 C. L. J. 90

... t a lease. It is an order ... for consideration which ...

(5) Amalnama—*contd.*

would be shown later on. It does not create any tenancy. 84 Ind. C. 385, 1924 Pat. 297.

——but an *amaldari* lease which contains all the essential terms of a lease requires registration and is not admissible without registration. The real test is whether the document purports to be a lease or an agreement to lease or not. If it does not amount to a lease it does not require registration 1925 Cal. 370, 82 I. C. 949.

——an *amalnama* not registered is admissible in evidence. 33 C. 502, 7 C 733 *Dist.* 13 C. W N. 265 : 8 C. L. J 538 · 4 I. C. 511, 15 C. W. N. 536.

——an amalnama creating a lease must be registered. 1922 Pat. 10, 15 C. W. N 204n, 15 C W. N. 536 *expld.*

[illegible] W. N. 265 8 C. L. [illegible] eed not be registered.

[illegible] the proprietors issued [illegible]

(6) Authority to adopt.

——an authority to adopt conferred by a will does not require to be registered. 1920 M. W N 684 · 12 L. W. 596 . 60 I C. 146, but where the document is a will simply by name but is really an authority to adopt it must be registered. 44 M. 753 : 41 M. L J. 648 P C.

——authority to adopt, will, disposition of property. 26 C. W N. 374 30 M L T 124 P. C

——an authority to adopt not registered at the instance of any of the persons mentioned in sec. 40 (2) is invalid. 42 C L J. 38 23 A. L. J. 799 · 27 Bom L. R 1082 : 1925 M. W N. 522 89 I. C. 733 ; 48 M 614 P C.

(7) Award

[illegible] ties to [illegible] J. [illegible] ted by the parties must be registered 29 Bom. L. R 297 : 101 I C 351.

(8) Bainapatra.

——an unregistered *bainapatra* for grant of a putni lease is admissible in evidence 25 C. W. N. 550, 24 C. W. N 177 P. C. 37 C 808 *Ref.*

——an agreement to sell though it acknowledges the receipt of earnest money, need not be registered. 6 Lah. L. J. 554 : 84 I. C. 865 : 1925 Lah. 284.

(9) Compromise, documents relating to.

——an undertaking given in proceedings under s. 145 Cr. P. C. not to plant trees in a grove, to remove new trees planted therein and to abstain from digging holes, is not a compromise which requires registration. 85 I. C. 585 : 1925 All 605.

——compromise petition filed in criminal court providing for enhancement of rents is not admissible without registration 12 C. W. N. 854

——a compromise petition filed before a Revenue court during mutation proceedings purporting to create or declare title to immoveable property of more than Rs. 100 in value must be registered 96 I. C. 227 1926 Lah. 586.

——compromise petition relating to properties other than in suit must be registered 16 C. L. J. 71, 19 C. W. N. 347, 36 M. 46, 2 C. L. J. 343, 11 C. L. J. 543, 5 C. L. J. 611 · 36 C. 193, 1 C. L. J. 388, 30 C. 783, 22 M. 508 26 I. A. 101, 25 M. 553, 20 M. 365, 25 M. 7, *contra*, 1917 Pat 161, 181, 28 A. 78, but see below

——a consent decree incorporating matters outside the suit is not valid as part of a judicial proceeding unless registered 48 C. 1059, *contra*, 4 Lah. 263 · 75 I. C. 461.

——petition of compromise containing a recital of previous oral agreement for lease need not be registered. 12 C. W. N. 59

——the provisions of sec. 17 do not apply to proper judicial proceedings filed by the parties whether consisting of pleadings or orders made by the court 2 C. W. N. 129; 25 I. A. 9 · 20 A. 171 P. C., 35 C. 837. 12 C. W. N. 849; 7 C. L. J. 492, but this principle does not apply to petition of compromise above referred to. 1 C. L. J. 388.

——a *razinama* dealing with properties outside the subject matter of suit, when given effect to by judicial order, need not be registered, but when not, requires registration. 3 C. W. N. 193, 26 I. A. 101. 22 M. 508: 2 M. L. J. 147, P. C., 29 M. 365, 12 C. W. N. 849 · 7 C. L. J. 492: 35 C. 837, 2 C. W. N. 663, 31 C. 455, 43 M. 638 F. B., 1928 Mad. 713: 109 I. C. 872: 27 L. W. 511 *contra* 48 C. 1059.

——a *solenamah* recording certain agreement between the parties as to how they settled the dispute and for which another document would be executed is a writing by way of memorandum only and need not be registered. 69 I. C. 57.

——where a decree is passed in terms of the solenama it need not be registered 30 C. W. N. 307; 1926 Cal. 666; 96 I. C. 753

——an *aposhnama* which sets off one decree against another need not be registered though it purports to convey some immoveable property also 11 C. W. N. 342.

——a composition deed need not be registered 19 C. W. N. 91, 38 B. 576

——a compromise containing a recital of the term agreed upon under a family arrangement filed in a mutation case need not be registered 95 I. C. 628, 33 A. 356 *Rel. on.*

(9) Compromise, documents relating to—*contd*

——a *solenama* which operated to create a tenancy to take effect at once is not admissible without registration 31 C. W. N. 1099 : 104 I. C. 812, but see 56 C. 427.

——a *solenama* which modifies the terms of a prior lease need not be registered. 55 C 701 32 C. W N. 268 1928 Cal. 441 : 111 I C. 340

——a compromise deed varying the rent in respect of a lease is in effect a lease and must be registered 30 Punj L R. 112 · 1929 Lah 291 : 11 Lah. L. J 50, 41 I C. 804 *fol.*

(10) Deed of gift or grant

——under sec 123 Tr P Act, a deed of gift must be registered 24 C. W. N, 346 but under the H. L. there may the gift by conduct only. 17 C. W N. 62

——a mosque being a juristic person according to the Mahomedan Law a gift to a mosque requires registration. 8 Lah L. J 156 . 94 I. C. 7 1926 Lah. 372

——a deed of gift by a Mahomedan donor only affords evidence of the fact that the donor has observed the formalities prescribed by the Mahomedan Law for making gift and does not transfer ownership of the immoveable property under s 17 of the Registration Act, so does not require to be registerd. 44 C L J 490 100 I C. 296 ; 1127 Cal 197

——an unregistered deed of gift is admissible for collateral purpose. 34 C. L J. 432 · 26 C W. N 165

——an unregistered deed of gift is admissible in evidence for a collateral purpose 46 M 349, 34 C. L. J 432 26 C. W N. 65, such as the question as to the date on which possession was taken 45 A 565

——deed of Govt grant need not be registered 19 C W N 203n

(11) Deed of release or surrender

[illegible] of claim in immoveable pro- [illegible] 10 C W N 551 · 3 C L J. 249, 16 W. R. 56, 2 P L. R. [illegible] in occupancy holding without a written document is valid, 28 C 256 : 5 C. W N 351, and a release of part of the mortgaged property on part payment of the mortgage debt by endorsement on bond need not be registered, 27 A 305, 72 I. C. 454 (C) and a deed of relinquishment by a Mahamedan daughter of her right of inheritance in her father's property need not be registered, 30 B. 304, but a deed of relinquishment by a tenant in consideration of remission of arrears of rent is not admissible without registration 20 M. 367

——the right of a reversioner to suceed is only a *spes successionis* and as he has no present right in the property a deed of relinquishment of his rights is not compulsorily registrable. 6 Lah. 87 : 7 Lah. L J 133 26 Punj L R. 217 : 1925 Cal. 341.

(11) Deed of release or surrender—*contd.*

——a debt may be released orally, but when it is done by writing it should be registered. 42 C. L. J. 582 : 1926 Cal. 170.

——a document by which one of the partners releases his interest in the partnership in consideration of certain sum does not require registration even if the partnership owns immoveable property. 49 M. 738 1926 Mad. 1040 : 96 I. C. 881 : 1926 M W. N 732

——when a document which purports to extinguish the rights under a registered lease is rendered inadmissibe in evidence for want of registration, it cannot be admissible to prove a secondary purpose such as evidence of an agreement to surrender a lease as that would completely defeat the object of the Registration Act. 1926 Bom. 573 28 Bom L R 1152

(12) Document between mortgagor and mortgagee.

——a receipt which purports to be a mere settlement of account and does not modify or supersede the original mortgage need not be registered 24 B 609 · 2 Bom. L. R 422.

——an unregistered receipt which extinguishes a mortgage debt must be registered 48 A. 705 : 97 I. C. 162 : 1926 All 693 : 24 A. L J. 839 43 M 803 *Dist* 34 A. 528 *Diss. from*, but a receipt evidencing prior discharge need not be registered. 1928 M. W. N. 537 : 192 Mad 1050.

——agreement between mortgagor and mortgagee varying the term of the mortgage deed must be registered 17 C. W. N. 233 **P. C.**

——unregistered usufructuary mortgage deed may be proved to prove possession. 33 M L. T. 146 : 45 M. L. J 667.

——an unregistered mortgage deed for more than Rs 100, does not affect any immoveable property. 32 C. L. J. 479 **P. C.**

——a subsequent oral arrangement may be proved by which an usufructuary mortgagee becomes owner of some portion of the mortgage property in lieu of his dues. 40 M. L. J. 105 : 1921 M. W. N 1 62 I C 603.

——a document by which a mortgagor conveys properties i lieu of mortgage debt to the mortgagee requires registration. 4 C L J 6 573.

——where a document in terms only discharges the debt it cann be brought under sec. 17 (b). 1928 Mad. 382 : 107 I. C. 808

——a document in writing but not registered purporting extinguish a mortgage debt is inadmissible in evidence but the paym itself cannot be inadmissible. 1929 Mad. 794.

(13) Document varying the terms of registered document.

——document varying the terms of the registered docu must be registered. 39 C. 284 : 16 C. W. N. 55 **F. B**, 37 C. 29 C L J 312. 8 Pat 585.

——when a deed of sale has once been executed and regi it can be avoided only by a subsequent registered docume transfer 27 C W. N. 8 **P. C.**

——a document which extinguishes the rights created by a tered lease must be registered. 28 Bom L R. 1152 : 1926 Bom

(14) Family arrangement, deed of.

35 A. 502,
9 C. 326.
registered.
8

——a family arrangement does not by itself require to be reduced to writing 89 I. C. 849.

(15) Lease and document varying the terms of lease

——a lease of immoveable property for a period of 10 years requires registration and if unregistered it confers no title 1925 Cal. 1225 : 89 I C. 180

——s 49 applies only to documents which are required by s 17 [illegible] instruments which are required of the Tr P. Act So an un- [illegible] an one year which is required [illegible]

——although a lease not registered is inadmissible in evidence under s 49, it may still be referred to in order to ascertain the nature and character of the possession of the person in whose favour the document is executed 86 I C. 733 . 26 Punj L. R 115 1925 Lah 500, 6 Lah 319 : 88 I. C 872

——an unregistered lease is admissible to prove nature of tenancy 19 C W N 115n

——the question is whether there was a present demise for one year Giving the lessee option to continue in possession after one year does not create a lease for a term exceeding one year. 37 C L. J 475

——document varying the rent of a lease must be registered. 27 C. L J 107, 39 C 284 . 14 C L J 411, 35 C 1010 · 8 C L J 90.

——a document only varying the terms of the tenancy with reference to amount of rent payable, need not be registered. 22 M. 217 : 8 M L J 256.

——a document which extinguishes the rights created by an original registered lease is compulsorily registrable and is not admisible as secondary evidence 1926 Bom. 573 · 28 Bom L. R. 1152.

(16) Letter

——a letter containing an admission of a previous mortgage as having been already made does not require registration. 33 C. 410 : 10 C. W N. 276. 4 C L J 102, 20 W R. 150, as surety bond or agreement of gift is admissible 16 C. L. J 53, P. C., 20 C. W N 1054 : 24 C L. J. 279 P. C , but as a lease is not admissible. 16 C. W. N. 240n 37 C. 293, 39 C. 284 F. B., 35 C. 1010.

(16) Letter—*contd.*

——where the letters embody the terms of lease they must be registered. 45 A. 220, but where the letter contemplates the execution of a formal lease it is admissible in evidence even if it was drafted by the attorney and lessee was placed in possession of the property in pursuance of it. 45 C. L. J. 33 : 1927 Cal 275 : 100 I C 404

——a letter admitting an agreement need not be registered. 25 C. W. N. 201 35 C L J 409 : 20 A. L J. 305 . 30 M. L T. 249 P C., 42 C. 801, 39 M. 509, 19 C. L. J 213.

——letter which records a previously completed transaction of mortgage by deposit of tittle deeds does not require registration 29 C W. N 784 88 I. C 866 : 1925 Cal 973, 1923 P C. 50 *fol*, 31 C W N 703 102 I C. 871 : 1927 Cal. 538 (48 C. 895 P C.) *Rel on.*

——a letter by which the vendee admits that the sale was a nominal transaction and not intended to take effect is admissible in evidence 91 I C 452 : 1926 Mad 362 : 1926 M. W. N 135

——a letter of instruction by the deft. to the pltf's solicitor asking him to draw up a lease containing certain terms is not inadmissible for want of registration. 1926 Cal 546 . 43 C. L J. 91 93 I C 81.

——an unregistered letter is admissible to show that a deed of mortgage and a deed of sale previously executed were not to be acted on and no money was due under the mortgage bond and no interest passed by the deed of sale. 1927 Lah. 626 : 103 I C. 181, 26 M L J 151 *fol.*

(17) Memorandum

——a memorandum to be treated as an instrument of equitable mortgage must be registered. 50 C. 338 · 28 C W. N. 1 38 C L J 41 44 M L. J 602 : 25 Bom. L. R. 582, P. C.

——a memorandum constituting a bargain between the parties must be registered 50 C. 338 · 38 C. L. J. 41 : 28 C. W. N 1 : 44 M L J 602 25 Bom. L. R 582 P. C.

——a memorandum evidencing the prior mortgage by deposit of title deed need not be registered. 31 C. W. N. 703 : 102 I C. 871 1927 Cal. 538, 43 C. 895 P C., *Rel. on.*

(18) Mortgage debt and mortgage decree, transfer of

——a deed of transfer of interest in mortgage debt must be registered 22 C W. N 641, 23 C. W. N. 51n , 27 A. L J. 279 1929 All 161, 10 A. L J. 167, 29 C. 1, 37 M. 51. but a mortgage decree need not be registered 35 A 524, 6 C. W. N. 5, 12 C W. N 625, 23 C 450, 9 C 839, 9 A. 108, 13 A. 89.

——assignment of a personal decree against the deft does not require registration though in the same decree there is also a mortgage decree against anotheer deft. 1928 Mad 142 : 106 I C 455

(19) Partition deed.

——an agreement for partition need not be registered 37 C. L J 435 27 C. W. N. 561 : 46 M. 373. P. C., 46 M. 349, 25 C. 210, 44 C L J 279 : 1928 Cal 705 : 112 I. C. 326.

(19) Partition deed—*contd*

——a partition need not be in writing 25 C. 210. *contra*, partition deed of property of Rs. 130 or upwards must be registered. 15 C. W. N. 375, 12 C. L. J. 25

——a deed of partition is compulsorily registrable. 68 I C. 712, 15 C. W. N. 375, 12 C. L. J. 25, (13 M 281, 2 Bom L R. 635, 800) *Expld. contra* 25 C 210, 46 M 349, 68 I. C. 859, 37 C. L. J. 435

——a writing setting forth the details of property allotted to the share of the parties on partition must be registered. 118 I. C. 59.

——a list drawn up of properties according to a *Panchayat* award signed by all parties and duly attested is a deed of partition and requires registration. But it can be admitted in evidence to evidence an intention to divide 87 I C 285: 1925 Mad 1097.

——a map and *chitta* put in to prove that land in dispute was allowed in a partition to a certain person cannot be said to be instrument falling within s. 17 R. Act requiring registration. 47 I C. 159 (C).

——an unregistered agreement arranging partition is not admissible in evidence as regards the transaction 49 C. L. J 98: 52 M. 83 . 33 C. W. N 233 1929 M. W. N. 43 1929 P C 13; 114 I C. 5 : 31 Bom L R 264 P. C but a list and other document declaring parties' desire to execute a partition deed as per list is admissible though unregistered. 1929 Mad 291, 1922 P C. 266 *Rel on.*

(20) Receipt of money

——a receipt granted to one of two mortgagors providing that money was received in full discharge of the mortgage and mortgagee was to execute the relinquishment is not admissible when unregistered, to prove that mortgage was fully discharged 1925 Mad. 302

——a document evidencing the receipt of a sum of money in full discharge of a mortgage debt is admissible in evidence without regis[illegible]

must [illegible]
839, [illegible]

——a receipt for earnest money need not be registered. 73 I. C. 1013.

——a receipt given to tenants at will for money given to purchase proprietory rights and remain in possession "as before" paying no rent, is not compulsorily registrable 83 I C 98 - 6 Lab L J. 402 1925 Lab. 204.

(21) Sale deed

——a sale of tangible immoveable property can be effected only by registered deed. 36 C 989, or when the value of the property is less than Rs 100 by delivery of possession, and the unregistered document may be referred to as evidence of intention, 29

(21) Sale deed—*contd*

C. 623, 2 I. C. 413, but when the value of the property is less than Rs. 100 and it is already in the possession of the vendee the deed of sale must be registered as there cannot be delivery of possession 34. C 207 : 5 C. L J. 390, 22 C 179 *Dist*, 6 I. C. 703.

——a document which is compulsorily registrable but unregistered, is not admissible in evidence. 4 C. 83

——though an unregistered kobala is not operative as sale deed it is admissible in evidence in a suit to enforce specific performance of the contract. 95 I. C 187 : 1926 Pat. 89 : 7 Pat. L. T. 730

——a sale deed executed before but registered after the institution of a suit is not affected by the doctrine of *lis pendens* in s. 52 T. P Act, as the sale deed on registration takes effect from the date of execution 83 I. C. 133. 1925 Mad. 359, 1922 Mad. 249 *fol* 5 P. L J. 715 *not fol*

——a sale deed becomes inoperative for non-registration even for the purpose of specific performance when the pltf. fails to pay the consideration money. 43 M 822.

——a turn of worship not being an immoveable property a sale thereof does not require registration. 97 I. C. 332 : 1927 Pat 7, (39 C. 227, 4 C. 683) *Rel.*

(22) Share list.

——a share list must be registered. 16 L. W. 781, *contra* 31 M L. T. 136 16 L. W. 615 69 I C 123 P. C.

(23) Surety bond

——a surety bond by hypothecating house properties for the amount of security, though inadmissible for want of registration may still be tendered as evidence in proof of the personal liability of the surety. 7 Lah. L. J. 3 : 87 I C 609 : 1925 Lah. 356, 32 M. 410, 80 P. R. (1881), 10 P. R. (1883) *Ref.*

——a security bond filed in court for the purpose of staying execution of a decree is a step in judicial procedure and is not compulsorily registrable. 52 B 72 : 1928 Bom. 42 : 107 I. C 710. 30 Bom. L R. 19.

(24) Trusteenama.

——a *trusteenama* divesting the owner of his connection with the ownership of the dedicated property and placing it into the proprietory possession of God must be registered. 32 C. L J. 471 : 39 M. L. J 263 · 42 A. 609 . 1 P W. R. 1921 P. C.

——*when the trusteenama does not purport to transfer the* ownership of property it need not be registered, 32 C. L. J. 471 P. C.

REGISTRATION OF DOCUMENTS AND EFFECT OF LEGAL AND ILLEGAL REGISTRATION. Ss.23 to 47.

——for the purpose of registration a document need not be dated and parol evidence may be given as to the date of execution 1 C L J 126

——execution must mean voluntary execution, the signing of the document out of the executant's free will. 1 C. L. J. 126

Registration of Documents and Effect of Legal and Illegal Registration—*contd.*

——although the time for presentation is fixed no time for registration is fixed by the Act. 15 B. L. R. 228, 11 C. 750, 15 C. 538.

——the omission to seal a deed is a mere defect in procedure which is cured by sec 87. 7 C W N 528,

——presentation of insufficiently stamped deed is good presentation. 11 C. 750

——when the executant admits his signature as being made on blank paper and denies the execution, it is sufficient admission of execution for the purpose of registration. 6 C. W. N 329 *contra*. 1917 Pat 40

——in case of *bakalam* signature a person whose name is put with his authority in evidence of his assent to a document, is execution within s 35 29 C W N. 539.

——where a minor registers a document it will not be invalid if there is nothing to show that he appeared to the Registrar to be a minor or the fact of minority was brought to his notice 21 C 872.

——when the question of minority of the executant arises, a

if the

that

it is

——the wife being herself the donee, may validly register the deed of gift in representative capacity. 33 C. 584 10 C. W N. 717 4 C. L J 340, 20 A 392, 25 M. 672

——when the donor is dead some one may admit the document for registration as he is practically the assignee 20 C. W N. 1345.

——when the executant is dead presentation by some or one of the heirs at law is valid 47 A 294 84 I C 78 : 1925 All 215, 55 C. 1008 32 C W N 646 . 1928 Cal 565

——document operates from the date of registration 22 C. W. N. 318, 16 C W. N 612 . 15 C. L J. 61, 20 B. 158, 29 B 42, 11 I A. 218 P C., 6 B. 380.

——when certain deeds are duly executed and registered the burden of proving that they are not real transactions, lies on those who allege it. 25 C 78 : 27 I A. 186 : 1 C W N 594 P C., 23 B 164

——in proceedings for registration of a document title to property cannot be gone into , s. 28 does not require anything more than the existence of property within the jurisdiction of a particular Sub Registrar in order to entitle him to register the document. 4 Pat 394 : 1925 Pat. 787.

Registration of Documents and Effect of Legal and Illegal Registration—*contd.*

——an improper registration on a wrong conclusion as to stamp will not affect a document. 23 C. W. N. 535.

——all things done before a Registrar in his official capacity will be presumed to be done duly and in order. 10 C W N 522 33 C 537 : 3 C. L. J. 349 : 8 Bom L R. 375 : 1 M. L. T. 131 : 16 M. L J. 161 **P. C.**, 44 A. 514 **P. C.**

——an executant registering a deed after altering the date as it was time-barred cannot question the deed 16 C. W. N. 585.

——under-raiyati lease for terms exceeding 9 years is void. 24 C L J. 538, 19 C. W. N. 412, 9 C L. J. 388, and is not admissible in evidence. 17 C W. N. 59, 468 : 11 C. W. N. 191, 6 C. W N. 915, *contra*, 15 C L J 672 : 16 C. W. N. 618 : 13 C. L J. 649, and so when sub-lease was executed before the B. T Act. 29 C. L J 331, 29 C. 148

——*false entry of property to give* jurisdiction to a particular register [illegible] 8 C. W. N. 817, 41 C. 972, **P.** [illegible] C. L. J. 440 P. C, 45 C. 509 **P** [illegible] L. R. 75 ; 93 I. C. 219, 1926 Bo[illegible] : [illegible] I. 121 : 1928 Cal 385, 1929 Mad. 420, 40 M L J. 489, 27 A. L. J. 801 : 1929 A. 659.

——but the registration is not good so far as the personal covenant contained in the deed is concerned 23 N. L. R. 149, 45 M 435 *not fol.*

——the falsity of the entry must be *proved* by the person *alleging* it. 22 C. W. N. 894, 29 C. 654 : 6 C. W. N. 856. 31 C 146.

——fictitious property included by mortgagor not in collusion with the mortgagee does not affect the mortgage. 1925 *Mad.* 451, 1927 Mad 93 : 98 I. C. 195, 1929 *Mad* 432.

——where in a sale deed certain property was included with the sole object of registering the document in the place where that *property* was situated and the parties had agreed that after the document was registered the vendee *should reconvey* this *item of property* to the vendor, held that the inclusion of the property *did* not vitiate the registration and was not a *fraud* on the registration law. 49 B. 821 : 27 Bom. L. R. 1103 : 1925 Bom 318 : 92 I. C. 628.

——a small item of property included *only for registration* at a particular place does not vitiate *the registration* if the *property* is intended to be transferred. 1925 *Pat.* 194.

——unless there *is* fraud or collusion between the parties the fact that the donor transferred a small piece of land with the object of giving jurisdiction to the Sub-Registrar *will not be* such a bad *motive* as to vitiate the registration *of the document.* 93 I. C. 782 ; 1926 Pat 582 : 5 *Pat.* 646, 46 A. 754 *fol* (41 C. 972, **P. C.**, 45 C 509 **P. C.**). *Dist.*, 105 I. C 172.

——a document registered without jurisdiction is a nullity 11 C 444 (24 W. R. 75 : 2 I. A. 210 : 15 B. L. R. 228) **P. C.**, *Dist.*, 21 C. 654 : 5 C. L. J. 188.

Registration of Documents and Effect of Legal and Illegal Registration—*contd.*

——presentation by unauthorised person vitiates registration. 19 C W N. 282 P C, 35 A 34 even when it is admitted by the executant, as the law must be strictly followed. 19 C W. N 282 P C.
[illegible] re the execu-
[illegible] re the docu-
[illegible] petent person
[illegible] is complied with

—— all the heirs of the deceased executant need not combine to present a document for registration 55 C. 1008, 32 C. W. N 646 1928 Cal 565, in the same case it has been held that when there are widow, brother, mother and sister as heirs, the widow alone can present a *kabala* executed by her husband

——presentation by pleader if not duly authorised is not valid. 3 Rang. 398

——where a sale deed was executed on behalf of the principal [illegible] attorney, but the power was not
[illegible] ation another person holding a
[illegible] admitted execution before the
[illegible] lid admission of execution and
[illegible] W. N 539: 88 I. C 33: 1925 Cal. 703

——when a document is presented by an agent holding an invalid power of attorney and is registered the registration is a nullity. 50 B. 628: 1926 Bom. 479 28 Bom. L R 949
[illegible]

—— an acceptance of an unauthenticated power of attorney can be cured by sec 87 (act in good faith) or by the executant's consent. [illegible] authority of the agent is revoked
[illegible] is not known to either the
[illegible] document is not invalidated

——the endorsement of the Sub-Registrar that the document
[illegible] that the power of attor-
[illegible] second presentation does
[illegible] 377: 25 Bom L R. 655:
44 A 514 31 M L [illegible], P. C., [illegible] L. T. 442: 67 I. C. 315
[illegible] appearance and admission of
[illegible] against others. 36 C. L. J.

——[illegible] complied with. 36 C. L. J. 109.

——ss. 32 and 33 are imperative and must be strictly followed 2 Lah. 5: 58 I C. 333, 44 A. 514 P. C.

——admission of husband on wife's behalf is an irregularity curable by sec 87. 47 A 294: 1925 All. 215: 84 I. C. 786.

Registration of Documents and Effect of Legal and Illeg Registration—*contd.*

——an improper registration on a wrong conclusion as to stat will not affect a document 23 C. W. N. 535.

——all things done before a Registrar *in his official capaci* will be presumed to be done duly and in order. 10 C W N 52 33 C. 537. 3 C. L. J. 349 : 8 Bom. L R 375 : 1 M. L. T. 131 : 16 L. J. 161 **P. C.**, 44 A. 514 **P. C.**

——an executant registering a deed after altering the date

16 C W. N. 535

eding 9 years is void

3, and is not admissible

7. N. 191, 6 C. W N 916

8 : 13 C L J. 649, and s

when sub-lease was executed before the *B. T. Act* 29 C. L. J 39 29 C. 148

——false entry of property to give jurisdiction to a particula registering officer vitiates the document. 18 C. W. N. 517, 41 C 972, **P. C**, 43 M 436 : 24 C. W. N. 985 : 33 C. L. J. 440 *P. C.*, 43 C.

. L. R 75 : 93 I. C. 213.

J : 124 : 1928 *Cal* 395,

: 1929 A. 659

so far as the personal

23 N. L. R. 143, 45 M

435 *not fol.*

——the falsity of the entry must be proved by the person alleging it. 22 C. W. N. 894, 29 C. 654 : 6 C W. N. 858 31 C 146.

——fictitious property included by mortgagor *not in collusion* with the mortgagee does not affect the mortgage 1925 *Mad* 430, 1927 Mad. 92 : 98 I. C. 195, 1929 Mad. 432.

——where in a sale deed certain property *was included with* the sole object of registering the document in the *place where* that property was situated and the parties had agreed *that after* the document was *registered* the vendee should *reconvey this* item of property *to the vendor, held* that the inclusion *of the pro*perty did not vitiate the registration and was not a *fraud on the* registration law. 49 *B.* 621 : 27 Bom. *L* R. *1103* : 1925 Bom. 311. 92 I. C. 628.

——a small item of property included *only for registration at* a particular place does not vitiate the registration if *the property is* intended to be transferred. 1925 Pat. 194.

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Sub-Registrar *will not be such a*

of the *document* 93 I. C.

41 *fol.* (41 C. 972, *P. C.*, 43 C.

——a document registered without jurisdiction *is a nullity* 11 C 444 (24 W. R. 75 : 2 I. A. 210 : 15 B. L. R. 228) *P. C.*, *Dist.* 29 C. 654. 5 C. L J. 188.

Registration of Document and Effect of Legal and Illegal Registration—*contd.*

——a third person can impeach a deed not duly registered. 5 C. L. J. 188, 32 I. A 113 · 27 A 261 P. C *Dist*

——sub-Registrar's note as to passing of consideration is no evidence. 1927 Pat. 49

——no act done in good faith will invalidate registration merely because of defect in procedure 45 M L J 497 33 M. L. T 349 : 25 Bom. L. R. 1248 . 75 I. C 7 P C.

——where a document is registered presumption will be that the document was executed on the date it bears. 1926 M W. N 939 : 1926 Mad 744 96 I C 26.

——when a document is registered it takes effect from the date of its execution 1926 All 549 : 95 I C 138

——where a subsequent purchaser is aware of a previous agreement of sale to another person he acquires no title 1928 Cal 754

Effect of non-registration of documents s. 49.

——a sale of tangible immoveable property can be effected only by registered deed 36 C 989, or when the value of the property is less than Rs 100 by delivery of possession, and the unregistered document may be referred to as evidence of intention, 29 C 623, 2 I C 413 but when the value of the property is less than Rs 100 and is already in the possession of the vendor the deed of sale must be registered as there cannot be delivery of possession 34 C 207 5 C L J 390, 22 C 179 *Dist*, 6 I C 703

——a document which is compulsorily registrable but unregistered, is not admissible in evidence. 4 C 83

——a document creating equitable charge must be registered. 33 C. W N 652 : 1929 P. C 14

—— ... than Rs 100, does ... 179 P. C.

... ered document can ... 26 C 334, 11 C. ... J 25, 11 C L. J. 548, 5 B L R 18 F. B, 4 B L. R. 1 F. B, 20 W R. 107, 5 B 143, 10 C. 315, 46 M 349, and so far as it affects moveable property. 11 C. W. N 342 *this view is accepted by the recent amendment.*

——unregistered document which is compulsorily registable may be admissible in evidence to prove an admission contained in it. 49 C. L. J. 532.

——an unregistered sale deed for Rs 90 is admissible to explain the nature of possession. 1928 All 726 : 26 A L J 1084 F B.

——an unregistered sale deed above Rs. 100 can be admitted for collateral purpose to prove the nature and character of possession of the vendee. 1929 Cal. 710, (1919 P. C 44 1921 Cal. 647) Rel. on.

——an unregistered deed of gift is admissible in evidence for a collateral purpose, 46 M. 349, 34 C. L. J. 432 : 26 C. W. N. 65

Effect of non-registration of documents s. 49—contd

such as the question as to the date on which possession was taken. 45 A. 565.

——a subsequent oral arrangement may be proved by which an usufructuary mortgagee becomes owner of some portion of the mortgage property in lieu of his dues. 40 M. L. J. 105 · 1921 M W. N. 1 : 62 I. C. 603.

——a sale deed becomes inoperative for non-registration even for the purpose of specific performance when the pliff fails to pay the consideration money. 43 M. 822.

——a memorandum constituting a bargain between the parties must be registered 50 C. 338 : 38 C. L. J. 41 · 28 C W. N. 1 44 M. L. J. 602 · 25 Bom. L. R. 582 **P. C.**

——where the property is divided by a registered partition deed an unregistered document proving reunion is not admissible in evidence 51 M 977. 1928 Mad. 1113. 43 M. 241 **P. C.** *Dist* (43 C 1031 **P. C.**. 40 A. 159: 44 I. A. 201 **P. C.**) *Rel. on.*

——an unregistered ... on is not admissible ... 83 : 33 C W. N 233 · ... Bom L R 251 **P. C** ... 291, 1922 P. C. 266 *Rel. on.*

S. 50. Competition between registered and unregistered documents.

——purchaser of immoveable property paying the full consideration of Rs. 500 and being placed in possession and having the right to sue the vendor for specific performance, has the right to retain possession aginst a subsequent purchaser under a registered conveyance. 18 C. W. N. 445

——purchaser under subsequent registered document having notice of the title created by prior unregistered document has a better title 18 C. W. N. 657, (8 C 597, 6 B. 515, 8 A 540, 16 B 148) *Ref.* 1928 Mad. 546 : 111 I. C 677 (1924 Mad 271 22 C. W. N. 53 27 B. 408, 2 Bom L. R 110) *Dist.*, but the burden of proof lies upon the person who alleges such knowledge or notice. 18 C W. N 697, 2 M 1. *Fol*

——where vendee has paid full purchase money and obtained possession, the doctrine of part performance will prevail over s. 53 Tr P Act 22 C W. N. 522, 20 C W. N. 149. *19 C. W. N. 250* 42 I A. 1, **P. C.** *Ref.* 24 C. W. N. 468—all the cases have been discussed there.

——s 54 of the Tr. P. Act is not exhaustive; a person in possession under an agreement which is *time barred and not formal* executed and registered may contest the title of a subsequent purchaser under registered deed. 23 C. L. J. 77, *but there must be* ... circumstances. 23 C W. N 513 ... of an agreement may be ... title to remain in possession

S. 51 Register-books to be kept in the offices.

——a deed of sale is not invalid simply because owing to an error of procedure it is entered in Book No IV instead of Book No. 1. 1927 Mad 586 · 102 I. C. 360 . 52 M. L. J 482.

S. 60. Certificate of registration.

——when a document is registered it is to be assumed that the document was explained to the executants who admitted its execution and the receipt of consideration and that the whole proceeding and endorsement etc were regular and in order 102 I. C. 283, 33 C. 537 P. C., 51 I. A. 18 *Rel on.*

R. 69. Power of Inspector General.

——rule 174 under s. 69 incapacitating a Registering Officer from registering a document in which he is personally interested, concerns procedure only, violation of that rule does not invalidate a document if it is done in good faith 32 C L. J 471 28 M L. T. 220 . 42 A. 609 P. C.

S. 74. Procedure before Registration.

——failure to pay a certain penalty according to the order of the Registering officer is non-compliance with the requirements of law within this sec 94 I. C 251 1926 Lah. 451

——the provisions of s. 74 are mandatory 1929 Pat. 500.

S. 75. Order to register and procedure thereon.

——refusal to appear after notice before the registration authorities amounts to denial of execution 6 Lah. 344 . 89 I. C. 15 ; 26 Punj L R 691 1925 Lah 542

——the certificate of registration is proof that the document was duly registered in the manner provided by law *above case.*

S. 76. Refusal by Registrar.

——the language of s 76 (*a*) is wide enough to cover all orders of the Registrar refusing Registration, whether such orders are passed on documents presented to him on the first instance or otherwise 86 I C 797 : 48 M. L. J. 221 1925 Mad. 619

——refusal to register a document without giving reason in support of the order amounts to refusal on the ground of denial of execution 108 I C. 379 ; 1928 Lah. 98

S. 77. Suits for registration of document.

——a suit to compel registration is maintainable only when the provisions of sec. 77 of the Act have been complied with. 49 M 302 · 1926 Mad. 530, 3 A. 397, 49 B 40 . 84 I. C 416, 9 C. 150, 851, *contra* 2 A. 46,6 A 303

——independently of sec. 77 no suit to compel registration lies 95 I. C 187 1926 Pat. 89 · 7 Pat L T 730 : 1926 P H C. C. 11. But in this case where the plff. brought a suit for registration of a sale deed and the court held that the suit was barred by s. 77 it gave the plff. a decree for the specific performance by the execution and registration of fresh sale deed. But the Madras H. C.

S. 77. Suits for registration of document—*contd*

has held that where the purchaser sues for specific performance more than 30 days after the refusal by the Registrar the suit is not maintainable 49 M. 302 : 1926 Mad. 530 : 50 M. L. J. 674 :

—the document must be presented within 30 days of the date of order 1 Pat. 146. 1922 P. 408

—in a suit for registration of document the necessary issues are, (1) whether the document was executed and (2) legally and properly presented 14 C. W. N. 12, (24 C. 668, 18 M. 255, 2 284), Ref.

—refusal of execution of document, the registration of which is optional, gives rise to a cause of action under the sec 1 C. L. J. 126

—although the [illegible] be of res [illegible] from ful [illegible]

— [illegible] executar [illegible] order under s 72 and a suit for registration lies under s. 77. 47 B 290

—refusal by Registrar on a wrong ground does not deprive the party of his right of suit under s 77. 11 C. L. J. 251 : 1929 Lah 409 40 M 759 Ref

—where the sub-registrar ordered that he could neither register nor refuse to register the sale-deed presented by the vendee because the [illegible] forthcoming [illegible] an order [illegible] nable 23 [illegible] A 165.

40 M. 109) Ref. On.

—for a suit [illegible] are necessary [illegible] registrar, (3) an (1) autho [illegible] (5) institution appeal w [illegible] of suit w[illegible] 13 I. C. 182

—a claim for possession and mesne profits cannot be joined with a prayer for enforcing registration. 39 C. L. J. 40.

—an appellate court can direct stay of registration ordered by decree in suit under the section. 85 I. C. 182 : 1925 Mad. 401 : 47 M. L. J. 735.

—in a suit under s. 77 the only question is whether the documents ought to be registered was executed by the person against whom compulsory registration is claimed. 1925 Cal. 1257 : 89 I. C. [illegible]

—under s. 77 the court is only to see the genuineness and execution of the [illegible] A. L. J. 271.

[illegible] in a suit for [illegible] in such suit [illegible] Lab. 409 : I.

Cal. L. J. 251.

—the valution for the purpose of jurisdiction in a suit under this sec is that fixed by the pltf. 53 C. 1023 : 30 C. W. N. 931 : 1. I. C. 762 : 1926 Cal. 1091.

Limitation to suits.

——'making of the order' means communication of the order 28 B 8

suit under the the suit may 8 C. 910, 28 A. ovisions of the

——provisions of s. 14 L Act applies to a suit under this case. 10 C 265, *contra.*, it does not apply as the Registration Act is a complete Code 30 C 532 : 7 C W N 550, 18 C 365 F B, *Ref.* 5 C L. J. 188, see also 24 C W N 4, F B, and all cases there and 24 C. W. N 29

——neither s 5 nor s 7 of the L Act controls proceeding under this sec 18 M. 99, 20 M 50, 240

——the limitation of 30 days for presenting the document for registration runs from the final decree 33 C 1020, 1 Pat 146

——in a suit under this sec. the court cannot see the validity of the document but only the genuineness 24 C 668 1 C W. N. 444, 29 A 284 18 M 255

S. 82 Penalty.

——proceedings in the criminal court under this sec. should be stayed pending the result of the civil suit 5 C. W N 44, 31 C 858, *Dist*, 5 C. L J 233

——an accused cannot be tried in one trial for offence under this sec. and ss 467 and 471 I P. C (forgery). 30 C 822 : 7 C W N 639

——where an accused is prosecuted under s 82 R Act and other secs. of the I P C which require sanction of the civil court, and the proceeding for sanction is pending, the accused should not be tried under s 82 R Act 12 C. W. N. 822

——s. 83 does not bar prosecution under s 82 at the instance of a person 1921 M W N 144

the knowledge of the mmenced by a private 83. The word "may" Rang 61 4 Rang 437, 24) *not fol.* 1 Rang 299. *overruled*

——fraudulent and dishonest intention are not necessary ingredients of an offence under s 82 1922 Nag 86 : 66 I. C. 527, 40 M. 880 · 11 C. 566 *fol*

——conviction for false impersonation based solely on comparison of thumb impression is illegal. 3 Pat. L T 526 1 Pat 242 1922 Pat 46 : 68 I C 958

——previous sanction is not necessary. 87 I C. 913 : 21 N L. R. 167.

——[illegible] under the sec. 11 C. 566

of false personation the court he accused for comparison. 104

S. 87. Nothing is invalidated by defect in appointmen procedure.

——registration of a mortgage bond is not invalidated by fact of its being written on a stamp of the wrong kind the case be governed by s 87. 5 Rang. 666, 23 C. W. N. 534 *Ref*

——to apply s 87 it is important to distinguish between defe in the procedure of the Registrar and lack of jurisdiction Whe therefore, a document not duly stamped is admitted for registrati the mistake is an error in procedure and is cured by s 87. 1929 P. 279 (2 I. A. 210, P. C., 1 All. 465 P. C., 23 A. 233 P. C, 23 C. W N. 534) *appled*,

S 90. Exemption of documents of Government concern

——a lease of Crown lands granted by the Secretary of Stat on behalf of the Crown is exempt from registration. 1927 Pat 319 104 I. C. 209. 6 Pat. 446.

RELEASE.

—— or release of re- of transfer 37 C, 20 C. W N 371, *tra*, 12 C W. N. 478

——simply by allegation in the plaint or sanction in the written statement title cannot be renunciated, it must be in a form known to law. 19 C W. N. 260.

——release of one of the mortgagors without even expressly reserving ... rest 21 C. ... C. L. J. 202, 3 C. L ... 74, 20 M 210 Diss 10 ... J. 576

——release of one wrong doer without any intention to release all, but only as a partial satisfaction does not discharge all, but the ... evidence of satisfaction of whole. ... of one operates as a release of

——... acceptance of less amount of instalments amounts to waiver and release. 1917 Pat 258.

——the release of a debt for value is not a transfer of owner-ship, 42 C. L. J. 582; 1926 Cal 170.

As regards payment to some of the creditors or D Hrs. see ... *P C payment*

RELINQUISHMENT see, '*Abandonment*' *and* '*Release*'

RENT-FREE.

——claiming rent-free for 12 years amounts to adverse posses-sion 15 C L J. 203.

——allowing to enjoy rent-free for a long time *is acquiescence* 15 C. W. N. 305.

——non-payment of rent for a long time gives rise to the pre-sumption that it is rent-free, 24 I. C. 319, 341, but the cause of non-payment may be ascribed to some other reason *25 I. C. 586*

Rent-Free —*contd.*

——there is no presumption that the lands are *Lakheraj*. 4 M I. A. 497 P. C.

——where in partition proceedings under the B E P. Act it was contended by all the landlords that certain lands were rent-free lands and the lands were taken as such in the adjustment of assets of the whom the lands were allotted were rent-free 29 C W. N. 1925 Cal 866.

see other cases under grant.

RESUMPTION

vice tenures called jagir male line it escheats to Sir or Khas property, minder becomes entitled to make a new settlement with the knowledge and sanction of the authorities 28 C. W N 145 1923 M W. N 702 P. C.

REVENUE SALE LAW (ACT XI OF 1859).

Applicability and scope of the Act

——the Act XI of 1859 extends to Govt tenures in Dehi Punchannagram in the District of 24 Parganas, by virtue of Act VII of 1868. 39 C 981 16 C. W. N 842: 16 C L J. 620 · 16 I C. 821 P. C.

——where a *howladar* holding a *howla* under the Govt. asked the latter to manage during his unexpired term and during that period *korsha* fell into arrears, a sale cannot be held under the Land Revenue Sales Act to realise the sums as they are not revenue.

y the purchaser of a separate aw is maintainable though the

——in a sale under the Act the interest of defaulting owner is not sold but the interest of the Crown subject to the payment of Govt assessment is sold 65 I. C 866 34 C L J 141.

the purchaser of an estate at a revenue sale takes the estate subject to Act has no of Rights, mits of the ssed on the claim them. 27 C. L J

a complete Code in itself Act 2 Pat L. J. 402:

— where sale under the Act is brought about by a deliberate of the co-owners and the pre-arranged plan to which a person who under that

Applicability and scope of the Act—*contd.*

arrangement was to hold the property for the benefit of himself and the other parties to it, the sale had no higher effect than a private alienation and the purchase should be made to reconvey the property to the rightful owners. 24 C. W. N. 662 : 30 C L J. 475 : 55 I. C. 689.

——the Act is a stringent enactment for the realisation of arrears of revenue and its provisions must be exactly complied with. 43 C. L. J. 463 : 30 C. W. N. 618 · 1926 Cal. 866 : 95 I C. 353

S. 2. (Arrears of revenue)

... given

... are

... ; 27

... ears

... le depends primarily
such as the course
which the accounts

are kept but on the contract between the parties. 26 C W. N. I...
68 I C. 491, 39 C. 981 ; 16 I. C. 821 ; 16 C. W. N. 842 P C *Fol*
... the latter to ma...
eld under *this Act*
V. N. 723
he first of the follow...
paid according to ...
power to put up ...
ate fixed for the p...
R 237 : 88 I C. ...

d in connection w...
istalment date fixed ...
the date fixed by ...
st date in each quart...
e fixed *for sale* T...
npaid is an *arrear* ...
C. 458 (C).
s. 2 is *unknown* a...

forgotten, latest dates fixed *under s* 3 are popularly known as k... dates. 7 Pat, L. T. 747 ; 1926 Pat 549 : 96 I. C. 807

——in Bengal and Behar the land revenue for *Chait Baisak* Kist becomes payable on the last day of *Baisak* from which date ... becomes payable as "arrear" and if this arrear is not *paid* within the date fixed by the Board of Revenue the estate becomes immediately liable to sale. 40 I. C. 638 : 2 Pat. L. W. 31.

S. 3. (Latest day of payment).

——the latest days for the payment of revenue, *in case of* new estates formed after partition, must be fixed in accordance with the

S. 3. (Latest day of payment)—*contd*

provision in Rule I of the Boards rule under sec. 3: a sale held for arrears, which would not have been due if kist had been fixed under rule I, is invalid and illegal and liable to be set aside 8 C. W. N 826

S. 5 (Proviso as to arrears).

——the expression 'current year' in s 5 refers to the year in which the latest date for payment falls and fixed under sec 3, and not to the year in which the sale of the property ultimately takes place. 7 C. W N 377.

——current year means the official year (1st April to 31st March) 34 C. 381 5 C L J. 425

——s 5 is the sec. under which notices should be issued when the arrears are for years other than the current year But even if [illegible] would only be an irregula- [illegible] nullity, 11 C W N 1107 [illegible] also an irregularity 32 C.

——a combined notification under s 5 and 6 cannot be legally issued 43 C L J 468 30 C W. N 618 1926 Cal. 866: 95 I C 353, 53 C 886

——the meaning of the words "under attachment by order of any judicial authority" cannot be extended to mean an order for sale in execution of a decree or a motgage 1928 Cal. 722.

——property sold need not be under attachment 17 C 393

——the commissioner has no jurisdiction to enquire into the charge of fraud in regard to sale for arrears 39 C. L J 165

——when payment is accepted for the latest kist, a sale held after the change of appropriation is a nullity 13 C L J 525 · 10 I C. 272 P C 33 C, 1193; 10 C. W N 948 *reversed*

——the Collector has [illegible] full satisfac- [illegible] as advertised [illegible] edure for the [illegible] not treat the [illegible] enue without [illegible] 30 P C

S 6. (Notification of sale and no tender after latest day).

——non-compliance with sec 6 vitiates sale 11 C 200 F. B.

——failure to notify the sale for arrears of Govt. Revenue in the Official Gazette is no illegality vitiating the sale as being contrary to the provisions of the Act. 46 C 255. 29 C L J. 198 · 23 C. W. N. 369: 47 I. C. 995 P. C., on appeal from 41 C. 276: 17 C W. N. 1135: 20 I. C. 423, see also 21 C. 70 P. C

S. 6. (notification of sale and no tender after latest day)— *contd*

——a combined notification under s. 5 and s. 6 cannot be legally issued. 43 C. L. J. 468 : 30 C. W. N. 618 : 1926 Cal. 866 · 95 I C. 353 53 C. 886.

——names of proprietors need not be mentioned in the notice. 32 C. 111 8 C. W N. 757, 13 C. 208

——the particulars in the notice should be sufficient in themselves to tell purchasers what they are invited to bid for. 19 C. W. N 481 : 42 C 897 : 21 C. L. J. 412, **P. C.**, 2 Pat. L. J. 402 : 40 I. C 13

——whether the contents of notice are sufficient depends upon the term in each case. 32 C. 502 · 9 C. W. N. 343 : 1 C L. J 14 **F. B**, (2 C. W N. 479, 6 C. W. N. 526), *Diss.*

——mistake in the notice as to the share to be sold does not vitiate sale 32 C. 509 : 1 C. L. J. 91 : 9 C. W. N. 348, 13 C 208, 32 C 111 . 8 C. W. N. 757, 8 C. W. N. 337, 6 C. L. J. 163

——inadequacy of price must be connected with the alleged irregularity in the notice before the sale can be set aside 6 C. L. J 163, 32 C. 509 ; 1 C. L. J. 91 : 9 C W. N. 348, 6 C. W. N 526.

——notification must be affixed thirty days before the date fixed for sale 9 C. 27 : 11 C.L. J. 466.

——no notice need be served on the proprietors before sale where the arrears are for the current or next preceding years 74 I. C 881.

——a sale held under this Act is not invalid on account of the notices under Ss. 6 and 7 having been signed by a Sub-Deputy Collector or other officer authorised to hold the sale. 35 C L J 221,

——s. 6 does not require the Collector to mention the arrear for which the property is put up for sale. 6 Pat. L. T. 738 . 83 I C 485 1925 Pat. 750

S. 7. (notice to rayats &c.)

——omission of notice under sec. 7 *does* not vitiate sale 21 C 354, 10 C W N 137 ; 2 C. L. J. 325, 30 C. 1, 6 C. W. N. 688, 34 C 381 · 5 C. L J 425, 28 C. L. J. 51, 1928 Cal 722, because a notice under this sec is served for the purpose of forbidding the tenants from paying the rent to the defaulting proprietor. If no notice is served and the tenant pays rent to the defaulter, it would be question whether the auction purchaser would again be entitled to get rent. 1928 Cal. 722.

——there is founded distinction between issue and service of notice. 10 C. W. N. 137 . 2 C. L. J. 325

——it is necessary for the Collector to mention in the notice under s 7. the last day fixed for payment of Govt. Revenue under s. 3 of the Act. It is not necessary for him to state the day on which the Govt revenue should have been paid according to the settlement and kistbandi of the mahal. 3 Pat. L. R. 237 · 83 I C. 485 6 Pat L T. 738 : 1925 Pat. 750

S. 7. (notice to rayats &c.)—*contd.*

S. 8. (Claims against Govt.)

——where revenue was sent by money order with incorrect descriptions and it was kept in deposit but not credited and the same fact was endorsed in the receipt but the defaulter did not take notice of the endorsement and the property was sold, held the sale would be set aside. 55 C 624 32 C W. N. 359 47 C. L. J. 12 : 1928 Cal 68 : 105 I C 15

S. 9 (Deposits receivable from non-proprietors.)

——if the person paying the revenue for the defaulter believes in good faith that his interest would be endangered by the sale he would be entitled to recover. 12 C 213.

——but mortgagee of share of an estate being himself part-proprietor, cannot recover under this s. 30 C 794 7 C. W N. 609

——a suit by mortgagee of a co-sharer against the entire body of co-sharers for recovery of revenue paid by him owing to their default is one under s 9. The plff. is not bound to claim against each co-sharer the specific amount of revenue payable by him proportionate to his share. The remedies of the person paying arrears of revenue are threefold. (1) if he is a party to a suit for possession of estate the court can put him in temporary possession (2) he can have a personal decree against the defaulting proprietors, or (3) he can have a lien on the estate for the amount paid 16 C. L J. 148 17 I. C. 45.

S. 10. (*Separation of shares*)

——a co-sharer separately registering his share under this sec. cannot sue for enhancement of rent without making his co-sharer party. 8 C. 353

——when an application for opening a separate account is made the relation between the total *jama sadr* and *jama sadr* assigned in the application to the share in respect of which the application is made is the determining factors as to whether the share is pokhta or kham. The Collector, in opening the separate account ought to interpret the share according to this proposition 4 Pat 1 3 Pat. L R. 66 : 88 I C. 465 ; 1925 Pat. 681

——there is no authority in the statute for apportioning, when a separate account is opened, the arrears of revenue, whether after taking an account or merely according to the ratio between Govt. revenue assessed on the separate account and that remaining to be assessed on the residuary share. *above-case.*

S. 10. (Separation of shares)—contd.

——when the patnidars of a share of an estate owned by number of co-sharers have been paying as per terms of their parties deed into the Collectorate, the Govt. Revenue payable in respect of their landlord's share in the zemindary, any of the cosharers who opens a separate account under s. 10 is entitled to have the money paid into Collectorate and is entitled to have an order directing the patnidar to pay the Collectorate the share of revenue to his separate credit. 21 C. W. N. 214 : 34 I. C. 403

——where the largest co-sharer takes advantage of his position and allows the property to be sold by making a default in the payment of the revenue, in order to purchase the estate himself the court in equity must order reconveyance to the cosharers of their shares on payment of their shares of the dues. 30 C. W. N. 1004 : 1926 Cal. 1195 : 97 I. C. 885.

S 12. (If objection be made, parties to be referred to Civil Court).

——the true kinds of objections specified in s. 12 are the only objection that could be made to the only statements that the appl ... It would seem to follow from this that ... bound to open a separate ... separate account is to ... (Pat 1 : 3 Pat L R 66.

——a purchaser of a "Noabad Taluk" acquires it in the condition in which it was at the last settlement and not at its creation. 20 C. W. N. 636 . 32 I C. 752

S 13. (Sale of separate shares)

——at a sale under sec. 13, it is not the right of the ... proprietor that passes, but the share itself. 43 C. 46 : 29 I ... 19 C W N. 782, (22 C. 641, 11 C. W. N 83, 29 C 223 : 6 ... 375) fol. 18 C W. N. 1951 · 20 C L. J. 563 P. C.

——no adverse possession holds good against a purch... share under s. 13, 13 C. W. N. 407, 1 I. C 81, 22 C. 244 Dist.

——a mokurari lease held by co-proprietor is not affecte... sale of a share of the estate. 30 C. 1071

——description of property in notification sufficient to ... W N ... C. 502 : 2 C. W. N. 343, ... 487, Dist.

... should be sufficient ... are invited to bid for. ...

... P. C.

——the notice should describe the residue with ... accuracy and fullness. Where the residue alone is me... without its value the description is not sufficient. 18 C. L. ... 21 C 354

——the term 'estate' used in the clause, "if the estate become liable to sale for arrears of revenue" means the entire out of which the separate share has been carved; and whe...

S. 13. (Sale of separate shares)—*contd.*

estate as a whole is not in arrears the sale of a share for its own arrears is illegal and can be set aside in civil court 18 C. W. N. 490 18 C. L. J. 505 : 21 I C. 953, 25 C. 833, 837, P. C., *Fol*

——the Collector can sell a revenue unit, whether estate or share as a whole He cannot separate it for the sake of realising arrears. 16 C. L J. 524 : 17 C. W. N. 844 16 I. C. 41

——the sale-law contemplates that an estate in arrears should be sold as soon as possible after the liability to sale has arisen by failure to pay the arrears on the latest day of payment Therefore where after opening of separate accounts the balance of a residuary share is sold for arrears of revenue, the onus of showing that the entire estate, including the separated share, was liable to sale at the date of the opening of the accounts is on the party alleging

[illegible] them is in arrear for that
[illegible] that kist the entire estate
[illegible] in be sold for an arrear of
[illegible] kist the sale is without
[illegible] *Rel on*

S, 14 (Entire estate may be sold under certain conditions).

——the purchaser of a share of the estate held by Hindu widow acquires the absolute interest in the share. 22 C 641 11 C W N. 821, 43 C 46 . 19 C W N 782 29 I C 350

——payment by a joint sharer would be no bar to a proceeding being taken under s. 14, and the period prescribed in s 14 runs from the time of notice and not from the date of sale. 21 C. 844

——(*Per Petheram C J*) s 33 applies both to sales by public auction and under s 14, (*Per Amir Ali J*) *s 33 does not apply to* sale under s. 14. 21 C 844 : 21 C 70, *Ref*

——separate account not actually in arrear,—Collector's mistake and sale of entire interest under this sec. is invalid. 19 C W N. 764 ; 34 I. C. 283, P. C.

——the Collector is not bound to give notice to the co-sharers, only declaration is necessary 34 C 381 . 5 C L J 425

——when co sharers deposit money under this sec they all acquire equal shares irrespective of their original shares. 4 C W. N. 465

——the purchaser of the entire estate sold under s 14 for arrears due on "part of the estate' gets it free from all incumbrances. The words "arrears due on account of the same" mean entire arrears and also part of the arrears due on account of estate sold but not on account of the other estate. 23 C. W. N 315 50 I C. 406.

——defaulting proprietors are not excluded from rules under *s 14.* The word "other" in the section seems to be a mere inadvertence. The section was not intended to deprive the rights of the

S 14. (Entire estate may be sold under certain conditions) —*contd.*

co-sharers *inter se* but merely to give them a chance of saving the estate and secure the payment of the revenue. 41 C. 1093: 18 C. W N 1071, 24 I. C. 276

——a revenue sale does not *ipso facto* avoid incumbrances and under-tenures but only renders them voidable at the option of the purchaser 17 C. W. N. 984: 19 I. C. 974.

S 18. (Estates may be specially exempted from sale.)

——order of exemption of share from sale should be absolute and unconditional 17 C. 808: 17 I. A. 57, P. C., 2 C. L. J. 335: 10 C W. N 137: 21 C. 844.

S. 25 (Appeals)

——all final courts including the Revenue Courts have an inherent power to make such orders as may be necessary for the ends of justice A commissioner of division possesses the power to restore an appeal under s. 25, which he has decided *exparte*, 46 I. C 621 (C).

S. 26 (Annulment of sale in special cases)

——the commissioner ... legally conducted 5'

Ss 27, 28 ... period

——a cert ... is bad. 18 C 12..

——the grant of certificate to the purchaser is conclusive of service of due notice ... 37: 2 C. L. J. 325 ... being joint with those ... way of its being an ... C. W. N. 341, 15 C. ... W. R. 44.

——a certificate of sale granted under s. 28 is no conclusive evidence of title 14 I. C. 10 (C).

S 29. (Delivery of possession.)

——the words "any person who refuses to vacate can be removed by the Collector" refer to the former proprietors or persons claiming proprietory right through them and do not refer to under-tenure-holders 17 C. W. N. 984: 19 I. C. 974

S 31 (Application of purchase money).

——an un-recorded ... proprietor is not his ... the sur- ... in the civil ... s governed ... B, 18 C ... 504, *overruled* 6 C. L. J. 535 *Ref.*

——mortgagees are entitled to the sale proceeds and such claim should be satisfied according to priority out of the sums in court 27 C L. J. 303: 22 C. W. N. 505: 4 Pat. L. W. 249: 44 I C 304 P. C.

S. 32. (Notification of annulment.)

——an assignee of an auction-purchaser is entitled of all the rights under s 32. 10 C. W. N. 148.

S. 33 (Jurisdiction of civil courts to annul sale).

——a putnidar is entitled to institute a suit to set aside a sale 7 C. W. N. 377.

[illegible] on the ground of fraud. 32 [illegible] 131, *contra*. 3 C. 300.

[illegible] been taken in revenue [illegible] 17 I. A. 57.

[illegible] owing to blunder of the Collector can be declared by the civil court as void. 13 C. L J 584 · 10 I. C. 272 **P. C**, 25 C 833 : 25 I A. 151 2 C. W N 513 **P C.**, 25 C. 876 , 2 C. W N. 360 10 W R 66 **F. B.**, *Fol* 21 C. 70, **P. C.**, *Dist.* (1 C L. J 565 · 17 M L. J 499), *Ref*

——the amount of cesses cannot be included in the amount recoverable under this Act, but the fact that the amount of arrears claimed was different from the amount due does not take away the jurisdiction of the Collector to hold the sale. 43 C W. N 468 : 1926 Cal. 866, 30 C W N. 618, 95 I C. 353 53 C. 886

——the existence of an arrear of revenue is essential, otherwise [illegible] 15 C. W. N. 443 . 13 C.

[illegible] on the ground of fraudu- [illegible] is not governed by s. 33, [illegible] I C 70.

——but when the sale takes place through the fraud of a co-owner, it is of no effect. 24 C. W N. 662

——to set aside a sale the party must show either want of jurisdiction or material irregularity which resulted in substantial injury. 35 C L J 221, 43 C L J 468 30 C W N 618 . 1926 Cal 866 95 I C 353.

——in annulling a sale the plff must prove 3 things (1) that the sale was made contrary to the provision of this Act, (2) that he has sustained substantial injury by reason of the irregularity, (3) that the irregularity was specified before the Commissioner. Trifling error does not vitiate a sale 31 C. W N 107 1926 P. C. 126 . 51 M. L J. 815 : 44 C. L J 515 : 6 Pat 200 8 Pat. L. T. 1 **P C.** (2 Pat. L. J 402 **F B**), *overruled* (42 C 897 **P C**, 21 C 70 **P C**, *Ref*

——omission to notify in the Vernacular Govt Gazette circula- [illegible] which the Govt. revenue [illegible] se vitiates the sale. It [illegible] in the Calcutta Gazette. [illegible] 47 I C 905 **P. C.**, on appeal from 41 C. 276 : 17 C W. N 1135 : 20 I. C. 423

——in a suit to set aside a revenue sale the plff cannot urge any ground which he did not take in his appeal to the Commissioner. 47 I. C. 422 (C).

S. 33. (Jurisdiction of civil courts of annul sale)—*contd*

——this sec also ... al sales held contrary to th... does not apply if the propert... 31 I. C 965 : 25 I. A. 151. ...

——s. 34 refers to cases brought before the civil courts under s. 33. The two sections must be taken as being closely connected with each other and the rule of limitation as applying only to suits under s. 33., 19 C. W. N. 464 : 28 I. C. 876.

——s 33 applies to sales under s. 14 and in the absence of injury to the plff. a suit to set aside a sale does not lie. 18 C. W. N 1071 : 41 C. 1092 24 I. C. 276.

... ct. to suits to set aside sale ... 148.

S. 3... decree of court) ... not executed within six mon... order ... aside on r... the s...

——ss 33 and 34 are closely related to one another 19 C. W. N. 464 28 I. C. 876

——s 34 applies merely to the case of an owner who after default ... set- ... in ... tin ... put ... ow ... par ... 629 (...)

S. 36 (Suit on the grousd of benami purchase).

——s 36 only prohibits a true owner to dispute the title of his benamder 12 C. 302.

... and literally, ... haser on the ... notice 2 C. ... N. 657, Appld.

——where a defaulting ... there may be such ... it right to treat such ... 233 : 18 C. L. J 97 : no fraud is necessary ... 9, P. C., 15 C. 194.

... 11 C. W. N. 1033 *Ref* ... It does not apply where
——s 36 should be construed ... nant through ... C W. N. 75.

... ing the title ... can enforce

S. 36. (Suit on the ground of benami purchase)—*contd.*

his claim against the true owner in respect of the property alleging the benami purchase 37 I. C. 790 (C).

——this sec. does not bar a suit for possession of lands in a Taluk purchased at a revenue sale in the benamdar's name. 23 I. C 917 (c).

... against the certified purchaser ... transfer the property to the.

... the representative of the

S. 37. (Rights of purchaser at revenue sale)

——the word "settlement" in s 37 refers not to the Permanent Settlement of 1793 but to the contract with Govt. 34 C L. J. 485 · 66 I C. 911, 5 Pat. L J 79 : 54 I. C. 658 : 1919 Pat 449, 19 I C 872.

——s 37 should be construed strictly and in favour of holders of ... 314, 10 M. I. A. 126, P. C.

... not alone annul an inc...

——the right of the auction-purchasers under this section is transmissible to his heirs and assignees. 1 C L J 579, who can annul under-tenures 5 C L J 264, 20 C. W. N 1028

——in a suit by the plff to set aside the deft's tenure, held that as all the lands of the deft's tenure were not included in the plff's *sadar patni* the plff was not entitled to annul the tenure in part 55 I C 645, (C), 5 C L J. 264 *fol*

——a dwelling house to be exempted must be of a permanent character and mere huts would not come within that description. 3 C. W N 212.

——exception applies to such portions of the land as are covered ...

——lands on which gardens have been, are protected though not expressly leased for the purpose. 12 C 327, 9 C W N. 852, Fol., but garden once made will not protect for all time to come, it must be in existence. 19 C W. N. 1030 . 20 C. L J. 494 42 C. 638 . 27 I. C. 258.

——the purchaser at revenue sale gets only the land and not the superstructures thereon which are not incumbrances within s. 37. The owner of such a superstructure can remain on the land subject to paying ground rent to the purchaser. 90 I. C. 901 : 1926 Cal 97, affirmed by the Privy Council in 54 A. 669 : 102 I. C. 98

S. 37. (Rights of purchaser at revenue sale)—*contd.*

198 : 1927 M. W. N. 461 : 31 C. W. N. 265 : 46 C. L. J. 1 : 8 Pat L 663 : 1927 P. C 135 : 29 Bom. L. R. 1143 P. C.

——when share in a tank has been held as an integral par an agricultural holding, occupancy right can be acquired therein such rights can be protected. 8 C. W. N. 192, 25 C 917, Dist L. R. 140,, *relied on.*

——suit to avoid tenure—burden of proof. 10 C W. N. 15 C. 555

——purchaser must prove that his *mal* land has since 1790, be converted into *lakhiraj*, 20. C. W. N. 1028, 1926 Pat 416 · 5 P 726 96 I. C. 575.

——when defence under exception (3) fails deft may ... 9 C W, N. 852.

the surrounding land is n the clause "a lease of (t ... C. W. N. 412.

——a tank existing prior to the deft's lease is not a protect interest within s 37. 41 I. C. 1 (C).

——exception (4) applies to *bonafide* improvements and perm nent buildings constructed before revenue sale, and does not exclu a raiyat. 8 C. 110.

——when new estate is created upon partition by Collector, it an entire estate under this sec 24 C. 887.

——" time of settlement " in case of permanently settled estate means the time of permanent settlement and in other cases, th time of last settlement with Government. 24 C. 887, 10 C. W. 503, Ref.

——the expression "right of occupancy" covers such righ acquired under any law promulgated since 1859, 31 C. 725 · 8 C W N. 601, 35 C. L. J 212

——raiyats holding at fixed rates are protected. 20 C W. N 185, 46 I C. 254 (C)

——occupancy raiyats are exempted and transferee from them possessing for 12 years. 49 I. C. 437 (C).

—— ... who has already acquired an occupancy right ... grant of a before ... protected fixed ... rred and 27 C

——when part of a taluk existing before ... but can be traced held in proportionate *jama* under a different name ... C W. N. 29 · 27 from the original taluk, it is protected 19 I C 14

——contract with Govt, Bajeapti taluk. 66 I. C. 911

——to bring a case under sec. 37, three things must concur: there must be a sale (1) of an entire estate (2) in the permanently ... 8 C. ... (3) for its own arrears 32 C. 27 : 31 I A. 176 : 8 C.

of every kind not due it ... higher than that paid

S. 37. (Rights of purchaser at revenue sale)—*contd.*

—— where an auction purchaser creates a *patni* that by itself is not an intimation to the under tenure-holders that the under tenures have been annulled. 68 I. C 449 · 1923 Cal. 195

——the purchaser purchases not the interest of the defaulter but that of the Crown, so free from any adverse claim 36 C. L. J. 472 ; 1923 Cal. 82, 18 C W. N 1281 : 20 C. L. J. 563 . 90 I. C. 901 (C) P. C , 34 C. 868 *contra*, 2 Pat 839.

——a person is not a defaulting proprietor whose title had not been perfected by adverse possession before the revenue sale. 1923 Cal. 82.

——"purchaser" in s 39 includes real purchaser and not only a certified purchaser or his heirs or assignees. 23 I C 917 (Pat)

——in a suit for possession of undivided half share on the ground that it was included within the taluk purchased by the plff. at a revenue sale in which the deft. pleaded that the share was a part of a *howla* which was a protected interest held that the deft. was to prove that the disputed land appertained to the *howla*. 16 C. W. N. 693 15 I C. 701 : 23 I. C 917 (C).

ld the lands
lement, held
within the

——a rent decree by an ex-proprietor is not *res-judicata* in a rent suit by subsequent purchaser at revenue sale, but the latter has the choice to take advantage of the decree. 24 C. W. N. 399.

——contiguous estate which is held by the defaulter in adverse possession does not pass by the sale of the defaulting estate. 23 C L J. 151.

——the word "settlement" in s 37 refers not to the Permanent Settlement but contract with Govt In case of *Bajeapti* Taluk the contract is made at the time of assessment of revenue. 34 C. L. J. 485 ; 66 I. C 911, 19 I. C. 872 (C).

——where a chur mahal which was disclaimed by diluvions was sold at auction by the Collector aprising the existing area the purchaser was entitled to any accretion. 40 C L J. 322.

S 39. (Common and special registry).

——the registration of a tenure in the common registry is not *prima facie* evidence of its existence. 9 C 116, 12 C L. J. 89

S. 52. (Rights of purchaser of estate not permanently settled).

——in a reserved *khasmahal* there was *nimosat taluk* of which the last settlement had taken place in 1908 and under this *nimosat*

S. 52. (Rights of purchaser of estate not permanently settled—*contd.*

taluk there had existed a *howla* from 1883 The *nimosat taluk* was sold for arrears of revenue in 1912, held that the sale did not affect the *howla* which existed before the last settlement of the *taluk* 45 I. C 892 (C).

——a patnidar whose tenure is specially registered under *Act (XI of 1859)* and who purchases the parental estate at revenue sale does not thereby acquire the right of avoiding the under-tenures *subordinate* to the patni. 18 C. W N. 672 : 25 I. C. 497.

Ss. 53, 54. (Rights of purchaser being a sharer and of purchaser of share.)

——a sale held under the Act passes to the purchaser the *whole share* of the estate and not merely the right, title and interest of the defaulter. 16 C W. N 587 : 15 C. L. J. 436 : 14 I. C. 219

——previous purchaser of a share without sale-certificate is an unrecorded co-partner of the estate under sec. 53. 4 C 607

——s. 53 is a proviso to or *qualification* of sec. 37, 32 C. 27. 6 Bom L. R. 754 P. C.

——s 53 protects the incumbrances created up to the date of sale and s 54 protects the incumbrances up to the date of *default* 17 C. 148, 7 C. L. J. 387, 3 C. L. J. 52, 7 C. L J 1, 35 C. L J *158*

——by revenue sale of estate in the hand of a Hindu *widow* the absolute estate and not the widow's life-interest passes. *11 C* W. N. 821, 22 C. 641.

——in a suit to establish *mukurari* lease no payment of rent is necessary. 14 C. 109 : 13 I. A. 160 P. C.

——whether adverse possession is completed before or after sale, a purchaser of a share for which separate account has been opened becomes entitled to it. 12 C. W. N. 528, 13 C. W. N. 407.

——the purchaser of revenue sale purchases the interest of the Crown and not of the defaulter, so adverse possession against him cannot commence before the date of the sale 34 C. L J. *141*, 35 C. L. J. 472 : 1923 Cal. 82 : 20 C. L. J. 563, *contra.*, 2 Pat 839.

——right by adverse possession is extinguished *by Revenue* sale. 36 C. L. J. 472.

——a lease of a right to collect rent from the Mukurraridar is an incumbrance within the sec. 63 I C 183 (Pat).

——the purchaser does not acquire any right in *respect of under* tenures or raiyats which were not possessed by the *previous pro*prietor at the time of the sale. 35 C. L. J. 185 : *1922 C.* 393: 69 *I. C. 67.*

—— [illegible] as it is therein *stated* is to [illegible] are on which the *revenue* is [illegible] revenue due *upon it.* 3 Pat. [illegible] *Ref.*

——in a case in which the property sold at a *revenue sale* is purchased by the recorded proprietor himself the *property* is acquired under s. 53, subject to all the incumbrances *existing at the* time of the sale which can therefore be enforced *against the pro-*

Ss 53. 54 (Rights of purchaser being a sharer and of purchaser of share)—*contd.*

perty. As regards the sale proceeds however in such a case the recorded proprietor has all the rights given by s 31. 22 C. W. N. 505 · 27 C L J 303 4 P L W. 249 : 44 I. C. 304 P C.

——if a co-proprietor purchases an estate sold for arrears, he purchases it subject to all the incumbrances even if he be a non-defaulter and the incumbrances were created by the defaulting proprietor. 1929 Pat 209, 16 W. R 136 *fol.*

——a purchaser who is the benamdar for the defaulting proprietor is only entitled to tak [illegible] brances created by the defa [illegible] (16 W R 130, 16 W R. 131, 22 [illegible]

——if a proprietor of an [illegible] another makes default in the payment of revenue and purchases the estate himself, he is in the position of a proprietor who has purchased his own estate and the purchase is subject to all the incumbrances existing at the time of the sale. 43 I C 461 (c)

——mortgage- sale,—then revenue sale,—respective rights of the purchaser at two sales 40 C. 89 , 16 C W N 985 ; 16 I C. 210 16 C. L J 606 P. C.

——when a separate share of an estate is sold for arrears and the share is subject to a mortgage, only the equity of redemption passes to the purchaser 1928 Pat 209.

——a proprietor granted a *mokurari* with respect to his entire share and later on he gave a lease to his wife of his right to collect rent from *Mukurardar* for Rs 29 per year, held that the right created in favour of wife was an incumbrance within this sec. 63 I C. 183 (Pat).

——where a sum of Rs 120 was being paid to a Mahanta for a period of more than 100 years it can be presumed to be a charge 91 I C. 411 1926 Cal. 552

S. 58 (Government may purchase)

——the power vested in the Collector to bid for the Government must be exercised with discretion and under the circumstances of the case, the sale was bad. 31 C. 1036 : 8 C. W N. 880, 22 C. W N. 769 *Dist.*

——the mere fact that at a sale under the Act a Collector's peon opens the bid, does not preclude the Collector from taking over the estate under the second portion of s. 58 22 C W. N. 769 ; 28 C. L. J. 51 46 I. C. 447

——when the Collector's servant formally opend the bidding with an offer of Re. 1 but the Collector himself never entered into com- [illegible] fairly and [illegible] or was not [illegible] the Estate

Act.'
'Sale Certificate'

SANYASI.

——the ordinary rule is that among the *sanyasis* generally no *chela* has right as such to succeed to the poperty of his *guru*, he must be ... being generally ... of appointment ... ions of the sect ... es, see '*Hindu Law, Endowments.*'

——Hindu texts applicable to the desinheritance of ascetics do not apply to *sudras* unless usage or custom to the contrary is proved. 46 A. 616. 80 I. C. 579: 1924 All. 742, 40 C. 545, 40 M. 846, 39 B 168 *fol*.

SERVANT see "*Master and Servant*"

SERVICE see "*Master and Servant.*"

Service Tenure, see '*B. T. Act s 181.*"

SPECIAL DAMAGE.

——in the ca... special damage arises. The ques... 39 C. L. J. 347. 26 C ...

——in case o... "village right of gopath" ... within the 2nd class of ... inciated by Mr. J. Wils... 347 26 C. W N. 587.

——decree may by obtained of a village road without proof of special damage. 17 C. W. N. 73: 15. C. 460 F. B *fol*, 33 C 905; 10 C. W. N 867 *not fol*

——in case of public path special damage is to be proved 18 C W. N 92n Special damage means the damage affecting the Plff individually 25 C W. N. 95: 61 I. C. 405.

——special damage does not mean pecuniary loss only. 23 M L T 258: 44 I. C. 834.

——where ... suffered special damage ... onvenient ... d injunc- ...

... R Act

SPECIFIC RELIEF ACT.

S. 9. (Possessory suit).

Applicability and scope of the sec.

——s. 9 takes out of the operation of the Act rights classed as "incorporeal rights" though they are immoveable property. 20 C. W N. 1158: 34 I C. 450, 19 C. 544 *Ref.*

——the object of s. 9 is to discourage people from taking the law ir... title may be 24 Bom. L R ... r the purpose of the

Sp R.

Applicability and scope of the sec.—*contd.*

——a suit under this sec by a tenant is not barred by the provisions of the Chota Nagpur Tenancy Act. 15 C. W. N. 387 : 13 C. L. J. 250 : 9 I. C. 478.

——in a suit for possession under this section mesne profits annot be awarded 1927 Mad. 722 . 102 I. C 661.

——independently of this sec. a suit for possession against a trespasser on possessory tittle is maintainable. 49 A. 191: 1927 All. 526 , 25 A. L. J. 281 99 I. C. 568, 103 I. C. 428 : 1927 All. 669 : 25 A L. J. 857.

Possession.

——where the plff. in a possessory suit is not able to prove his title and alleges that symbolical possession was with him the suit is not maintainable 21 I C. 118.

——where the plff appointed a *pujari* of a *thakurbari*, defrayed the expenses of worship, repaired the building and had the key of the door with him, his possession was such physical possession as to attract the operation of this sec although the *thakurbari* as a residence of diety, was open to the public. 44 I. C 497

——mere previous possession is sufficient in a suit under s 9. 20 C W N 773 36 I C 890

——only possession and dispossession is to be proved by the plff and no title 48 I C 433 (c), 13 I. C 541 (c), 22 I C. 279 : 1914 M W N. 95

——it is immaterial that possession of the plff was without title 12 C. L J 605, 17 C W. N. 501 18 I C 298

——prior peaceful possession furnishes a good title as against a mere trespasser 50 C, 23 74 I C. 283, 67 I C 941

——a trespasser cannot interfere with the possession of the holder of an invalid under-raiyati-lease 1929 Cal 384. 20 C W N. 182 *Dist*

——except under the Sp. R. Act, s 9, a suit for ejectment even [illegible] ied merely on previous posse-
[illegible] W N. 141 *Diss.*
[illegible] title into one for possession.

——act of possession must amount to act of dominion, which varies according to the nature of property , mere isolated acts of trespass will not do. 12 C L J 605, 13 I C 125, 541, 15 B. 685, 5 B. 208

——juridical possession is necessary, which means physical detention or occupation acquiesced in by the previous owner or occupier 12 C P. L R. 52, 15 B 685, 17 I. C. 469 : 15 O C. 317.

——possession for a relative who is not party to the suit is not juridical possession 22 C 562

——possession of certain property gives rise to the presumption of possession of appendages thereof 24 A 294.

——possession of *adhiar* is protected under this sec. 19 C. W. N. 1205.

Possession—*contd.*

——one of the co-sharers in possession when dispossessed ca sue alone under this sec 19 C. W. N 120 : 19 C. L J 117 : 23 618, 31 I C. 720 : 29 M. L. J. 760, but he can sue other co-sha when they dispossess him. 19 C. W. N. 1117 : 28 I. C. 570, 29 M J. 760. 1922 M 183 : 68 I. C 183, 5 N. L. J. 151 : 65 I. C 18 N. L R. 71.

——where co-owner in physical possession of property joi with other co-owners is dispossessed by the latter he can institut suit for recovery under s. 9 Sp. R. Act. 8 N. L. J 182.

——the possession of *archaka* in a Hindu temple is that servant of a trustee. The possession of a servant is that of master. 1922 Mad. 183 : 1922 M. W. N. 422.

——any one of the persons dispossessed can sue if others are ... 5 ... a trespasser the land ... 112 I. C. 120 : 1928 N

——the sec. contemplates legal possession ; the owner who entered without delay has in law never lost possession 1928 P 124 · 6 Pat 794 : 106 I. C. 691.

For other cases see Possession.

Dispossession otherwise than in due course of law.

——dispossession by order under s 145 Cr P. C. is dispossession in due course of law. 22. C. W. N. 931 : 43 I. C 153 : 12 C. W. N 696 · 7 C L. J. 347, *contra*. 30 A. 331 : 5 A. L. J. 297 : 20 W. R. 13 26 B. 353 ... under s. 145 (4) Cr. P. C. ... pltf. of his ... 41 Cr. P C. ... under this sec 5 B. 440.

——a tenant holding over cannot be dispossessed by force by landlord and can sue the latter under this sec. 17 C. W. N. 501. 23 B 213 : 7 B. L. R. 12 : 9 W. R. 123, 87 I C. 1002 : 1925 Sind 273

——dispossession by landlord under s 87 B. T. Act is not in due course of law and the tenant can sue under this sec. 11 C. L. J 433.

——dispossession of tenant in execution of decree against landlord is dispossession in due course of law. 15 C. W. N. 936 · 14 C. W. N. 405 :

——the possession of a servant is that of his master and a court ... The ... in a suit by servant against master ... of a servant of the ... taking possess on under ... W. N 694 : I C L.

Dispossession otherwise than in due course of law—*contd.*

——partial dispossession is sufficient to maintain a suit. 3 M. 250.

——dispossession of the tenant is the dispossession of the land- [illegible] W. N 303, 305 : 1 I. N 294 : 12 C L. J. 483, 15 12 I. C 190 : 28 M. [illegible] N 763 1926 Mad 18.

——the owner of a property who has leased it to others has no right to institute a suit under s. 9 against trespassers The lessee is to institute such suit. 1925 M W N. 763 . 1926 Mad. 18 · 22 L. W. 448

——a dispossession by a legal process or under provisions of law which ought not to have been applied is not a dispossession in due course of law 18 I. C. 727 (C).

Immoveable property.

——a suit for rent of a fishery is a suit for, 24 C 449

——under sec. 9 Sp. R Act, a right of way is not regarded as, 23 B 673 (675), so also a right of fishery. 19 C 544, F. B

——a hat, the possession of which is held by collecting tolls or rents, is not 29 C 614 (617), *contra* 22 C 752

——a *jalkur* right is 20 C 446 (448), 14 C L. J 572

——right of fishery in a khal having no ownership in the soil is not, 19 C 544 F B.

——standing crops are immoveable properties but when severed from the land they become moveable properties 22 C 877.

——growing trees are immoveable properties and standing timber is immoveable property 7 C L J 152, 19 C 207

——right of easement is immoveable property 19 C 544 F. B, 24 C 449, 35 C 889 · 12 C W N 969

——decree upon a mortgage is not an immoveable property. 6 C. W N 5 3 C 450, *relied on*

——the right to mesne profits under a decree is not immoveable property 22 M 356.

——right to officiate as priest at funeral ceremonies of Hindu is in the nature of immoveable property. 10 C 73

——the interest of mortgagee in immoveable property is itself immoveable property 29 C 1 : 5 C W N 821 F B

——equity of redemption is immoveable property 33 C L J. 7 : 21 B 226

——a turn (*pala*) of worship is not an interest in immoveable property. 22 C W N 994

——a *mela* or fair is not immoveable property. 35 C. 82 · 11 C. W. N 1053 6 C. L. J 342 F. B.

Removal of constructions.

——no order can be passed under this sec. for removal of huts, 28 I. C. 473 (C). 25 C. 803, but the jurisdiction of the court is not ousted by the erection of hut. 3 C. L. J. 38n

Appeal and Review.

——there can be re-hearing under Or. 9, r. 9 but no review. 4 M. 217 : 31 I. C 307 : 2 L. W. 1067.

——an order passed in execution of a decree under s. 9 Sp R Act is not appealable. 63 I. C. 760, 22 C. W. N. 446, 45 C 519 : 26 C L J 325 : 42 I. C. 711, 1923 Lab. 105, 45 P. L. R. 1915 : 28 I C 232, 39 I. C. 375 ; 4 P. W. R 1917 : 21 P. L. R. 1917, 39 I. C 379 : 5 P W R 1917, 63 I. C. 76.

Limitation

——a suit by the Secretary of State for India, whether it be under s 9 or otherwise must be governed by Art. 149 L Act and not Art 3, 87 I. C. 1002 : 1925 Sind. 275.

Effect of decision under s. 9.

——a finding as to possession under this sec. cannot operate as *res judicata* The judgment itself is only relevant as evidence of a transaction or instance when the right to possession was claimed or disputed and also as evidence to show that there was such a judgment or decree. 1925 Cal. 1046 : 85 I. C. 979.

Suit against the decree under s. 9.

——a person against whom an order is made under s. 9 can sue for declaration of title and for injunction restraining execution of that decree. 24 Bom. L. R 768 : 68 I. C. 490, 4 C. 580 *Dist.*

S. 12—30 (Specific performance of contract).

[illegible] must be taken [illegible] ities can be [illegible] 314 : 1929 [illegible]

——plff. must show that he has performed his part of the contract and is ready to perform the rest. 24 C. L. J. 90.

——mortgagee cannot sue the mortgagor to deliver certain herds of cattle according to contract. 20 C. W. N. 1020

——the court in exercising discretion should not refuse specific performance in the absence of fraud or misrepresentation 38 C 805 15 C. W N. 934, P. C.

——contract to reconvey within certain year on repayment of consideration money may be specifically enforced. 15 C. L. J. 332

——contract may be specifically enforced in part. 16 C. W N. 247, 38 M 1187 : 16 M L. T. 370, 33 M. 359, 37 M. 403, 14 C. L. J. 627.

——in a suit for specific performance of an agreement to reconvey it would be proper for the plff. to tender the money or bring it into court with the plaint 24 Bom. L. R 434 : 67 I. C. 865.

——specific performance of a contract by manager of undivided Hindu family cannot be enforced. 37 M. 887 ; 15 I. C. 613, it can only be enforced to the extent of his share. 33 M. 1137 ; 16 M L. T. 370 *contra*, it can be enforced 32 M. 320, 20 M. 74, 2 C. L J. 321 5 M. 337.

Ss 12—30. (Specific performance of contract)—*contd.*

——when there is no completed contract between the parties it cannot be specifically enforced. 65 I C 594 (C). 24 Bom. L. R. 466 : 67 I. C. 433.

——no specific performance against minor can be claimed. 39 C. 232 : 16 C. W N. 74 . 15 C L. J 99, P. C., 11 C. W. N. 34 : 4 C. L. J. 431, F. B *Reversed.*

——the court cannot allow specific performance against a minor of a contract entered into by his *defacto* guardian 4 Pat. L T 553, 44 M. L. J 226 . 72 I C 42, 1928 M W. N. 185 108 I C. 282 · 1928 Mad. 407.

——when the deft. contracted to sell on behalf of minor son and afterwards became owner, it cannot be specifically enforced. 32 C. 832 : 9 C. W. N 1019 : 2 C L J 6.

[illegible] sell his share as well [illegible] ordered so far his [illegible] regards the minor's [illegible] 1926 Cal. 744.

[illegible] cannot be enforced [illegible] : 1928 Cal.

[illegible] of part is [illegible] construc- [illegible] V. N. 693 [illegible] P. C and [illegible] or to any [illegible] able doubt.

——option to purchase—sale to third person before acceptance of offer, effect of. 42 M. L J 432 65 I C. 720 46 M 30

——s. 15 is enacted for the benefit of the purchaser who has the option to accept partial performance 115 I C. 251 : 1929 Mad. 189

——after a contract of sale vendor becomes a trustee as to the land and the vendee becomes a trustee as to the purchase money 67 I. C. 888.

——proof of payment of full consideration for the sale in ignorance of the original contract of sale raises a presumption of good faith. 67 I C. 888.

——contracts enforceable against the insolvent at the date of his insolvency may be enforceable against the official receiver. 1928 Mad 860 : 1928 M. W. N 617, 15 M. L. T 92, *fol.*

——when there is a subsequent agreement a prior agreement with respect to the liquidation of a debt cannot be specifically enforced. 33 C. W N 652 . 1929 P. C 141 P C

——in case of subsequent purchase the burden is on the plff. to prove notice. 25 Bom. L. R 375 . 73 I C. 231, 45 M L. J. 157 ; 73 I. C. 297, *contra* 69 I. C 470.

——specific performance of an agreement to grant lease cannot be granted unless the agreement either expressly or impliedly fixes

Ss. 12—30. (Specific performance of contract)—*contd.*
the date from which the term is to run. 25 C W. N. 330 33 C. L. J. 57 : 39 M. L. J. 329 : 22 Bom L. R. 1332 P. C.

——some of the contractors cannot enforce specific performance which others refuse. 24 C. 832, 7 I. C. 393.

——although there was a provision in the contract of sale for damages in case of default by either vendor or vendee, a decree for specific performance was allowed 90 I. C. 605 : 48 M. L. J. 152 . 22 L. W. 366.

——the fact that a contract of sale provides for payment of penalty on default does not disentitle a party to claim specific performance of the contract. 26 Punj. L. R. 751 : 1925 Lah. 605

——provision for damages under certain circumstances does not bar a suit for specific performance. 84 I. C. 612 : 1925 Mad 237, 1925 Lah 605 : 87 I. C. 511. In such cases the presumption is that the breach cannot be adequately compensated in money and the onus is on the defts. to show that specific performance should not be granted 87 I. C. 511 : 1925 Lah 605.

... of specific perf ...

ing that he was ¼ the sharer of an ejmali property ... fourth share having fallen to him by succession, and it was later on discovered that additional ¼ never so fell to the deft. in a suit for specific purformance relating ¼ share belonging to the deft. on a proportionate payment it was held that the case before the court ... that the plff. would be entitled ... of full consideration ... I. C. 904 : 1925 Cal.

——where there is want of title in some of the items of pro... ... to be sold in a suit for specific performance the court can... the properties ... the price of the properties ... on a new price subject to ... C. 335 : 3 Pat L. R. 95 : ... 45.

... and negative in their form ... Code within the terms ... mance must be granted, if ...

... the contract. 27 A. 119 ... perform his part of the con... W. N. 953 : 111 I. C. 113 ... P. C. 208 : 43 C. L. J. 451 ...

... of sec. 27 must show that ... in sec. 107 I C. 251. 1925 ...

... 301.

——purchaser is entitled to deduct the money he has paid from the deposit with him to save the property from execution sale 9 C W. N. 178.

Ss. 12—30. (Specific performance of contract)—*contd,*

——a lessee may sue either for possession or for compensation. 13 C. W. N. 326 . 6 M. L. T. 368, 12 W. R 149.

——where compensation in money is an adequate relief a decree for specific performance of the contract should not be made, proper decree in such cases being one for damages which should be calculated on the price of the property at the date of the breach. 32 C. W, N 893 27 A L. J. 780 : 1929 M. W. N. 452 : 1929 P. C. 190 : 117 I. C. 1 P. C,

——purchaser is entitled to a refund of deposit of the part of the consideration money notwithstanding his default to pay the balance 15 C. L. J 410, 24 C 897 : 1 C. W. N. 705, 33 M 375 . 20 M. L. J. 230

—— right to specific performance or in the alternative to a return of earnest money should be determined in the same suit. 31 A. 68, 9 C. L. J 512 · 19 M. L. J. 295 · 11 B. L R. 525, P C , 25 A 618

ssible
32
suit
1041

——when the court cannot grant specific performance it can grant damages as alternative claim 28 Bom. L. R 126 1926 Bom. 189.

——in case of alternative claim if the plff. debars himself by his own action from obtaining specific performance at the hearing, compensation cannot be awarded 52 B. 597 55 I. A 36 · 32 C W N. 953 : 111 I C 413 1928 P C 208 48 C L J, 451 : 26 A L. J. 1220 : 1928 M. W N. 893 P. C

——the description should be certain, 14 C L. J 627 and terms should be ascertained 31 A 68 9 C. L. J. 512 11 Bom. L R 525 : 18 M. L J. 295 P. C. 25 A. 618

—— [illegible] fically enforced. 14 C. W [illegible] he agreements against [illegible] 50, 30, 30 M. 290, 27

——a person cannot at pleasure revoke a submission to arbitration 17 C W. N. 351.

——where the contract is fair and reasonable the court should not refuse specific performance. 14 C L J. 627, 38 C 805 14 C L J. 250, 15 C. W. N. 934 . 13 Bom. L. R. 704 · 8 A L. J 1193 10 M. L. T. 455, P. C but the court of equity may in certain cases properly refuse to exercise jurisdiction 18 C. W. N. 689 : 21 I. C. 910

——to avoid multiplicity of suits the court may refuse specific performance the granting of which lies to the discretion of the court. 41 C. L. J. 162 1926 Cal. 1237 98 I C 193.

——where the vendor enters into a contract without full knowledge [illegible] up upon the [illegible] fused, 40 C. [illegible] 41 C. 152.

Ss. 12—30. (Specific performance of contract)—*contd.*

——*a speculative purchaser for nominal price cannot complain of hardship when the sale is set aside.* 13 C. W. N. 710.

——*when once a conveyance is duly executed and delivered to the purchaser but it is not registered owing to the latter's neglect or omission a suit for specific performance does not lie and a fresh conveyance cannot be compelled.* 1922 M. W. N. 70.

——*contract between two rival bidders to purchase the property in the name of one for the interest of both may be specifically enforced* 1 C. L. J. 85.

——*agreement without consideration cannot be specifically enforced* 31 C. 584 : 8 C. W. N. 594 P. C.

——*a stranger to an agreement cannot sue on it unless it can be shown that there has been a charge created in his favour or that under the agreement he is entitled to some beneficial interest S. 23 (c) relates to contracts of settlement on marriage and compromise of doubtful rights between members of the same family and gives a right of action to persons who are beneficially entitled thereunder* 87 I. C. 724 : 1926 All 7.

——*when two contracting parties confer benefit upon a third person he cannot enforce it specifically.* 11 C. L. J. 264 *contra.* 5 C. W. N. 386.

——*when the personal quality is a material ingredient of contract, it cannot be specifically enforced against legal representative* 30 C. 265.

——*in a suit for specific performance if the pltf. becomes bankrupt before instituting the suit he cannot enforce the contract. But where the bankruptcy takes place after the suit is decreed and the money deposited by the purchaser that principle does not apply* 1925 Cal. 324 78 I. C. 962

——*where the deft. has agreed to take an assignment of a decree for a particular amount the subsequent insolvency of the Jt. Dr* ... 1924 M. W. N.

... a family may ... 111 - 7 C. W.

... is pltfs. and dfts. ...

——*in suits for specific performance of contract relating to* ... *property the rule is that time is not the essence of the* ... N 693, ... C. 700 : 27 C. W. N ... 1923 ... 33 C. L. J. 244, ... 30 Punj L. R. 255 ... instituted more than ... been within 12 months ... me reason which throw ... or must show that the ... time before the proceed- ... I. A. 214 : 63 I. C. 913

Ss. 12—30 (Specific performance of contract)—*contd.*

——delay in bringing suit which amounts to laches, waiver, ... ed. 10 C 1061, 27 ... 2, and the court ... ntract. 11 C W. ... 740 P. C., 20 C. ... 265 : 7 C W. N. ... 46 M. 148 : 44 M. ... L. J. 107 . 1923 Mad 284.

——when delay is a ground for refusing specific performance. 48 M. 148 : 44 M. L. J. 107 1923 Mad 284.

——in an appeal against a decree directing specific performance, the court cannot go into the question whether the court below had power to extend the time for depositing money or as to the effect of withdrawing the money deposited 78 I C 962 : 1925 Cal. 324

——in a contract for purchase of land the deft on receipt of earnest money agreed to complete the sale in two months This ...

... oney with interest 85 I C 491 1924 B 282.

——burden of proof of want of notice is on transferee, in a suit for specific performance of a prior contract of sale. 52 C 121 84 I C 693 . 1925 Cal. 61, 1929 Pat. 300 . 10 Pat L T. 307

——the proposition that delays short of limitation period, which is of such character as to give rise to an inference of abandonment of right and which is shown to have prejudiced the deft is a bar to the exercise of right of specific performance, is doubtful 34 C L J. 164, 1923 Lah. 694, 4 Lah 327

——specific performance of an agreement to grant lease cannot be enforced unless the terms were expressly or impliedly fixed. 25 C. W N 320 33 C. L. J. 57 . 22 Bom. L. R 1332 . 39 M. L. J. 329.

——a suit for specific performance lies when the lease essential for the completion of the contract has not been executed and when there is a valid enforcible contract either party may call upon the other to complete the transaction by the execution and registration of document of title. 38. C L. J 177

——when the vendor refused to accept the price he must be deemed to have waived and dispensed with any actual tender. The mere fact that some of the persons entitled to the benefit of a sale refuse to join as plffs in a suit for specific performance thereof by the others and are therefore added as defts. is not a ground for not granting specific performance 46 M 148 44 M. L. J. 107 : 1923 Mad 284

——in a suit for specific performance of contract of sale the deft is to prove that he is a *bonafide* purchaser without notice of

Ss. 12--30 (Specific performance of contract)—*contd.*

the previous contract. 40 C. L. J. 184. (36 B. 446, 26 M. L. J. 38 A 184, 44 I. C. 470) *fol.* (2 B. 299, 25 M. L., 36 B. 446, 16 C. L 119) *Dist.*

— specific performance of ... cannot be enforced agai ... had notice

... mance wh a trustee has entered into a contract for lease which is in exce of the powers. 36 C. L J. 48 : 27 C. W. N. 159.

——it is the discretion of court to decree *specific performanc* 73 I. C. 1013.

——when the tenant is in possession the transferee from th landlord is presumed to have knowledge of the rights of the tenan *unless it is proved that he is a bona fide* transferee for value. 25 C W. N. 220, 3 Lah L. J. 447.

For other cases see L. Act, Arts 113-115

Court Fee.

——in a suit for the specific performance of contract to grant ... under S. 7 sub-sec. X ... the valua- ... L. J 94 ... n Act is ... d in the ... stion for

Court fees. *above case.*

S. 31. (When instrument may be rectified).

——in order to justify rectification there must be proof of a common intention different from the expressed intention and a common mistaken supposition that the intention *is rightly expressed* in the instrument. 34 C. L. J. 256 : 26 C. W. N. 36.

——when by clerical mistake the intention of the parties to a mortgage deed is defeated the court can give effect to the undisputably real agreement without driving them to a suit for rectification. 36 C. L. J. 421 : 1923 Cal. 53, 34 C. L. J. 256 *Ref.*

——a plff. who was co-vendee of land with defts. but whose name was omitted from the conveyance by the fraud of the defts. can *secure possession* of his share even though the limitation period for rectification of the conveyance under s. *31 has expired.* 28 C. L. J. 197 : 41 I. 747, 53 I. C. 379.

——where there is no allegation of fraud or mental mistake or any finding to that effect, the suit is not one for settlement of ... and the suit does not come under s 31. 26 I. C. 363 ... 92 of the Evi. Act and the ... for possession by pleading his ... 39 M. 792 : 1915 M W. N.

——the court will not exercise its equitable jurisdiction to rectify an instrument if it is likely to prejudice a subsequent *bona fide* incumbrance. 2 Pat. L. T. 64.

S. 34. **(when rescission may be adjudged).**

——fraud in the performance and not in making the contract is no ground for rescission of contract and restoration of parties to *status quo ante* 37 B. 158 : 19 I C. 406.

——this document under which one person agrees to stop a pending prosecution of a non compoundable offence can be set aside by him The parties in such case are not in *pari delicto.* 50 C. 639 : 75 I. C 27.

——failure to pay a part of the consideration is no ground for rescission of contract though subsequent conduct of the parties is a ground sometimes 2 Pat. L. J 168 : 38 I. C. 877 : 1 Pat. L W. 250.

——the word "contract" in the sec. is used in the sense of both executed and executory contracts i e transfers and promises. 40 M. 308 : 1916 M W. N 363 36 I C 921 **F. B.**

——the words "in the same case" in the last para of s. 35 refer to clause (C) and the court has power to make an order in the suit in which the decree was made. 47 B. 589 : 25 Bom. L R. 234 : 1923 B. 211

S. 35. **(When rescission may be adjudged)**

——in setting aside or annulling a contract on the ground of fraud one should seek to set aside the whole contract and not a part of it. 95 I C. 144 1925 Cal 959

S. 36. **(Rescission for mistake).**

——s 36 applies only to suits for recission of contracts and not to a suit for refund of money advanced under a contract discovered subsequently to be void. 21 C. W N. 404 25 C. L J. 459 : 39 I. C. 78.

S. 38. **(Court may require party rescinding to do equity).**

——where a person enters into an unenforcible contract for the purchase of property with another who is of unsound mind at the time of the contract, he cannot get a *refund of the money paid* either under s 65 Contract Act or under ss 38 and 41 of this Act or on principles of equity 32 I C 804 (C), 30 C 539 **P C.**, *Dist*, *contra* 128 P W R. 1913 · 1913 P. L R 215. 19 I C 755, 53 I. C. 65 : 15 N. L. R 149.

——the provisions of the sec can be invoked where a transaction is sought to be set aside on the ground of undue influence as it is only a species of fraud in equity. 33 I. C. 376 18 Bom. L. R 27

——where a mortgage is found to be void on account of the minority of the executant the minor is not liable to refund the money even if he misrepresented his age 53 I C 14 26 M. L. T. 245 : 10 L W (225, 39 I. C 405 **P. C**, 43 I C. 908 *fol.*

S. 39. **(Cancellation of Instrument.**

——when Hindu widow executes a deed of gift a cloud is thrown on the reversioner giving rise to cause of action. 34 C. 853 : 11 C. W. N. 956 : 6 C. L J. 233.

S. 39. (cancellation of instrument)—*contd.*

——non-payment or inadequacy of consideration is no ground. 19 I. C. 746 : 13 M. L. T. 521.

——when the suit is time-barred, objection may be taken in defence. 30 M. 167, 28 B. 639, 30 B. 395.

——when a person is induced to execute a document other than that he had undertaken to execute, the document is void and need not be cancelled 37 C. L. J. 499 : 1923 Cal. 362.

——a suit for declaring an endorsement on a mortgage deed to be a forgery being a fact for the cancellation is one of the kind under s. 39, and s. 42 does not apply. 39 A. 103 : 37 I. C. 89 : 14 A. L J. 980.

——a person suing for recovery of property which he has transferred to another under a deed of exchange which is not binding on him, need not have the deed cancelled. 33 I. C. 441 : 17 Bom. L. R. 1137n.

——where the plff. has some interest to the land covered by the *kobala* he has clearly a cause of action 28 I. C. 138.

——a party to a contract can rescind if it has been based on misrepresentation. 42 C. 28 : 24 I. C. 193.

——when the plff seeks to avoid the statute of limitation on the ground of fraud he must state the time when it was discovered 20 C. W. N. 638 . 35 I. C. 284.

——as under s 39 the relief is entirely discretionary the court of equity may well refuse to cancel a void document where both the parties to the deed are guilty of fraud. 20 C. W N. 760 : 1 Pat. L. J. 48 : 33 I. C. 711 : 3 Pat. L. W. 405

——a suit under s. 39 is maintainable only by the person against whom the instrument is void or voidable or to whom it causes injury. 26 I. C. 272.

S 40. (What instrument may be partially cancelled).

——the endorsement on a document is itself a document like the several parts of documents under s. 40 Sp R. Act. 39 A. 103 : 37 I. C. 89, 14 A. L J. 989.

S 41. (Power to require party to make compensation).

——s. 41 applies to proceedings in which plff. is seeking to cancel an instrument and does not apply to a case where an instrument is void and therefore a nullity. 55 C. 712 : 1928 Cal. 537 : 111 I. C. 349

——[illegible] of a false represen- [illegible] and at the same [illegible] 19 : 10 Lah. L. J. [illegible]

F. B.

S. 42. (Declaratory suit)

——the court has no concern with the object or motive of the party. 22 C. L. J. 419 : 20 C. W. N. 446.

——a public servant cannot question his dismissal in a suit. 17 C. L. J. 75, 18 C. W. N. 106 : 16 I. C. 922.

S. 42. (Declaratory suit)—*contd.*

——"further relief" referred to in the sec. does not include all the reliefs which could possibly be granted. 14 C. 586, 17 C. L. J. 30, *Ref.* it must be relief appropriate to and consequent on the right or title asserted. 15 I. C. 552

——the quest on whether a plff ought to have asked for conse-

——an injunction is a consequential relief 39 C. 704 : 16 C. W. N. 838, 23 C L. J. 561 . 17 C. L J. 30.

——confirmation of possession is consequential relief. 22 C. L. J. 415 16 I C. 898.

——a suit for a declaratory decree should not be dismissed unless it is quite clear that the plff should seek further relief 37 C. L. J. 482 : 75 I. C. 41, 17 C L, J 468

——the proviso to s 42 does not compel a plff. to sue for all the reliefs which could possibly be granted or bebar him from obtaining a relief which he wants unless at the same time he asks for a relief which he does not want. 37 C. L J. 482 · 75 I C. 41.

——whether it is incumbent upon the plff. to ask for consequential relief must depend upon the circumstances of each case. 37 C. L. J. 499.

——where the plff does not ask for consequential relief also ... M. 75, 15 M 15, 186, 24 ... 2 Pat 391 . 74 I. C. ... ed the suit will not be ... Pat. 403 1924 P 560. ... 19, 8 C L J. 458, 36

——where a person is out of possession of property a suit for a bare declaration of title is incompetent under s. 42. 80 I. C 544, 3 Pat. 915 6 P L T. 191 · 1925 P. 210.

——where the property is in the possession of third person the plff. is not bound to ask for an injunction 1926 M W N 167 : 91 I C. 714 , 1926 Mad. 164.

——where a relief claimed was granted in a prior suit and could be obtained in execution, *the plff cannot institute a fresh suit for* the same relief. A merely declaratory decree declaring the rights of the parties only is incapable of execution In such a case a separate suit lies. *36 C. L J. 101*

——application of sec 42 could not be decided before the plaint was registered. 28 C W N 143n 27 C W N 792 . 37 C L. J. 499

——whether it is incumbent upon the plff. to ask for consequential relief must depend upon the circumstances of each case. 37 C. L. J. 499 : 1923 Cal. 362.

——this sec does not authorise the dismissal of the suit but only forbids the court to make the declaration the prayer for which

S. 42. (Declaratory suit)—*contd.*

is not coupled with prayer for consequential relief. 80 I. C 2· 1925 Cal. 233.

——giving up or not adducing evidence in support of prayer consequential relief does not convert the suit into one for a bare declaration. 85 I. C 629 : 1925 Cal. 819.

——a suit for declaration that a will is void after the testators death *is not* maintainable unless there is prayer for possession of property or *if the right* to possession is postpond, a prayer for cancellation of the will. 10 Lah. L. J. *562 : 112 I C 48.*

——Or. 21 r. 63 C. P. C. gives a special right to which s. 42 does not apply 4 Pat. L. T. 409.

——when the plff. is in possession with other member of the family no consequential relief is to be asked for 45 A. 164

——it is always in the discretion of the court to grant or refuse a declaratory decree. 45 A. 311.

——in getting a declaration that an *ex-parte* rent decree and sale thereunder are fraudulent prayer for injunction against possession is unnecessary. 27 C. W. N. 449 : 1923 Cal. 382.

——but a suit for mere declaration that an exparte decree was obtained by fraud does not lie when the decree was executed and the decree-holder entered into possession of the property. 103 I. C. 29 : *1927 Lah. 788.*

——this sec. does not allow a pre-emptor to enforce the right of pre-emption by a mere declaratory decree 48 C. 110. 25 C. W. N. 298 : 28 M. L. T. 149 : 3 P. W. R. 1921, P C.

——where a plff. who sues for a declaration that a decree and sale thereunder is not valid, is not in possession of the property, he cannot proceed without asking for recovery of possession. 62 I. C. 685.

——a suit for mere declaration without a prayer for consequential relief is maintainable when the suit is to set aside a former declaratory decree on the *ground of fraud.* 21 C. W. N 375 : 35 I. C. 797.

——where a relief claimed in the suit has *already* been granted by the decree in a prior suit and could be obtained in execution it is not open to the plff. to institute a fresh suit for the same relief. *A* merely declaratory decree declaring the rights *of the parties* merely is incapable of execution. In such a *case* a separate suit will lie. 70 I C 427 : 1923 Cal. 252, 36 C. 2

——a Court will not grant a *declaration* of plff's right to an unknown and uncertain share in joint property. 40 C. L. J. 29 : 82 I. C. 392 : 1924 Cal. 1046.

——where a co-sharer preferred to grant a *lease* of the entire property while he held a share only and the other co-sharers refused to join, lessee's suit for possession, mesne profit and refund of the proportionate *selami* was not a suit for specific performance under ss 15 to 16 but was maintainable under s 42. 53 C. W. 314 : 1929 Cal. 380.

——a suit for the declaration of future right of indemnity is maintainable under s. 42. 26 Bom. L. R 678 : 1924 Bom 470.

S. 42. (Declaratory suit)—*contd.*

——no court of law can entertain a claim on his part that he has passed a certain examination when the authorities of the University conducting the examination and lawfully entitled to adjudicate upon its results declare him to have failed. 47 A. 434 : 86 I. C 695 : 1925 All 253

——when the object of a declaration in civil court is to affect the decision in a Revenue Court the Civil Court should refuse the declaration. 48 A 88 : 1925 All 637 23 A. L. J. 941 · 89 I. C 1013 F. B

——a suit for declaration that a certain award is null and void is not governed by sec. 42 but is covered by s 39. 80 I C. 773 : 1925 P C. 216, P C.

——a suit for declaration that the directors of the company were not properly appointed is not maintainable 32 C W N 1084 : 1928 Cal. 868.

——claim against those who claim adversely to the plff and against those who may do so in future must once and for all be determined in one suit 1928 Mad 489 · 110 I C 21 . 1928 M. W. N. 98.

——a *suit for a declaration of right to sacrifice cows and for an* injunction is maintainable 110 I C 657 · 1928 All 710 : 26 A L. J. 1001.

——this sec does not bar a suit for the declaration that the previous decree in a partition suit throwing clouds on the rights of the plff is a nullity 1929 Cal 586

[illegible] hat the decree based on [illegible] ght be declared null and [illegible] influence the lower court [illegible] suit was not maintain- [illegible] court to dismiss a suit [illegible] ere declaration will not [illegible] considering the relief. 82 [illegible]

——Or 21 R 63 C P C. gives a special right of suit to a party whose claim is rejected under Or 21 R 58 and in such a case the proviso to this sec. does not apply 4 Pat L. T 403. 1923 Pat. 564, 3 Pat. L J. 182 · 4 Pat L W 138 1918 Pat 141 43 I. C 396.

——it is not competent to a reversioner to sue for a declaration that a will executed by a Hindu widow is void, because there is no alienation 37 A 422 : 29 I O 302 13 A. L. J. 551, 27 A. 14, 26 A. 238 *Ref*

——a mere attachment is sufficient invasion of right to confer a cause of action 9 I. C 663 (c)

—— [illegible] title to a village and to a [illegible] disturbance of possession [illegible] aintainable 20 C W N. [illegible]

——a suit for a declaration of title to and confirmation of possession in a certain piece of land on the allegation that the deft. had threatened to take possession thereof with a prayer for a

S. 42. (Declaratory suit)—*contd.*

defence is that the title is with ground that the plaint discloses

be exhaustive as regards the maintained 12

to grant a to disputes : 39 M. L. J.

—— grant of declaration which is nothing more than a stepping ffect is not a 322 : 20 A. L. J.

rt to grant or refuse a 287, 42 A. 492 : 17 A. L. J.

grant the declaration of claimed in the plaint. 45

the court is not concerned with the object or motive of the party who comes into court in assertion of his alleged right 43 C. 473 : 20 C. W. N. 446 : 22 C. L. J. 419.

——in a suit for declaration of tittle the deft. cannot succeed by pleading title in third person. 2 Pat. L. T. 743 : 62 I. C. 841

——when an insolvency court sold certain properties belonging to the plff, he is entitled to sue for a declaration of his title to properties. 100 I. C 641 (c).

——no declaration can be made of an abstract right specially when it is not productive of any benefit. 103 I. C. 313 : 1927 Pat 286 : 8 Pat L. T. 477.

——a declaration which will be wholly futile should not be granted by the court. 9 Pat. L. T. 210 : 106 I. C 423

ff. is entitled to appoint is maintainable. 41 A 1045

declared at the insta

——the court cannot grant a declaration that the author to adopt is invalid before any adoption has been made. 98 I. C. 6

——a suit for declaration that plff. is entitled to certain sum money without asking for its recovery is not maintainable I. C. 38 (c)

——a plff. must first of all establish his own title as mortgag of a declaration of the title of the mortgag

valid is maintainab C. L. J. 31 :

S. 42. (Declaratory suit)—*contd.*

——a rate-payer who is not a voter cannot set aside an election. 31 C. W. N 926 : 103 I C 890 : 1927 Cal. 704.

——maintainability of a declaratory suit to have the name of the plff inserted in the Register as voter. 1928 Cal 736.

——"further relief" must be relief appropriate to and necessarily consequent on the right asserted 33 C. L. J 592.

this sec Such a suit is *prima facie* competent only to the nearest and prospective reversioner and if a more distant relation claims to sue, he can only maintain his suit by showing that the nearest reversioner had colluded with the widow 27 Bom L R. 725 : 29 C. W N. 749 : 28 A. L. J 739 · 48 M L J. 64 P C.

——where a declaratory suit by a Hindu reversioner is decreed and during the pendency of appeal the widow dies the decree should not be set aside simply on the ground that the reversioner had become entitled to possession. 100 I C. 84 28 Punj L R. 341 : 1927 Lah 198

——a suit by Hindu Reversioner for a declaration that he is the next person entitled to the property is not maintainable. 44 M I, 20 A. L. J 282 66 I C 899, *contra.* 1929 Pat 164 8 Pat 153 10 Pat. L. T. 259

Court fee

——to set aside a fraudulent decree court-fee on decretal amount is to be paid 8 C L J 485, 39 I C 132.

——devises for avoiding court fees by shaping suits into a declaratory shape cannot be encouraged S 42 sanctions only such declarations, which declare a plff 's title or right to any legal character or property. 16 C. W N 838 . 39 C. 704 . 15 I C 427

S. 45 (Power to order public servants and others to do certain specefic acts.

——writ of mandamus can be issued only by the High Courts at Calcutta, Madras, Bombay and Rangoon but not by the High Courts of Allahabad, Patna and Lahore. 7 Pat L T 695 . 96 I C 791 : 1926 Pat 305 5 Pat 595

——cl. (f) means only that orders should not be passed against the Govt 1926 M W N. 842 : 99 I C 18 . 1927 Mad 22

——an application under this sec to direct the Commissioner of Income tax to make a reference should be brought on the Original side of the H C 1928 Bom. 434 : 30 Bom L R 1114.

Ss 52-56 (Injunction.)

——In granting injunction against the sale of similar medicine, points of similarity and not the points of dissimilarity are the test. 41 A. 606

S 42. (Declaratory suit)—*contd.*

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[illegible] o grant a [illegible] disputes [illegible] 9 M L J [illegible]

——a grant of declaration which is nothing more than a stepping stone for further litigation and is of no practical effect is not a proper exercise of the discretion of the court 44 A. 622 : 20 A L. J. 557 : 1922 A. 349.

—[illegible] of the court to grant or refuse a [illegible] All. 287, 42 A. 492 : 17 A. L. J. [illegible] C. 676.

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——a declaration which will be wholly futile should not be *granted* by the court. 9 Pat. L. T. 210 : 106 I. C. 423.

——a suit for a declaration that the plff. is *entitled to appoint trustee* and has made such an appointment is maintainable. 49 A. 435 : 1927 All. 257 : 25 A. L J. 329 : 99 I. C. 1045.

——validity of an adoption cannot be declared at the *instance of a remote reversioner.* 62 I. C 627 (C).

——the court cannot grant a declaration that the authority *to adopt* is invalid before any adoption has been made. 99 I. C. 631

——a suit for declaration that plff is entitled to certain sum of money without asking for its recovery is not maintainable. 63 *I. C. 38 (c)*

[illegible] establish his own title as mortgagee [illegible] of the mortgagor. [illegible]

[illegible] is maintainable [illegible] L. J. 31 : [illegible] C. [illegible]

[illegible] N. 317 : 1926 Cal. 1070, 96 I. C. [illegible]

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——in granting injunction against the sale of similar medicine, points of similarity and not the points of dissimilarity are the test. 41 A. 606

Ss. 53-56. (Injunction)—contd.

——when passing an order of injunction the Court should look into the balance of convenience of the parties. 1928 Cal 293

——every owner of land has an obligation not to allow the branches of his trees to grow so as to overhang, or the roots of his trees to extend so as to penetrate his neighbour's land, in case of breach of this the court can grant mandatory injunction for the removal of the nuisance. 34 C. L. J. 315, 8 C. W. N. 710, 31 C. 914 *Ref.*

——in the case of joint wall if encroachment is made by one party by four inches the court should not direct the encroachment to be pulled down but should only grant a declaration that the encroachment belonged to the other party. 1923 Bom 370.

——the court of equity may in proper case interfere by injuction to restrain an act or proceeding criminal or quasi criminal in [illegible] proprietory right. It is also a [illegible] interfere with corporate [illegible] the powers. 50 C. 803:

——though it is correct to say that a person living in a manufacturing town cannot expect the same freedom from noise as a person living in the country, it does not justify a business which involves a violent hammering on iron in a room separated only by a partition wall from the house of the plff In such case an injunction should be issued 1923 A. 443 : 71 I C. 620

——when a nuisance only diminishes the comforts of human life there is always the question whether the courts will proceed against the defendant by an injunction or compensate the plff. to damages. 40 B. 401 : 33 I C. 192 : 17 Bom L. R. 1049.

[illegible] injunction must prove that the opposite [illegible] the plff's rights [illegible] something which [illegible] ct of irremediable [illegible] steps to stop the [illegible] until an actual nuisance has been committed, but it may, by virtue of its jurisdiction to restrain acts which, when complied with, will result in a ground of action, interfere before any actual nuisance has been committed where it is satisfied that the act complained of will inevitably result in a nuisance 49 C. 1059 : 1923 Cal. 271.

——in the joint wall where one of the parties encroached on the other's right by four inches, the proper remedy is not to direct the encroachment to be pulled down but to grant a declaration that the encroachment belonged to the other party. 1923 B 370.

——a mandatory injunction is a most exceptional remedy and one which is never to be applied except with the greatest safeguard for the prevention of waste as well as injustice. 78 I. C. 599

——perpetual injunctions are governed by the Sp R. Act and an injunction cannot be issued by a court to stay proceedings in a

Ss. 52-56. (Injunction)—*contd.*

court not subordinate to that from which the injunction is issued. 1925 Cal. 233 - 81 I C. 2.

[illegible] de [illegible]

——an injunction may be granted restraining partition by Collector though applicant has taken part for several years in the partition by Collector 84 I C 151 : 1925 Pat. 137.

——though the H C has no jurisdiction over the Batwara Court, it will always assert its right to restrain the parties to a pending suit for proceeding with Batwara proceeding until the determination of the suit. 6 P. L T 524 . 85 I. C. 551 : 1925 Pat. 710.

——when a decree by a competent court grants a right to the use of water in tank to a person, injunction should be granted to restrain the owner from interfering with such right by filling up the tank. 35 I C 40

——laches in the part of the plff. disentitles him to the discretionary relief of injunction 1927 Lah 718 28 Punj L. R 590 . 104 I. C. 563.

——in order to get mandatory injunction this plff must show diligence and must not be guilty of laches 1928 Cal. 510, and mandatory injunction cannot be given where the plff. constructively acquiesced. 1929 Pat 349

——the civil court will not interfere with the criminal proceeding by way of granting injunction or declaration of right unless in a very special circumstance 55 C. 978 : 32 C. W. N 576 : 1928 Cal 464.

For other cases see '*Injunction.*"

STAMP ACT.

——in determining stamp duty the document itself should be looked at and not any collateral circumstances which may be shown in evidence. 90 I. C. 68 : 27 Bom. L R. 1122 : 1925 Bom. 527.

——the definition of bond in the S. A. is not exhaustive : the word 'includes' has an extensive force. 8 C. 534.

——an instrument which on the face of it is not payable to order is not a bond under s. 2 (5) (b). 1927 Cal. 472 : 54 C. 445 : 100 I. C. 630.

——attestation referred in s. 2 (5) vi means attestation on the face of the instrument. 49 C. 729 : 26 C. W. N. 585 : 35 C. L. J. 459.

——non-payment of stamp duty does not invalidate a document but subjects it to penalty only. 40 C. L. J. 443 P.C.

——the payment of penalty under s. 20 of Act XVIII of 1869 does not enable a party to render insufficiently stamped *hundis* admissible in evidence. 4 C. 259 : 2 C. L. R. 409.

Stamp Act—*contd*

——the mere *fact of a document* being an acknowledgment of a debt would not *make it liable* to a stamp duty; circumstances should be looked to. 30 C 687, 8 C. 282, 21 B 201 F B. 4 L. B. R 310 F. B.

——an acknowledgment in writing stating that interest will be paid at a certain rate must be stamped as an agreement not otherwise provided for under Art. 5 (C), of the Sch. 1927 All. 677; 49 A. 796. 25 A L. J 403: 100 I. C. 593.

——a *batchita* containing stipulation to pay interest is an acknowledgment or agreement which requires 8 as. stamp 35 C ... 11 C. W. N. 1120.

——conveyance of property by certain persons to themselves under ... duty as if they were differe...

... rgeable with 8 as stamp. 13 C. ...

——a notice of allotment which is not duly stamped is admissible in evidence. 4 C. W. N. 309.

——an *amaldastak* does not require stamp duty—amaldastak defined. 20 C. W. N. 923

——in a lease Govt. assessment should be excluded and stamp will be paid on rent only. 39 Bom 434.

——a *statement* "Rs. 2115 balance due" followed by date and signature of the debtor is an acknowledgment which should be stamped 18 C. W. N 617.

——... is simply an agreement. 21 C L. J ... , which are not p ... 29 C.

——payment of penalty makes the document admissible W N 296: 4 Pat. 34 · 3 Pat. L. R. 145 P. C.

——where no statement is made as to the value of property in a deed of gift no stamp is *required*. 44 A. 339.

——a copy of an unstamped document is not admissible in evidence on payment of penalty. 4 C. W. N. 117, 23 M 49; 26 L A 262 P. C. U. B. R. (1897-1901) 365 *Fol.* U. B. R. (1907) 4th quarter *Ref* 3 Lab. 282: 1922 Lab. 401.

——the master is not liable for the action of his servant unless he can be directly connected. 8 C. W. N. 378.

——provisions of Stamp Act are self-contained as regards penalties for unstamped receipts, prosecution is improper. 64 I. C 255

——s 64 (C)—using insufficient stamp intentionally would not make one liable to criminal prosecution. 94 C. L. J. 441: 21 C. W. N 249. rulings on the point under the old Acts are 2 C. 393 F. B. 12 M. 231, 8 C. 259: 10 C. L. R. 365, L. B. R. (1872-92) Vol. 1 623, U. B R. (1893-96) Vol. 307

——to bring a charge under sec. 64, it must be shown that the person accused has been required under s. 58 to give a properly stamped receipt and had refused to give it. "Person" includes the members of a trading partnership. 27 C. 324.

Stamp Act—*contd.*

——stamp of power of attorney is determined not by the number of executants but by the number of agents. 1925 Bom 237 : 73 I. C. 718

SUCCESSION ACT (ACT XXXIX of 1925).

Application.

——where there is a special enactment its language should be examined and meaning should be ascertained without being influenced by any consideration of the previous state of law or the English law, specially in testamentary cases 47 C. L J 171 · 32 C. W. N. 402 · 7 Pat. 221 · 30 Bom L R 227 26 A. L J. 385 : 1928 P. C. 2 : 107 I C 14 ; 1928 M. W. N. 182 P. C

S. 2.

——the mere fact that in a trust deed a provision is made for the appointment of a future trustee does not make it a testamentary disposition within the meaning of this sec. 46 C. L J 145 : 1927 Cal 756 105 I C. 12

S. 3

——under s 3 (2) the payment to the widow or child is not subject to the rights of an assignee. 1928 M. W. N. 402.

S. 63.

——a will cannot be given effect to because of this section where the testator and the witnesses signed the will otherwise than in the presence of one another. 112 I C. 13 1928 Oudh 258

S. 70.

——a will must be destroyed by some method *ejusden generis* with the methods described in s 70, it cannot be cancelled by merely being struck through the pen, or by the writing on it ' the will is cancelled " 52 B. 653 1928 Bom. 194 . 109 I C. 742 30 Bom L. R. 473.

S 90.

——unless the contrary appears from the will there is a presumption under this sec. against intestacy in respect of properties acquired by the testator subsequent to the execution of the will, 1927 Mad. 383 : 99 I. C. 775.

S. 111.

——this sec. does not apply to Hindu Varnacular Wills. 1927 Mad. 494 : 99 I. C 705.

S. 195.

——the H. C. will not interfere with the discretionary order of the District Judge in the matter of an application for appointing a curator. 1927 Nag 253 . 102 I C. 622.

——the application for the appointment of curator should be summarily and speedily disposed of. 1927 Nag. 253 : 102 I. C. 622.

S. 209.

——although the order of the District Jndge is not open to appeal or review it is open to revision. 1927 Nag. 253 · 103 I. C. 622, 34 C. 929. *Rel. on.*

S. 211.

——an administrator under this Act, steps into the shoes of the deceased in respect of all his rights and obligations and he must take over the entire estate for the purpose of administration. 30 Punj L. R. 503 : 1929 Lah. 753.

——an administratrix can agree to pay the time barred debt of her deceased husband. 1928 B. 539 : 30 Bom. L. R. 1407.

——a decree against widow who is not the legal representative of the widow is invalid. 109 I. C. 444 : 1928 Rang. 83 : 5 Rang. 742 :

S. 218.

——under this sec. the grant of Letters of Administration should be made to a person who is entitled to some part of the estate of the deceased. The court always prefers sole administrator to a joint grant 1929 Bom. 397 : 31 Bom. L. R. 999.

S. 219.

——the word adultery has not the limited meaning as in the Penal Code ; it means sexual intercourse of a married person with a person of the other sex, married or unmarried. 1928 Mad 797 : 110 I. C. 439.

S 224, 230.

——there is no provision in this Act precluding an executor from asking for probate at any time even if he at first disputes the will and then asks for probate 32 C. W. N. 729 : 1928 Cal 380 : 110 I C 542.

S. 229.

——mere failure of an executor to appear in court in pursuance of the citation issued does not amount to renunciation of executorship in India though it does so in England. *1928 Lah. 470 :* 110 I C. 506

S. 230.

——there is no provision laying down when and why an administrator can renounce his office, but none is bound to act as executor or administrator againt his will. 30 Bom. *L. R. 1566.*

——the writing by which a person renunciates his office as executor need not be in court, it is sufficient if the renunciation be in writing and it is proved to the satisfaction of the court 1928 Mad. 797 : 110 I. C. 439.

——"by a writing signed by the person renouncing" does not mean that the writing should be in the handwriting of the person renouncing or should be addressed to any person, neither any form is prescribed. A statement written by the court and signed by the executor comes under this sec. 1928 Lah. 470 : *110 I. C. 506.*

S. 230—*contd.*

——the word "Judge" means the Judge of the Probate Court who is seized of probate and administrative proceedings. 1928 Lah. 470 : 110 I. C 506.

——intermeddling with the estate of the deceased by the executor does not amount to an acceptance of the office The liability to account for such interference with such estate stands on a different footing 1928 Lah. 470 ; 110 I C 506 (1924 Lah. 543, 32 M. 361, 35 C. 156, 1926 M. 605) *Dist* 1924 Cal. 864 *fol.*

S. 235.

——universal legatees are not relieved of issuing citations on reversioners giving them an opportunity of protecting their vested interests. 1929 Pat. 385.

S. 237·

——a person asking for probate of the draft of a will is to prove that the will has been lost or mislaid since the testator's death. 55 C 482 : 1928 Cal. 307 110 I C 283.

S. 246.

——an application for administration during the minority of the successors by a person as guardian for the use and benefit of the minors until the elder attains majority is to be made under this sec. 1929 B 397 : 31 Bom L R 999.

S. 254.

——the expression "*leaving a will of which there is no executor*

S. 263.

——this sec. means when a just cause is made out the court has no discretion to revoke or not to revoke the letters of administration. 1929 Pat. 385, 1925 Cal. 223. *rel on*

——grounds for revocation of the grant of letters of administration. 109 I C. 243.

——meaning of the expression "useless and inoperative" in cl. (d) of s 263, 48 C L J. 262 , 32 C W. N 993 : 1928 C al 695.

administration cannot be or had nothing further to 3 C L J. 262 : 32 C W. N.

——proceedings are defective where service of notice does not give opportunity to protest 47 C. L. J. 171 : 107 I. C. 14 · 9 Pat L. T. 7 : 32 C. W N 402 ; 30 Bom. L. R. 227 . 1928 P. C. 2 : 26 A L J. 385 P C.

——want of necessary citation makes a proceeding defective and letters of administration may be revoked. 1929 Pat 385, 10 C. L. J 263 *Ref*

S. 268.

——a probate court has the same power to order to make a inventory as the ordinary civil Court has under Or. 39 R. 7 C. P. C 4 C. L. J. 484 : 1929 Cal. 498.

S. 270.

——the court *cannot refuse* to grant probate merely on the ground that a part of the estate of the deceased is situate outside its jurisdiction. *110 I. C. 391.*

S. 291.

——if the executor is the sole legatee the security fixed must be a nominal sum. 1929 Cal 733

——where the testator mentions in the will that the executors *should obtain* the probate without security it is not the function of the Judge to ask for security. *1929 Cal 733, (7C. 84, 1 C L. J. 180), Dist.*

S. 295.

——the *caveator* appeal in a probate proceeding cannot have nother will filed by him to be proved by way of counter claim. eparate petition is his remedy. 31 Bom L. R. 1014.

S 299.

——no appeal lies against an order asking for security from the etitioner for probate of the will, as it is not a final order 1929 al 733.

302.

——the court is competent to determine questions between ecutor and the legatees and to construe the will and to give to e executor or the administrator any general or special direction ating to the estate or the administration 51 M. 849 : 55 M L. J. ; 1928 M. W. N. 170 : 110 I. C. 186 ; 1928 Mad. 356.

304.

——heirs of a mortgagor who had intermeddled with the estate the deceased are legal representatives within s. 2 (ii) of the P. C. and are liable as executors *de son tort* under s 304 of this though no letters of administration have been taken. *51 B. 771* . Bom. L. R. 900 : 104 I. C. 794 : 1927 Bom 474.

——where one of the heirs of the deceased enters into possession collects rents and profits and the person who has obtained ers of administration sues him for an account the suit is ntainable under this sec. 30 Punj L. R. 503 : 1929 Lah. 753.

317.

——the inventory and accounts filed under this sec., so far as proceedings on the testamentary side are concerned be regarded nal. 1927 Bom 438 : 29 Bom. L. R. 683, 32 C. 629 *Ref.*

75.

——procedure to be *followed in case of* an application in the of a minor represented by his next friend. 1927 Sind. 187 . 101 166.

SUCCESSION CERTIFICATE ACT.

——s. 4 does not apply where the person seeking to execute the

——money due from an Insurance Company under an insurance policy is "debt" under s 4 and succession certificate may be granted in respect of that 50 M. 412 · 100 I. C. 484 . 1927 Mad 359 1927 M. W. N 113.

——it is the duty of the judge to inquire into the liability himself before dismissing an application for assigning a surety-bond executed in a previous certificate case. 24 C W N 72n

——in a suit by surviving partners for the debt due during the life of a deceased partner his representatives should be made parties. 18 C. 86, 9 A. 486 *Dist*

——in case of revival of suit it is not necessary to produce a certificate where it was a question of a joint Hindu family. 16 B 349, 7 C L. J. 658

——in an execution proceeding in a mortgage decree the representatives of the deceased mortgagee need not take certificate. 26 C. 839, 16 A 259, 15 C. 54, 19 C 336, 22 C 143 *Ref* 20 B 63 *Diss* see also. 28 C 246

——in a suit for account no certificate is necessary 32 C. 418, 7 C L. J. 658.

——certificate is necessary in case of application under s. 90 Tr P Act. 35 C 767 : 12 C. W. N 145 7 C. L J. 658

——award of arbitrators can be filed without a certificate. 16 B. 240

——certificate is necessary in execution case if the right to execute does not develop by survivorship 1 C. W N 32, 19 B 838 14 M 377, 17 A 578.

——a suit may continue without certificate 16 B. 519

——s 4 applies to suit for personal decree only 19 C. 336, 22 C. 143, 26 C. 839, 16 A. 259 *not Fol.* 15 B 105 *Dist.*

——a dower is a debt under s. 4. 32 B 612, 30 A 315, 2 C. W N 1 *Diss.* 12 C W. N 84 *Dist*

——s 5 applies to a suit in *forma pauperis* 16 M. 554.

——amount due on a usufructuary mortgage is not a debt. M. 22.

——it is sufficient if the certificate is produced before an order r sale in execution is made 18 A. 34, 12 A 537, 19 C. 482.

——the principle of *res judicata* has no effect upon the provisions s 4. 24 A 138.

——when the plff sues as manager of an endowment no certicate is necessary. 1 C W N. 497

——in granting certificate the court is to take some evidence *prima facie case.* 2 C W. N 59, 2 Lah. L J. 578 · 68 I C. 301 and here must be some inquiry though summarily. 23 C. 431, 31 C. 133

Succession certificate Act—*contd.*

8 C. W. N. 51, 5 C. W. N. 494, 21 B. 53, 25 B. 523, 17 M. 477, 27 A. 442, 25 C. 320.

——the decision in succession certificate proceeding is not *res judicata*. 92 I. C. 138

——the decision does not bar the trial of the same question in any other proceeding. 2 Lah L. J. 578.

——joint certificate may be granted. 19. M. 497, *contra* 15 B. 684, 5 A. 105, 11 B. 179.

——sister's daughter's son is not *prima facie* an heir under the Dayabhaga Law. 7 C. L. J. 555, 35 C. 631, (6 C 119, 5 C. 776), *Dist*

——a Jt Dr. cannot resist the execution of decree by the holder of the succession certificate on plea of latter not being D Hr's heir. 1925 All. 66

——extension of a certificate is not the granting of a certificate giving right to appeal. 25 M. 934.

——a certificate may be granted for a portion of debt 18 C. W N 386 *contra*. 19 A. 129.

——a decree cannot be passed subject to the production of certificate. 24 I. C 143

——a trustee of a religious endowment succeeding another trustee need not take out a certificate. 1 C. W. N 497. 20 M. 152; 24 I A. 73 **P. C.**, 28 B. 215 : 5 Bom L. R. 938, *Ref.*

——whether the debt becomes payable during the lifetime of the deceased creditor or after his death, his heirs cannot get decree without production of certificate. 13 C W N. 966 : 10 C. L J 180. 36 C. 936, **F. B.**, 2 C. W. N 591 *Overruled*, 30 A. 315. *Fol.*, (14 M. I. A 40 **P. C.** 22 M. 139, 32 C. 418 *Ref*).

——a decree under Or. 34 r. 6 C. P. C. (for the recovery of unsatisfied mortgage debt) cannot be passed in favour of representative without certificate. 35 C. 767, 12 C. W N. 145 : 7 C L J. 658 6 Bom. L. R 585 . 28 B. 630 *contra*. 26 C. 246 : 5 C. W N. 607.

——a certificate of succession may be assigned. *36 A 21.*

——payment to assignee of a succession certificate-holder is not contemplated by the Act 35 A 74.

——if the debt is family debt and has vested *by right of survivorship* (Mitakshara) no certificate need be produced. 12 C. W N. 145 : 7 C L. J. 658, 1 C. W N 32.

——certificate when granted is conclusive as against the debtor under sec. 16 S. C Act, 36 A. 423, the court before which it is produced cannot question the right of the court which granted it 27 A. 87 but it does not establish the rights of the party to the debt. 5 C. W N. 494.

... be taken for the first t ... must pray for the certifi...

——when the claim is one by way of inheritance of dower money against a co-heir, no succession certificate is necessary. 43 A 473, 35 A. 327 *Dist.*

Succession certificate Act—*contd.*

——a Hindu son cannot obtain a decree upon a debt due to his deceased father forming part of his self-acquired property, with succession certificate 44 M 499: 40 M L J 481 1921 M. W. N 290 F. B.

[illegible] court cannot write [illegible] the ground that the [illegible] in a suit where the plff sues not a debtor of the estate of the deceased but a person who has wrongfully collected debts due to the estate and withheld them 43 A 440

——a son in a Mitakshara family can sue for recovery of the debts due to his deceased undivided father without succession certificate. 26 C. W. N. 488 65 I C 367.

——a Hindu widow having beneficial interest in the debts due to the husband is entitled to succession certificate without giving security 21 A L. J 452 74 I C 761.

——the dismissal of a suit for non-production of a succession certificate is improper. Sec 4 only provides that the court shall not pass a decree without the production of succession certificate 1923 Lab 597, 71 I C 840, (19 C W. N 794, 27 I C 822, 88 P. R 1891, 10 P R 1901) *Ref*

——an order refusing certificate as to some of the debts alleged to be due to the deceased comes within s. 19 and is appealable 27 C. W. N. 947

SUITS VALUATION ACT

——under sec. 8 of the Suits Valuation Act, the value of the suit, upon which the court fee has been assessed and paid without objection, is the value for the purpose of jurisdiction 34 C 954, 11 C W. N. 1133 6 C L. J. 255 F. B, 31 B 73, 25 C W N 768: 34 C. L. J 94

——a party cannot put a purely fancy value for the purpose of jurisdiction where the valuation can be correctly ascertained 1927 Pat. 224. 101 I. C. 506: 6 Pat. 597.

——the value of a suit is the *value of the interest* claimed by plff so that the value of a suit for establishing a right as an occupancy raiyat in a garden and for possession thereof is that of the interest claimed and not that of the entire interest in the land including that of the superior landlord 23 I C 964

——the valuation of a claim in a declaratory suit should be based on the annuity claimed by the plff. under s 7 (4) (c) of the Court Fees Act and it is the same for the purpose of jurisdiction, under s. 8 of this Act. 27 Bom L R 247: 87 I. C 801. 1925 Bom 182.

——a court can fix a valuation for the plff even if plff's valuation is deliberately fictitious. It can compel the plff to put a reasonable valuation 39 A 723 42 I. C 891.

——the court can question the value of the reliefs in a suit coming under s. 7 (iv) (c) of the Court Fees Act where the valuation

Suits valuation Act—contd.

appears on the face of the *plaint to be too small*, as it is its dut to see that the reliefs claimed are properly valued. 40 C. 615 21 I. C. 404

——pltf's valu ... the court fe and forum of th ... : 52 I. C 897 P. C., 35 C. L. J. ... N 453, 1 C. L. J. 418, 14 C. ... 43 B 376.

——in a case of specific ... purpose of co ... I. C. 268 : 34 ...

——in a ... s. 7 (IV) (d) of ... the pltf. valu ... jurisdiction is ... I. C. 777.

——the pltf. has the right to put his own valuation on claim for the purpose of court fees in a suit for a declaration for an *injunction* by way of consequential relief and the same is t value for the purpose of jurisdiction. 44 B. 331 : 56 I. C 34 Bom L. R. 289.

——a suit for declaration that the pltf. is the sole shebait an *also for injunction restraining the deft. from interfering with* *possession falls within s.* 8 and so the valuation for jurisdiction court fee must be the same. 40 C. 245 : 16 C L. J. 194 : 17 C. W. 591 : 17 I. C. 162.

... and for accounts th ... urt fee is the valu 123 : 22 I. C. 71.

——an admin ...

L. J. 728.

——in a suit ... for the possession he ... purposes of ju ... C. 903, 21 M. ... 56, 31 *M.* 89 *Dist.*

——a partition suit is triable by court *competent to try suit* valued at entire value of the property to be partitioned; *the nature of suit is not changed by pltf's title having to be determined* 52 C. 128 : 85 I. C. 870 : 1925 Cal. 320, *contra*, 29 I. C. 766 : *1915 P. W. R.* 68 : *1915 P. L. R.* 108.

——as the Suits Valuation Act has not fixed any method of valuing a redemption suit the amount of the principal debt must be

Suits valuation Act—*contd.*

taken as determining the jurisdiction under the Civil Courts Act 1925 M. W. N 747 : 1925 Mad. 1254.

——the proper valuation of a suit to enforce a right of pre-emption is that fixed in s 7 (V) of the Court Fees Act and the *forum* is determined accordingly 41 M. 721, 45 I C 69 : 34 M L. J 397.

——in a suit for declaration that the pltf's mortgage is not affected by the attachment in execution of the deft's decree, there being no dispute between the pltf and the mortgagor as to the validity of the mortgage, the proper valuation is the amount for which the decree may be executed 54 I C 43 37 M. L J 611, 30 M. 335, 38 A. 72, 38 M 602, *doubted*

——in a redemption suit it is the amount of the principal debt that should be taken as determining the jurisdiction under the Act. 39 M. 447 : 1915 M W N 239 : 28 I C 624.

——for the purposes of jurisdiction the value of a declaratory suit must be taken to be what it would be if it was a suit for possession of the property 5 Pat L. J. 397 : 1 Pat. L. T 390 · 1921 Pat. 105

——valuation for the purpose of Court Fees determines the valuation for the purposes of jurisdiction also 1922 Lah 236 68 I C. 34, L R. 3 A 630, 47 A 501 . 87 I C 190 : 1925 All 605

——the valuation of a suit for rendering of accounts will be the same for the purpose of jurisdiction as well as for the Court Fee 109 I. C. 895 : 1928 Pat 535 : 9 Pat L. T. 726

——in a case undervalued the decision of a Munsiff instead of a Subordinate Judge is to be heard in appeal by the District Judge unless point was taken and decision on the merit was prejudicially affected. 45 M. L J. 135 . 46 M 631 : 1923 M W. N 489 · 1924 Mad 6 : 18 L. W. 1, F B., 20 M L J 726 41 I C 167 *approved*, 5 Pat L J 397 *Dist*

——if the appellate court finds that a suit has been undervalued and therefore beyond the jurisdiction of the first court it should first consider whether the under-valuation has prejudicially affected the disposal of the case. If the parties have not been prejudicially affected it is the duty of the appellate court to dispose of the appeal as if the court of first instance had jurisdiction 36 A. 58 22 I C. 614 . 12 A. L. J. 21, 52 I C 992 · 1919 M W N. 707, 41 I. C 167.

——where a suit is undervalued and tried by a Munsiff the deft. can r

of th
unde

——appeal value of suit for possession is that of subject matter as determined by court and not that stated in plaints 1925 Lah. 1, F. B.

——in order to determine the proper appellate court what has to be looked at is the value of the original suit. The word "value" must be taken to be the value assigned by the pltf in his plaint and not the value as found by the court unless it appears that the true

What is agriculture—*contd.*

character of the holding and the case is governed by the Tr. P. Act 25 C. W. N 378.

——a lease of land for betel cultivation is an agricultural lease. 24 Mad 421.

——where the purpose of the tenancy is residential the B T Act has no application 19 C. W. N. 35 : 24 C. W N 114 n, 19 C 483

As to the meaning of the term "Agriculturist" see, 'C. P C S. 60'.

Horticultural.

——where a land is let out for horticultural purpose ... he acquires a ... is a raiyat

——it applies to garden and not to orchard land. 44 I C 530 (c). 25 C. W. N. 378

——the fact that a portion of a holding used for residential purposes is planted with fruit-bearing trees does not alter the character of the holding and it is governed by the Tr of P Act 25 C. W. N. 378.

——where a land is let out containing fruit trees to be enjoyed by the tenants and on which fresh and additional trees may be planted the lease does not come within the B. T. Act Unreptd second appeal, 2371 of 1915, Rajkumar Vs Mohesh.

——planting of fruit bearing trees on some portion does not alter the character of the holding 25 C W. N. 378.

——where a tenancy from its inception contained agricultural as well as homestead land a suit for ejectment is to be governed by B. T. Act 67 I. C. 66

S. 3. DEFINITIONS.

Estate.

——means entire estate. 6 C. L. J. 216 ; an estate is an entire one even if its land be joint with other estates 2 C. W. N 229, 27 C 292 ... permanently settled one 8 C L J 470 ... as an ordinary Zemindar ... bad to grant patta 35 C

Holding.

The definition has been amended making the old rulings obsolete ... of a particular holding

——it is the rent which gives the index of a particular holding 1929 Pat. 237. ... show a separate ... A khata number ... t. 207 · 8 Pat L.

Landlord.

——a person to whom land and arrears are transferred is a landlord. 7 C L. J 425.

Permanent tenure

—— not confer a right of perma W. N. 146 1922 Mad. 82, 43 *Ref*

payment of rent are not by nding that the tenancy was J. 478

——a tenancy may be permanent without payment of premiums. 35 C. L J. 90.

——a *bemiadi patta* does not necessarily create a permanent heritable interest. 6 P. L. J 687 · 65 I. C 303

——where the rent was *thika mokrari* and the grantee was authorised to cultivate the land from generation to generation it was a permanent tenancy with fixed rent 35 C L J 90.

——fixity and uniformity of rent and transfer and devolution of interest for a long time without objection raise a presumption of permanent tenancy. 4 Lah. L. J 311, 15 C L J 220, 34 C 902, 15 I. C. 110, 121 P R 1912 *Ref* 1922 M W N 639 · 43 M L J 556.

——though a tenure may not be permanent it may be saleable by agreement between lessor and lessee. 65 I C 145, 21 C W. N. 809, 46 I C. 1

——when the origin of the tenancy is known the fact of the rent being altered once negatives the hypothesis that the rent had been fixed in perpetuity 38 C. L J 121

——the use of the word *taluk* in a lease *prima facie* imports permanency If there are no words of inheritance in a *patta* or d by evidence bearing on the of the parties. 65 I C 145, M I A 263 P. C., 21 C W N.

—— for the purpose as been created, confer such rigt 39 C L. J. 585

——before the Tr P. Act, a *patta* was not necessary to creat a permanent lease. 14 C. L. J 614

——when the original purpose of letting out is unknown the tenant is to prove the permanent nature of the tenancy. An assertion in the kobala executed by a tenat in favour of his transferee, that his right in it is a permanent one, is admissible in evidence in such suit under s 13 Evi. Act. 39 C L J. 527, 32 C. 51 *Ref*.

——when permanent tenancy may be inferred 39 C. L. J. 527, 37 C L J, 478, 32 C. 51, 24 C W. N. 1.

Permanent tenure—contd.

——in the case of a permanent tenant *there may be* contract between the parties the result of which is to deprive the tenant of the *benefit of s. 52 B. T. Act*, but must be stated *with clearness* 33 C L J 431

——*in order that the presumption of permanency may be drawn* it must be established that the *origin of the tenancy is unknown* and *substantial pucca structures* must be built without objection by the landlord. 29 C W N. 138, 16 C. W N. 569 ; 15 C. L. J. 200, 33 C. L J. 85

——*where in a subsequent lease of 1886 there was a provision that if at any time of measurement the defts were found to be in* possession of excess area *they should pay rent* at the *original rate for the excess* ... continue in occupation from ... roportionate cesses, the rent ... 47 C. 230, 1 C. L. J. 572, 1

——where the origin of the tenancy is unknown *permanency of tenancy may be inferred from circumstances.* 27 C W N. 903. 71 I C 330 1923 Mad. 54. 73 I. C. 2 (c), 1923 A. 496 · 71 I C 370.

——*a dwelling house need not be brick-built to indicate that the* tenancy was intended to be of permanent *character.* 43 I. C. 2 (c).

——*if there were a series of successions and recognitions and the rent continued to be uniform for a long time permanency may be inferred.* 27 C. W N 969.

——but the mere fact of *Pucca buildings without proof of* landlord's knowledge and standing by, will not suffice. 27 C W. N 969.

——proof of permanent tenancy 43 M. 567 ; 38 M. L. J. 476 · 25 C W N. 485 · 22 Bom L. R. 578 ; 18 A. L. J. 707. P C. 1920 M W N. 175 · 59 I. C. 241, 1921 M. W. N. 719 : 41 M. L. J. 173 · 62 I. C. 750 63 I C. 109.

——there are tenancies which are *heritable but not transferable.* 33 C L. J 193 25 C. W. N. 420.

——*uniform payment of rent, permanent tenancy.* 36 C. L J 73

——permanent tenancy or tenancy at will, evidentiary value of dakhilas, *lands used as house-site* 66 I. C. 61.

——the word *mourosi* which implies according to its literal meaning "a *succession from generation to generation*" conveys the idea of permanency 56 C. 180.

——a *noabad* mahal is not necessarily a temporary settled one 8 C. L J ·470, it implies a hereditary and transferable title in perpetuity. 18 C. W N. 531.

——*istemrari mokurari tenure is not necessarily a perpetual* hereditary tenure : the words *istemrari* and *mokurari* are interchangeable expressions 30 C. 20 ; 7 C. W. N. 314, 13 B. L. R 131 133, 12 C. 117, 27 C 156 ; 26 I. A. 216 ; 4 C. W. N. 274 P C.

Permanent tenure—*contd*

——*mokurari* alone raises no presumption that the tenure is hereditary. 5 C 543, 15 C 342.

——*mokurari istemrari* tenure shall be presumed to be heritable until the contrary is proved. 3 B L R 226, 13 B L. R 124.

——a perpetual *mokurari* lease implies that the tenancy is permanent, heritable and transferable and that the rent is fixed in perpetuity 12 C. W N 154, 175

——when the words of the grant do not limit the grant or make it heritable and the grant is made for the purpose of planting a garden, it is only a life-grant. 7 C. L. J 90

——nature of the grant may be ascertained by reference to the interest which the grantor purports to convey. 3 C 210 P. C.

——long possession of a tenant, succession and transfer may give rise to the inference that the tenancy is permanent one. 16 C. W. N. 74.

——forfeiture clause does not affect the permanent character. 34 C 358 5 C. L J. 208. 11 C. W N. 527.

——acceptance of rent at the same rate for a long time is not conclusive to show that the tenancy is permanent 8 C W N 155, but each case depends upon its own circumstances. 8 C. W N 297, 301, 8 C W N 889 · 32 C. 41, 34 C. 902 11 C W N. *865 : 6 C L J 122* P C, *9 C W N. 292, 699,111 C W N·* 527, 27 *C* 570 : 4 C. W. N. 210, 11 C W N. 242 5 C. L. J. 178, 7 C. W N 734. 32 C. 41 8 C W N 889, 32 C 51, 8 C W N. 895

——in case of lease for building purposes perpetual grant may be presumed 9 C W N 463 · 32 C. 648, 16 C. W. N. 567 15 C L J. 220, 27 C 570 : 4 C W. N 210, 3 C. W N 502 21 A 496 26 I A. 58 P. C, 23 W. R 399, 11 C. W N 242 5 C L J 178, 8 C. L J. 475, 8 C. L. J. 513.

——subsequent splitting up of permanent tenure does not affect its nature 16 C. W N 241, 36 C 287 13 C. W. N 410 *Dist.*

Underground right.

——in the absence of all evidence the holder of permanent tenure should not be presumed to own the underground rights. 38 C 845 : 16 C W N 241. The Zemindar is presumed to be the owner of the underground rights, 37 C 723 14 C W N. 746 11 C. L J 653 P. C., intention of the parties at the inception of the lease should be looked to 36 C. 1003 14 C W N 1, 6 C. W. N. 292, 2 C L J. 408, 34 C 358 : 5 C L J 208 : 11 C W. N 527

——lessee of temporary interest cannot have mineral rights. 33 C 54 10 C W. N. 425.

——"all rights of various kinds" in a permanent lease includes mineral rights 33 C. 511 10 C W N. 738 · 3 C L. J. 306

——*Durbast Zemindari Hakook* includes the mining rights. 16 C. L. J. 7

——grant of *jaghir* implies no grant of soil. 17 C. L J 17 P. C.

——in a case of *Digwari* tenure the presumption is that the mineral right rested with the Zemindar. 16 C. W. N. 482 : 39 C 696.

Permanent tenure—*contd.*

——the owner of underground right may do all acts as may be reasonably necessary. 33 C. 462 : 10 C. W. N. 17, 9 C. W. N. 255, 2 C. L. J. 408

Rent.

——money payable in respect of forest right is not rent 7 C. L. J. 152.

——the word 'rent' has been defined in the sense in which it would be understood without any statutory definition. 33 C. 140 : 10 C. W. N. 201 **P. C.**

——a suit by ticcadar for arrears after the expiration of the lease is a suit for rent. 8 C. W. N. 531.

——Chowkidari tax payable by putnidar under the putni settlement is rent. 22 C. 680.

——Dak-cess is rent. 21 C. 132.

——crop payable by bargadar is rent. 1 C. W. N. 55, 16 C. W. N. 89.

—— [illegible] by the t[illegible] ssser, what is payable

—— [illegible] certain quantity c

[illegible] r of a *mela* held on agricultural [illegible] 11 C. W. N. 1053 : 35 C. 82 : 6 C. L. J. 342 **F. B.**

——if the term "*Malguzari*" is not to be regarded as necessarily a definition of actual rent still less can the term *Mal* be so regarded. 1929 Pat. 307 : 8 Pat. 655 : 10 Pat. L. T. 329.

——malikana is not rent. 8 C. L. J. 300.

——damages for the use and occupation of land is not rent. 1 C. W. N. 78 n.

——sums payable to third person on behalf of landlord is rent. 2 C. W. N. 455, 27 C. 67 : 4 C. W. N. 3 **F. B.**, 27 C. 663, 7 C. L. J. 23 n. *contra.* 9 C. W. N. 96 : 32 C. 169, 4 C. L. J. 402, 19 C. W. N. 174

——but money payable by putnidars to Govt. as revenue on behalf of Zemindar over and above the stipulated rent is not rent. 33 C. 140 : 3 C. L. J. 7 : 10 C. W. N. 201. **P. C.**

——suit by assignee of landlord for arrears is rent suit 27 C. 827 : 4 C. W. N. 357 **F. B.**, 4 C. W. N. 605, 35 C. 744.

——cess is a charge like rent. 21 C. 722, 16 C. 638, 1 C. W. N. 30. But cess is not a charge on the estate. 30 C. 778.

——interest on rent is not rent. 25 C. 571n : 2 C. W. N. 297, 25 C. 571, 11 C. W. N. 110 : 5 C. L. J. 69. But in sec. 160 (a) rent includes interest. 5 C. L. J. 27 n. *contra.* 12 C. W. N. 144 n.

Tenant

——a lessee of zerati land is a tenant during the continuance of the terms of the lease and after the termination of the lease he becomes a trespaser. 26 C. W. N. 833 : 35 C. L. J. 506 : 1922 P. C. 112 : 3 Pat L. T. 177 : 1 Pat. 340 **P. C.**

Tenant—*contd.*

— [illegible] absolutely necessary to [illegible] '98, 67 I. C. 859.

[illegible] entitled to the possession [illegible] but he is not entitled to hold the same rent-free. [illegible] W. N. 1200, (8 C. L J 541, 21 C 233, 7 C. 479, 11 C. 696) *Ref*

Bona fide tenant.

[illegible] *de facto* proprietor holds good, [illegible] land by a trespasser may be a [illegible] 17 C. W N. 348, 20 C. 708 F B, *contra*, [illegible] 003, 5 C L J 9, 8 C. W N. 315, 320, 14 C W N. 681.

——to create a *bona fide* tenancy the supposed landlord must be in *de facto* possession 19 C W. N 772, and both lessor and lessee must act *bona fide*. 19 C. W. N. 108 n 20 C L J. 563, 21 C. W. N. 93 (all cases considered). 8 C W. N 315 5 C L J. 9

——a landlord in de facto possession can settle lands with tenants. The question as to whether a settlement is *bona fide* or not depends on the circumstance as to whether settlement was taken from a person who although was ultimately found to have no title was at any rate in actual possession of the suit lands 46 C. L J. 575

——when acting *malafide* this principle of *bonafide* tenant will not apply 8 C. W N 315, 320

——tenant under a co-sharer landlord is not worse than a *bona fide* tenant 19 C W. N 407, (18 C 10, 20 C 708, 7 C. 414) *Fol*

——when a person is inducted into the lands by the landlord dispossessing a tenant and raises crops, on every principle of law and equity he is entitled to the crop or its value. 45 A 404

Intermediate Right, creation of.

——intermediate right between Zamindar and Putnidar and between Putnidar and Durputnidar may be created 49 C. 495 ; 1923 Cal. 412 . 34 C. L J. 76, 77, 79, 9 C W N. 656 *fol* 14 C. W. N. 389 *not fol.*

——a landlord can create an intermediate right between himself and his raiyat 20 C L J. 148 · 26 I C 980, 55 I C 615 (c)

——*mirash* right may be raiyati right 18 C. L. J 334 21 I. C. 530

— [illegible] between a Zamindar and Patnidar can not [illegible]

Intermediate Right, creation of—*contd.*

rent from the first. In this case the pliff's. suit was dismissed although the superior landlord was made party and did not contest the suit 37 C. L. J 263 1923 Cal. 368.

Tenant at will

——description in the dakhila as tenant at will is not conclusive evidence 25 C W. N. 378.

——rent receipt stating tenant to be tenant-at-will is not proof *against* him unless his consent to it is proved. 24 C. W. N. 1 F. C. 25 C W N. 378

——whether a tenant is a tenant-at-will or yearly tenant is a question of law 8 C W. N. 774 F. B., 16 C. W. N. 725

——when non-proprietor has occupied common land (generally *abadi*) for several years with the consent of the proprietor he cannot be *ejected* so long as he uses the land for the purpose for which it was granted, but the case of a tenant-at-will is different Their possession has been on sufferance and they have no occupancy right 1923 Lah. 413

—— be proved by direct y be considered 1923 Cal. 294. ppreciable market

Village.

——the word village means an area defined, surveyed and recorded as a distinct and separate village in one or other of three ways. survey which has been hird look forward 735. 3 of the B. T. Act , to urban areas as regards homes. 9 C W. N. 111.

S. 4. CLASSES OF TENANTS.

——a raiyat paying as rent a fixed quantity of paddy is a raiyat at fixed rent. 73 I. C. 416 (C), 27 C W. N. 115 : 72 I. C. 663 : 36 C L. J. 220.

——a tenant whose rent is fixed in perpetuity is a raiyat at fixed rate. 63 I. C 592 (C).

——a raiyat at fixed rent or rate of rent may also be an occupancy raiyat. 49 C. 280 : 34 C. L. J. 233 : 24 C. W N. 15, 19 C W. N. 358, 27 C. L J 284.

——a person who takes the land originally as a raiyat at fixed rate, may not thereby acquire an occupancy right but a person who has already acquired an occupancy right cannot by obtaining a grant of fixed rent lose that occupancy right. 42 C 745 : 20 C W. N. 155.

——a raiyat at fixed rate does not acquire the *status* of a settled raiyat or a right of occupancy by occupation for 12 years. 13 C. W. N 1025 12 C. L. J. 298.

S. 4. Classes of tenants—*contd.*

——an occupancy raiyat may have a permanent right in the holding in the sense that the landlord is not entitled to eject him. 14 C. W N. 372.

——when an occupancy raiyat subsequently acquires a *mokurari* right, if the *mokurari* right be extinguished under s 16 Act XVIII of 1865 (B. C.) he is not liable to be ejected as he has the occupancy right still. 19 C W N 858

——a lessee of a zirat land is a tenant of a class outside s. 4 4 Pat. 89 : 6 Pat L T 240 84 I C. 305 1925 Pat. 241

——the word "raiyat" in this Act does not include under-raiyat. 1926 Cal 1160 . 96 I C 588.

——the word "jote" is a general term used with reference to a "holding" and is not necessarily equivalent to a "raiyati jote." 32 C. W. N 587 1928 Cal 880, (1922 P C. 241, 2 C W. N. 188, 8 C. W N 117) *fol*.

S 5. TENURE-HOLDER AND RAIYAT

——definitions in s 5 are not exhaustive. 5 C. L J 522, 27 C. 205 . 4 C L J. 76, 18 W. R. 234 9 B L R 10, 21 C. 129

——lease for building purposes or coal depôt does not come within the B T. Act. 19 C 489, 27 C 205 · 4 C W N. 76

——presumption of s 5, cl 5 applies when there has been sub-division of 100 bighas 22 C. W N. 89 , it applies to tenure created before the Act 1 C W N. 83 . 23 I. A 158 24 C. 272 P C. I. C. 22.

——"jote" does not necessarily mean that it is not a tenure. 8 C. W N 117, 14 C L J 38 p 42 It is a general term used with respect to a "holding" 56 C. 173 · 32 C W N, 587 1928 Cal 880, (1922 P C. 241, P C, 2 C W N. 188 8 C. W N 117) *fol*

——a putni lease *prima facie* comes within the provisions of Tr. P. Act. 28 C 744

——a lease of land for betel-cultivation is an agricultural lease 24 M. 421

——the question as to the nature of tenancy (there the question was whether the tenant was a tenant-at-will or yearly tenant) is a question of law. 8 C. W. N. 774, F B, 16 C W. N 725

——not only the origin of the tenancy but the subsequent conduct of the parties should be looked to 15 C W. N 218, 13 C L J. 485 , this is so only when the lease is ambiguous. 15 C. W N 902 : 14 C. L J. 38, 15 C W N 896, 16 C L. J. 322

1925 Cal 1238.

——where a tenancy was created as heritable and was not held for a limited term and was subject to payment of fixed rent and was

S. 5. Tenure-holder and raiyat—*contd.*

transferable, the circumstances that the rent originally fixed wa increased with the consent of both the parties, did not destroy it permanent and transferable character 35 C. L. J. 440.

——long possession and uniform payment of rent are not b themselves sufficient to satisfy the finding that the tenancy wa permanent from its inception 75 I. C 105 (C), 32 C. L. J 85 · 57 I C 877, 24 C. W. N 11, 1919 M. W. N. 811, 50 I. C 856 P. C *Dist*

——a tenancy may be permanent without the payment of premiums 35 C. L. J. 90.

——the presumption under s. 5 sub-sec (5) is rebuttable one 8 C L J. 533 and when the area *held by* tenant is less than 100 bighas there is no presumption that he is a raiyat. 16 C. W. N. 293.

——the presumtion under this sec. is not retutted by the use of the word "*cultivator*" in a printed kabuliyat. 1927 Cal. 413 · 100 I. C 466.

——but where a registered kabuliyat expressly stated that the tenancy was a raiyati tenancy and prohibited the sale and [illegible] *f trees*, the [illegible] *re and there* [illegible] B T. Act [illegible] *area* 33 C W N. 256.

——where a kabuliyat read as a whole is good evidence that *the* tenancy is a *rayati* and not a tenure, the mere fact that the person who executed the kabuliyat did not belong to the cultivating class is not sufficient to prove that he was a tenure holder 1925 Cal. 1086 : 87 I. C. 903.

——but where a kabuliyat does not render any help to determine whether the tenancy is a raiyati holding or a tenure evidence of actual user should be looked to. 1925 Cal. 1183 : 88 I C. 492.

——when the area exceeds 100 bighas the tenant should be presumed to be tenure-holder. 29 C. 707 . 6 C. W. N. 825, 29 I A. 196 : 4 Bom. L. R. 793 P. C., 15 C. W. N. 218.

——recital in rent receipt as to the tenant being a tenant-at will is no evidence against him unless he consented to it. 21 C. W. N. 1 P. C

[illegible] tenure-holder or raiyat is a question of [illegible] cumstances to judge of [illegible] 23 C. W. N 611 P. C. [illegible] C. *Ref.* 1927 Cal 413 : 100 I. C. 466.

[illegible] limited liability Company [illegible] purchased, the plots [illegible] reference to the mode [illegible] *f the original grant*

S. 6. Tenure-holder and raiyat—*contd.*

In determining whether the status of a tenant under this Act ... to be considered are ... and (2) the extent ... 100 bighas there is presumption that the tenancy is tenure But if the first criterion is established the second does not arise But if the first is not established the second is conclusive. The point ultimately is not a question of fact 6 Pat L. T. 787 90 I C. 895. 1925 P. H C. C. 281.

——whether a tenant is a tenure holder or a raiyat should be determined by reference to the entry in the record of rights 1927 Pat. 225 · 8 Pat L T 578 · 101 I C 119

——when a tenant is given the right to bring the land under tivation he is a raiyat within this sec 9 Pat L. T. 589 1928 Pat. . 109 I. C 461 7 Pat 275

——the mere subletting of the holding by the raiyat would not nsform him into a tenure-holder 1928 Pat 603. 7 Pat 566 · I C 287

——an occupancy raiyat may have a permanent right in his lding 14 C W N 372.

——origin of tenancy should be looked to 8 C. W. N. 751, 9 C L. 82, 15 C W N 902 14 C L. J 38, 15 C W. N, 896, 5 C L J 53

——the Act leaves the court free to discover by ordinary means ... originally acquired ... is to apply it to the ... institute an inquiry 33 C. W N. 564.

——presumption of permanent tenure 15 C. W N. 45, 32 C. 41 : C. W. N 889 32 C. 51 ; 8 C. W. N. 895 P C 34 C 902 : 11 C. W N. 5, P. C. 24 C W. N 1 P C *contra* 20 C. 496, 11 C. W. N 242, 17 144, 7 B L R. 159 15 W. R 275, 25 C. 896, 2 C W N 122, 8 C. W 889 P C, has set aside 6 C W. N 134 and virtually overruled 5 W. N. 846 and 6 C. W N 354

——presumption of tenure or holding. 22 C W N. 89 . 36 I. C. 4, 24 C. L J 363, 21 C. W. N 188, it may be rebutted 15 C. . N. 218, 55 I C 249 (C).

——proof of nature of tenancy. 16 C. L J. 322 Recital in a ed as to nature of tenancy how far evidence 21 C. W. N. 188, 24 L. J 541.

——raiyat 18 C W. N. 208n.

——person taking land for horticultural purposes is a raiyat. 21 W. N 129.

——a tenant who instead of cultivating the lands has let them it to tenants is a tenure-holder 50 I C. 468 (C), 1917 Pat. 379 . 43 C 941

——a co-sharer granting a lease of a village creates a tenure and ot a raiyati right. 4 P L. W. 428 ; 45 I C 706.

——a mortgagor raiyat by executing kabulyat in favour of ortgagee does not hold under a raiyat, as mortgagee is not a raiyat.

S. 5. Tenure-holder and raiyat—contd.

43 C. L. J. 242 : 93 I. C. 1015, 3 Pat. 266 : 78 I. C. 923 : 1925 Pat 1? (2 C. W. N. 758, 10 C. W. N. 351, 15 C. W. N. 345, 47 C. 377, 23 . 338) *Ref*

——A Zaripeshgi is an instrument of mortgage and not a leas A Zaripeshgidar is not a tenant of the mortgagor and is not a raiy within s. 5 (3). 3 Pat 266 : 78 I. C. 923.

Ss. 6-9. ENHANCEMENT OF RENT OF TENURE.

——when there was an agreement that rent would not be en hanced but subsequently to buy peace the tenant agreed to pay e hanced rent, the same tenancy continued. 16 C. W. N. 725

——where a landlord seeks to have the rent of a tenure-hold enhanced, the first point for investigation is, whether the rent liable to enhancement. When this has been made out, the ne point for determination is whether there is a customary rate pa able by persons holding similar tenures in the vicinity. It is on when this has been answered in the negative that the rent can b enhanced up to such limit as the court thinks fair and equitabl 36 C L. J. 96.

——as to whether the tenancy existed from the time of th permanent settlement, long possession of the tenant shifts the on ... 9 C. L. J. 177, 10 C. W. N. 503, 3 C. W. N. 311

[illegible] lar can enhance th

[illegible] before the Perma nent Settlement are all within the scope of s. 39 C. L. J. 605 1924 Cal. 1015 : 84 I. C 86.

[illegible] tenure has been held from [illegible] it be liable to [illegible] able either by [illegible] nure is held, [illegible] to determine [illegible] of the Per- [illegible] ditions under [illegible] 1923 Cal. 165.

——a stipulation that the tenure-holder is to pay rent for lands besides those mentioned in the *Kabulyat* which may be under his cultivation or which he may be found in excess upon measurement indicates that rent is not fixed in perpetuity and hence the same is [illegible] 38 C. L. J. 369

[illegible] t on the application of [illegible] cation of the tenant [illegible] ng his respective r ght [illegible] 4 : 45 C. L. J. 305 : 54

I. A. 48 : 1925 P. C. 20 : 100 I. C. 93 P. C.

——unless the landlord abandons his right to enhance the rent such right must be considered to exist even in case of a permanent heritable and transferable tenure. When the ... tenure

Ss. 6-9. Enhancement of rent of tenure—*contd.*

——in a s it for enhancement of rent of ten ... the B. ... not exis ... as it thin ... Cal. 454, 49 C. 866 *fol.*

——before a court can take action under s 7 (2) it must be definitely found that no customary rate exists A finding that the plff. has failed to prove a customary rate is not sufficient to empower the court to proceed to determine to what extent the rent should be enhanced 89 I. C 190 (c)

——the landlord in order to claim the benefit of s 7 (2) must prove that there is no customary rate. If he asserts that there is ...

rate. 1928 Cal 1218.

S. 10. PERMANENT TENURE-HOLDER NOT LIABLE TO EJECTMENT

——when the tenant claims to be permanent tenure-holder and not a raiyat the onus lies on him. 5 C L J 413, 32 C 51 18 C. W. N 895 · 31 I A. 194 P C 8 C L J 513.

——when the tenant has been in long and peaceful possession of land as part of his admitted tenure, the landlord is to prove that it is his *khas* and not included in the tenure 6 C. W. N. 105, 3 C. W. N. 763

——when the title of the plaintiff is proved or admitted the defendant is to prove his right to retain possession 9 C. W N. 144, 8 C. L J. 170, 13 C W. N. 661, Dist. 7 C L J. 553.

——how the permanenc...
31 I A 144 8 C W N. ...
C W. N. 865 : 6 C L J. ...
9 C. L J. 475, 32 C 51, 8 C ...

——permanent tenant cannot make excavations causing substantial damage 9 C W. N 255.

——but he can make excavation so long there is no risk to the right of the landlord to recover the rent payable 1924 Cal. 56

——a stipulation of forfeiture for non-payment of rent is invalid 4 C. L. J. 521, 2 C. W. N. 455, 9 C W N 122.

——after a decree for ejectment the decree-holder is entitled to sue for arrears of rent. 10 C. L J. 189.

——a permanent tenure-holder is entitled to cut down trees within his tenure. 44 I. C. 451 (Pat).

S. 11. TRANSFER AND TRANSMISSION OF PERMANENT TENURE.

——a lease for 105 years and for general purposes is sufficient to show that the interest is asignable. 19 C. L. J. 448

——non-permanent tenures seem to be not transferable 7 C L J 553.

... the covenant ... llord

..., to an

... pass

——a covenant whi... with the land so as to b... otherwise where there ... nected with or concern... L J. 259.

——a restrictive convenant runs with the land if created for the benefit of the land conveyed. 12 C. L. J. 259

——vendee's covenant in case of settling the property, to give preference to the vendor is not binding on his heirs 5 C W N 343. 24 W. R. 321.

——stipulation to give the mortgagee a preference of pre emption in case of sale is enforcible. 2 C. W. N 475.

——where the holding has not been proved to be one with a fixed rate ss. 11 and 18 cannot apply. 85 I. C 636 . 1925 Cal. 761

Ss. 12-13 TRANSFER OF PERMANENT TENURE.

——a transfer of permanent tenure completes as soon as the deed is registered and then the landlord is bound to accept rent from transferee 50 C. 680 ; 39 C. L. J. 26 . 28 C. W N 517 · 73 I. C. 193 P C, 19 C. W. N. 112, 20 C. W. N. 355, 19 C. 17, 10 Pat L. T 469 · 1929 Pat. 440, 12 C. W. N. 478, 16 C. W. N. 64, and the transferor is no longer liable for rent to the superior landlord 39 C L J 25. ... the Public demands ... 28 C. ... feree is Reco ... not ... 56 C ...

——but it is doubtful if a release is a transfer of a permanent tenure by way of sale, gift or mortgage within the meaning of s 12 which the landlord would have been bound to recognise. 33 C W N 629 : 49 C. L. J. 132 ; 1929 Cal. 258

——a *darpatni* tenure is a permanent tenure governed by the provisions of the Act. When the transfer is complete under s. 12 ... liability consequent on privity ... C. W. N. 1020 . 42 C L J ... 12 C. W. N. 428) fol. ... been held to apply in the case ... transfer by the original lessee, and after the transfer the ... was no longer liable for the rent. 29 C. W. N 1020 : 42 C L. J. 4... I C 451. 12 C. W. N. 478 Ref

Ss. 12-13 Transfer of permanent tenure—*contd.*

——after partition co-sharer is not liable for rent, and no notice is necessary. 17 C W N. 44n. 313

——B. T. Act. does not apply to the transfer of putni tenures. 17 C. 162, 20 C 247, but it applies to the transfer of darpatni lease. 18 C. 360.

——when a tenure is treated as transferable in the lands of the original tenant it must be treated as transferable in the hands of the transferee also. 35 C L J 493 77 I C 261

——a part transferee of a patni tenure is not entitled to be recognised by the Zemindar. 18 C W. N 629

——sec 12 does not apply to a case to transfer by partition. 17 C. W. N 313.

——s. 59 of the T P. Act is governed by this sec, so a mortgage of permanent tenure for a sum not exceeding Rs 100/- can only be effected by a registered instrument 2 C W. N 499.

[illegible]

ation of sale when it was not paid before [illegible], when the sale is confirmed without payment of the landlord's fee the J. Dr. cannot object to the auction purchaser's taking possession 7 C W. N 591

[illegible]

S 15. SUCCESSION TO PERMANENT TENURE.

——landlord is not bound to find out the successor of the permanent tenure, so a suit for rent may be brought against one of the heirs. 3 C W N 371, 38 I C 578 (c) but other's share will not be affected 26 C W. N 138. 63 I C 706. 1927 Cal 825 10 I. C. 707, 97 I C. 489; 1927 Cal 81

——failure on the part of the heir to comply with the requirements of sec. 15 does not necessarily entitle the landlord to treat one of the heirs of the original tenureholders as representative of the tenancy. 26 C. W N. 138 63 I. C 706. 3 C W. N. 371 Dist 32 C L J 77 50 I C 49

[illegible] tenureholders without [illegible] tenure-holder who did [illegible] the tenure was fully represented and the decree was a rent decree. 60 I. C. 510

——but a tenure devolving on *matwallis* who are trustees, all *matwallis* must be sued for rent 65 I C 592.

S 16. (NOTICE OF SUCCESSION)

——ss. 15 and 16 have no retrospective effect and do not apply when the succession took place before the B. T. Act 22 C. 337.

S. 16. Notice of succession—*contd.*

——suit for rent can be instituted but not decreed unless notic is given 24 C 241 : 1 C. W. N. 98, and it may be complied wit in the appellate court. 2 P L. J. 701 : 42 I. C. 838.

——ss 15 and 16 apply to putni tenures. 19 C. 504

——it is incumbent on persons, who acquire an interest in patni tenure by succession to get themselves registered in th books of the landlord under s 15 of the B T. Act. 37 C. L. J. 222 1923 Cal. 527 : 73 I. C. 482.

[illegible] 14 C W N 788 [illegible] tiff sue[illegible] comply

——it is a penal sec. and should be strictly construed It applies only to a person who claims the land as a holder of the tenure and not to a person who claims it by virtue of purchase from the person to whom the rent accrued due 34 C L J. 119 27 C 535

——where the heir of a tenure holder does not comply with s 15 a transferee from heir is not debarred by this sec. from recovering rent from tenants. 1928 Cal. 220.

——the provision does not apply when subordinate interest devolves upon the proprietor. 18 I. C. 254 (C). [illegible] W. N. 42 : 2 C. L J. [illegible] I. C. 434 or to receiver

[illegible] users of a makurarridar's [illegible] lthough as a matter of [illegible] of the law and had [illegible] ervice of notice through [illegible] tenure by succession

S. 18. RAIYATS HOLDING AT FIXED RATE.

——the term transfer in cl. (a) includes a lease 25 C W. N. 9 : 61 I. C 529, 19 C. W. N. 1127, 1927 Cal 878 : 104 I. C. 150

——an occupancy raiyat may be presumed to have acquired the right of raiyat at fixed rate by the uniformity of rent for 20 years. 25 C. 744 : 2 C W. N. 580, F. B. 24 C. 152 *overruled*, 12 C L. J. 107.

——fixed money value of rent in kind cannot be regarded as fixed in amount. 37 C. 626.

——when there is provision for enhancement of rent in the lease the raiyat is not a raiyat at fixed rate. 31 C 960

——only incidents of transfer and succession apply to this. 5 C. L. J. 413

——he can cut down and appropriate trees 21 C. W. N 635

——s 85 does not apply. 57 I. C. 580 (C).

——in a suit for enhancement of rent the onus is on raiyat 5 C. W N. 880

S. 18. Raiyats holding at fixed rate—*contd.*

——transferee of a portion of a makurari holding is not bound by the rent decree against transferor alone. 21 C 433.

——the word *kaimi* does not impart fixity of rent. 6 C. W. N. 916. 19 C. W. N. 1129

——raiyat at fixed rate does not acquire the status of a settled *raiyat or an occupancy raiyat 13 C W N. 1025 · 11 C L. J. 293 ; 20* C. W. N. 185, but a raiyat claiming higher status may fall back upon lower status. 18 C W. N. 358.

——a raiyat at fixed rate may become a settled raiyat of a village under s. 20 B T Act and then acquire the right of occupancy within the meaning of s. 21, 31 C. L J 233 · 26 C. W N 15. 63 I. C. 986

——the status of a raiyat at fixed rate can be combined with that of an occupancy raiyat *above case.*

——status of a raiyat at fixed rate of rent may be inferred from the language of the lease and such a raiyat can grant a *mokurari* sub-lease 19 C W N 1127, 25 C W. N 9.

——grantee of a raiyat at fixed rate acquires a heritable right. 19 C W N. 1129, 54 I C 750 (C), 57 I C. 580 (C).

——ss. 11 and 18 do not apply when the holding is not proved to be one with fixed rate *1926* Cal 264.

S. 18-B. SAVING AS TO ACCEPTANCE OF LANDLORD'S FEES.

——acceptance of landlords' fees by landlord at the time of transfer of tenancy would not operate as an admission as to its permanence under the provisions of this sec though it would amount to a recognition of the transferee as a tenant 85 I C 636 1925 Cal 761.

——acceptance of landlords' fee by landlord does not operate as admission of permanency of the tenancy of the transferee, 1926 Cal 264

S. 19 (Continuance of existing occupancy right)

——sec 19 of this Act is governed by s 181 44 C. L J. 271 ; 1927 Cal 46, 27 C. L J. 556, 31 C 1021 *Rel on*

——s 19 can refer only to person who, being raiyats within the meaning of s 5 had acquired right of occupancy prior to the passing of the Act 21 C. W. N. 505 p 506.

S 20. SETTLED RAIYAT

——if a person is alleged to have been a settled raiyat it must be proved that he continuously held as a raiyat, land situated in the village although the land need not be identical throughout the period of 12 years The holding of land must be continuous and urther it is to be in the character of a raiyat. 72 I. C. 640 (c).

S. 20. Settled raiyats—*contd.*

——status of a settled raiyat cannot be transferred. 3 C. L. J. 285, 2 C. W. N. 302 n.

——an heir of an occupancy raiyat can claim recognition. 27 C 454 : 4 C. W. N. 608.

become a settled raiyat 31 C. 986.

include a vendor. 7 W. R. 395, R. 22, 23 W. R. 237.

——as to the possession of raiyat for less than 12 years the *burden* of proof is on the landlord. 3 C. L. J. 285.

——*but in case of chur* or *dearah* land the burden of proof is on the raiyat. 33 C. 441

——so also in case of suit by a purchaser at revenue sale 3 C L. J. 51 n.; 10 C. W. N. 497.

——a suit by a tenant to recover lands from the landlord, from which he alleges to have been dispossessed, is not a proceeding under *Cl. 7 of* the sec. and no presumption arises. 16 C. W. N 393 : 14 C. L J. 598.

——the presumption under Cl. 7 does not apply to *Dearah* lands. 3 C. L. J. 43 n

——a raiyat by taking a *Zuripeshgi* lease does not divest himself of the right to acquire occupancy right 10 C. W. N. 351

——where the lessee of a Zerait land has title and a tenant is duly inducted by him upon the land the tenant holds the land ... sec. and if he holds the sa[me] ... occupancy right is compl[ete] ... 653 : 1924 Pat. 207 : 2 Pat 91 ... in area defined, surveyed an[d] ... in one or other of thos[e] ... nue Survey whic[h] ... cond and third loc ... ncy right may b[e] ... period of complet[e] ... 336

... ds occupancy righ[t] ... had acquired th[e] ... ation 48 C L. J

... cultivator in occu[pation] ... ry tenant Where ... ul but outside the jungle tract which did not form part of any village and where no man could live, he wa a khudkhast raiyat all the same 54 C 798 : 1928 Cal 52 : 106 I. C. 71, 20 W. R. 426 *Rel on.*

S. 21. SETTLED RAIYAT TO HAVE OCCUPANCY RIGHTS

Occupancy Right, Acquisition of.

——the right of occupancy appears to be a statutory right and is not conferred by a gift from a proprietor. 31 C. W. N. 74 : 44 C L. J 86 95 I. C. 1025 : 1926 P. C. 72 : 7 Pat L. T. 553 P. C

Occupancy Right, Acquisition of—contd

——to acquire occupancy right in any land held by a settled or occupancy raiyat he must hold the land as a raiyat 7 C. L. J. 475

——the status of a settled raiyat cannot be transferred 3 C. L. J. 285 ; 2 C. W N. 302 n

——occupancy right cannot be acquired by local usage 14 C. W. N. 372

——a raiyat under a jotedar cannot be regarded as an occupancy raiyat. 2 C L. J. 570.

——a lessee of land in the occupation of raiyat having jote right, having obtained khas possession with the consent of the raiyat for the purpose of indigo cultivation, cannot claim occupancy right and retain possession after the expiry of the lease 11 C W N. 397 . 5 C. L J 307

——if the original grant was raiyati any subsequent dealing cannot take away that character 8 C W N 751

——previously acquired occupancy right cannot be curtailed by subsequent lease. 47 I C 157 (c).

——the right of occupancy may be acquired in chowkidari chakran land 31 C. 1021 · 8 C. W N 860 31 I A 17 P C , but a tenant under a person who holds for service as chowkidar cannot acquire the right of occupancy 11 C W N. 46 5 C. L J 53

——a share in a tank being held as an integral part of an agricultural holding situated on its bank, occupancy right could be acquired therein. 8 C. W. N 193

——under Act VIII B C. of 1869 a raiyat can acquire occupancy right in a share of an undivided property. 8 C W N 751.

——in a suit by the purchaser at revenue sale deft must prove his occupancy right 10 C. W. N. 497

——a right of occupancy can be acquired by holding over. 33 C 459.

——occupancy right cannot be acquired in *ghatuali* lands. 33 C. 630, but custom may prevail 1 C. L J 138, 10 C. L J. 602

——in Bengal a co-sharer has no more power to confer a right of occupancy on a raiyat than a middleman would have and in Bengal a middleman cannot obtain as a middleman a right of occupancy himself much less can he create in his tenant a right of occupancy in lands held by him as middleman, 29 C. W. N 34 51 C. 631 P. C

Occupancy right in Chakran land *See 'Sec 181 B. T Act.'*

Occupancy right in chur or diara land

——occupancy right can be acquired in *chur* or *diara* land by accretion to original holding. 21 C 233, 15 W. R 87, 149, 16 W. R. 95, 8 B. L. R 73, (24 W R 404) *Not F*

——lease of *chur* land for a term of years creates non-occupancy right 42 I C. 546, 20 C. W. N 14, 1097.

Occupancy right in Fishery, jalkar tank.

——occupancy right cannot be acquired in *jalkar* or *fishery* or tanks, when they are not appurtenant to land acquired or held for

Occupancy right in fishery, jalkar tank—*contd.*

cultivation. 20 C. W. N. 341, 8 C. W. N. 192, 34 C. 937 : 8 C. W. N. 804, 2 W. R. 200.

——but where the tank is the principal subject of the lease there cannot be any right of occupancy. 4 C. 767, 961, 23 W. R 432, 11 C L. J. 63

—— the test to be applied is whether the grant is subsidiary to ... the purpose of rearing or ... N. 372.

Occupancy right in Ghatwali lands.

——occupancy right cannot be accquired in Ghatwali lands 33 C. 630. 1 C. L. J. 138, *contra* 27 C. L. J. 556, 31 C. 1021, 5 C. L. J. 53.

——right of occupancy cannot be acquired in *Katowali Jagir* lands. 23 C. W. N 136.

——right of occupancy cannot be acquired in Chowkidary Chakran lands. 52 I. C 181, 6 C. W. N. 571 . 1 C. L. J. 503

Occupancy right in Homestead or bastu lands.

——in the absence of local custom or usage, the homestead portion of an agricultural holding is governed by the provision of this Act in the same manner as the portion under cultivation. The question whether a case of this description is governed by the B. T. Act or the T. P. Act depends on the nature of the tenancy originally created. 40 C. L. J. 307. (15 C. L J. 672, 21 C. L. J. 475) *Rel.*

——where a pleader purchase the homestead portion of an occupancy holding situated in the Narayanganj Municipality and used it as his residence and carried on his profession there and the landlord recognised him as a tenant at an enhanced rent and granted him rent-receipts in the forms prescribed under B. T. Act. the tenancy was governed by the T. P. Act. 26 C. W. N. 389.

——where a tenancy from its inception contained agricultural as well as homestead land a suit for ejectment is to be governed by B. T. Act. 67 I. C. 66.

——occupancy right cannot be acquired in land used for building purposes 16 C 952.

——but it can be acquired in land used by cultivator for his own habitation and forming part of his entire agricultural holding 22 W. R. 591, 14 W. R. 402.

——where the main feature of the land is *bastee* mere cultivation of a portion of use of a portion for horticultural purposes will ... land 40 C. 402.

... tural land in the ... estead land not ... J. 176 ... pplicable whether ... er the same or ... C. L. J. 332, the homestead and raiyati-holdings ... different landlords 9 C. W. N. 416, 10 C. W. N. 944 : 4 C. L. J. 332, 16 C. W. N. 536 : 14 C. L. J. 170, or in one or different village 20 C.

Occupancy right in Ghatwali lands—contd.

W. N. 550 ; 22 C. L. J 219 (10 C. W N. 944 ; 4 C. L. J 332, 9 C. W. N. 416, 13 C. L. J. 255, 14 C. L. J. 170, 16 C. W N 536)

—to bring it under the B T. Act the land must be actually used by the raiyat for his residential purposes and it is not sufficient that its character is such as would justify its use as homestead. 22 C. L. J. 219 . 20 C. W N. 550.

—a sub-lease of homestead portion only is governed by sec. 182 B T. Act. 16 C W. N 618 · 15 C. L. J. 672, 21 C L J. 275 : 19 C W. N. 914, 8 C. W. N. 454, 15 C. L J. 2 n

—in case of sub-tenancy it is not necessary to investigate the actual origin of the tenancy. It is sufficient if it is established that at the time of the sub-lease it was an agricultural holding. 40 C. L J 307.

—where the homestead land was under a separate jama formed by mutual consent of landlord and tenant, s 182 B. T Act was not applicable 23 C W N. 16 n

For other cases see "s 182 B T. Act"

Occupancy right in Horticultural lands.

—horticulture means the cultivation of a garden or the science of cultivating or managing a garden including growing flowers, fruit and vegetables 17 C L J 411

—when land is let out for horticulture purpose and lessee holds it for statutory period as an orchard, he acquires the right of occupancy. 27 C. 405 ; 4 C W. N. 76, 21 C. 129. 8 W. R. 250, 2 W R. 40.

—but if the lease be for gathering fruits from the trees it is not for horticultural purpose. 17 C L J. 411.

—where a land is let out containing fruit trees to be enjoyed by the tenants and on which fresh and additional trees may be planted the lease does not come within the B T Act. unrepted second appeal, 2371 of 1915, Rajkumar Vs Mohesh.

—planting of fruit-bearing trees on some portion does not alter the character of the holding 25 C. W. N 378

Occupancy right in Khamar, nij &c.

—Tenant under a lease of khamar land is neither an occupany raiyat nor a non-occupancy raiyat 20 C W N. 1097

—tenant of kamat land does not acquire the right of occupancy by holding it even after the expiry of the lease 12 C W. N 439.

—whether a bargader is a tenant or not depends upon the circumstance of each case. 28 C W N. 848.

Occupancy right in Municipal land.

—before Act 1 of 1907 B C right of occupancy might be acquired in urban areas, 9, C. W N. 141 But under the provisions of the present Act, Govt. has been empowered to withdraw some municipal areas from the operation of the Act.

Occupancy right in Pasture land.

——occupancy right may be acquired in pasture land 11 W R 231.

——a tenant may have a right of pasturage on his landlord's waste lands by immemorial user 31 C. 503 : 8 C. W. N. 425 P. C.

——grazing should be in relation to agriculture. 16 C. L. J. 451 : 14 C. W N 372.

Occupnacy right in Shop, Ghat, Bazar, Arhat.

——not right of occupancy can be acquired in land used as such But where a rayat takes lease of land for cultivating purposes and afterwards converts it into a site for a shop and receives profits from the shopkeepers he may acquire right of occupancy 11 W R 88, 21 W R. 400.

——chandina or bazar lands are non-agricultural lands 26 C W N 483. 34 C. L. J 504.

Occupancy right in Undivided share.

——occupancy right could be acquired in undivided share under the former law. 8 C. W. N. 75, 3 C. L. R. 140.

——such right cannot be acquired, 25 D. 217, 917, 2 C. W. N. 680, 2 C. L. J. 10, because it can be acquired in raiyat's [illegible] a raiyat and [illegible] land is [illegible] [illegible] 1 C W. N [illegible] ng have [illegible]

Occupancy right in Utbandi land.

——right of occupancy cannot be acquired unless particular land held for 12 continuous years. 17 C. 392, the presumption of s. 20(7) of the B. T. Act does not apply to dearah land, 4 C. L. J. 63. [illegible] C 444.

——the [illegible] or dearah lands [illegible] W. R. 87, 113, 16 [illegible]

[illegible] non-occupancy [illegible]

Effect of acquisition of occupancy right.

——when once the occupancy right is acquired it is not affected [illegible] the raiyat [illegible] is determinable by [illegible] subsequent [illegible]

S. 22. EFFECT OF ACQUISITION OF OCCUPANCY RIGHT BY LANDLORD.

[illegible]ings which have become ineffective after the amendment

——occupancy holding and occupancy right are distinct things where the occupancy raiyat purchases the tenure the occupancy

Rulings which have become ineffective after the amendment —*contd*

right ceases to exist but the holding subsists 19 C. W N 246 *vice versa*, 13 C W N 943

——when an occupancy raiyat takes a lease of the superior tenure he becomes a tenure holder and liable to eviction on the expiration of the term of the lease 20 C W N 800, 13 C L J 568, *contra* 4 C L J 209, which says that the purchase of an occupancy right by temporary lessee cannot extinguish the occupancy right

——this sec applies only to transferable occupancy holdings. 5 I C 264, 27 C 473 4 C W N 569, 19 C L J 400. 23 C. L. J. 559 21 C. L J 441, 43 I. C 467 (C), 25 I C. 414 (C)

——co-sharer landlord does not acquire occupancy right. 14 C. W. N 814 37 C 709 12 C L J 15, 9 C W. N. 249 32 C. 336 F. B.

— [illegible] a lessee under a co-sharer [illegible] upancy holding was a [illegible] 759 75 I. C 447, 59 I.

——when the proprietor purchased the raiyati holding before the Bengal Tenancy Amendment Act 1 of E. B and A of 1908, the only effect was the extinction of the occupancy right, the holding itself subsisting as a raiyati holding 26 C W N 100, 34 C. 521, 24 C. 143 *Ref*

——where a joint proprietor in an estate purchases the occupancy holding the raiyati, interest is merged in the proprietory right. The purchaser cannot hold it as raiyati and the under raiyats are automatically raised to the status of tenant A lessee from the joint proprietor thereafter can only sue for rent if there is a grant to him of the right to collect rent 90 I C 816 - 1926 Cal. 158

[illegible] that the occupancy holding [illegible] and as joint proprietor or [illegible] id he is made to pay his [illegible] such use and occupation, [illegible] rent they had priviously realised from the occupancy raiyat are in this manner compensated for their loss. 36 C. L J 89 · 70 I C. 68 1923 Cal 210, 89 I. C. 232. 3 Pat. L R. 138 : 1925 Pat 547

——the word "acquire" in respect of occupancy rights is really [illegible] (2) the expression occurs [illegible] ancy under law then in [illegible] ed in s 22 sub sec. (2) in [illegible] right in land is trans- [illegible] ppear from the context [illegible] to a raiyati tenancy of right conferred by the statute rather than the transfer of rights by another tenant 72 I C. 705 (Pat).

——the right of a co-sharer to bring a suit for the entire rent is not affected by one co-sharer purchasing a portion of the holding. 62 I C 47

Rulings which have become ineffective after the amend
—*contd.*

ccupancy right it c
possession. 24 C
13 C. W. N. 913, 2

y raiyat
5, nor do
570, 4 C

N. 667.

——benami purchase by the landlord determines raiyat's inte
12 C. 82.

——*even when co-sharer zeminders have separate posses of separate portions of lands in the zemindery*, and one co-sh purchases raiyati holdings and have separate possession, there be no relationship of landlord and tenant. 3 C L. J. 141.

Rulings which are still in force.

the assumption that an occ
here the raiyati right is in c
until the claim is establishe
341 : 97 I. C. 217 P. C

——the doctrine of merger enunciated in s. 22 (1) applies wh an occupancy raiyat who is also a co-sharer landlord acquires up partition the interest of the sole landlord in the *whole or portion* his occupancy holding. 2 P L T. 525 : *1921 Pat* 357.

——when partition is effected and the holding is *allotted to som* other co-proprietor he could not be entitled *to eject the co-propriet* who has purchased the holding. 2 P. L. T. 163 ; 58 I. C 955, 7 Pa L T 170 : 93 I. C. 1001 : 1926 Pat. 263, *contra* , 59 I. C 87.

——when an occupancy raiyat takes a permanent *lease of th* holding his occupancy right is not merged *and he cannot be evicte* in case the estate within which the holding lies, is sold *for revenue* 76 I. C. 382 : 1923 Cal. 373, 26 C. W. N. 565 P. C. *fol*

——a jotedar under the *Government* is not *necessarily a* "proprietor or a permanent tenure holder" within the *meaning of this* sec. 2 C. L. J. 570.

——an ijaradar purchasing an occupancy holding *acquires it as* non-occupancy holding. 15 C. L J. 647.

——an ijaradar acquires a right of occupancy in any land comprised in the ijara by purchase or otherwise. *13 C L. J* 568, 4 C. W. N. 209 *doubted*.

Rulings which are still in force—*contd.*

——an ijaradar when purchased an occupancy holding and settled the same with another, the sub-tenant was an under raiyat. 15 C. L. J. 617.

——an ijaradar who purchases an occupancy holding in execution of a rent decree becomes a raiyat and his lessee an under-raiyat 15 C. L. J. 54.

——"third person" includes every person interested other than the transferor and the transferee. 21 C 869.

——the landlord purchasing the holding in execution of a rent decree is entitled to eject an under raiyat without valid lease. 5 C W. N. 310 : 28 C 205, 17 C W N. 860

——landlord-purchaser of occupancy holding at private sale cannot eject any under-raiyat without notice under s 49, 34 C L J. 155. No notice is required when the raiyat surrenders the occupancy holding. 2 C. L J 570.

——when some of several co-sharer landlords purchases certain

ie cannot

41.

r.

make it

N. 794 :

6 C. L. J 19 P C.

——the holding cannot be made temporarily unfit for agriculture ; co-sharer landlord is entitled to injunction against another co-sharer who takes possession by partial surrender 24 C L. J. 85, (34 C. 18 · 6 C L J. 99) not *Fol*

——an occupancy raiyat may erect a building consisting of masonry walls with corrugated iron roof. 31 C 1014 : 8 C. W. N. 754, he may also build a pucca house 6 W. R (Act X) 40. *Now under the amended sec. 76 the point is clear*

S. 23 A. Rights of occupancy raiyat and landlord in trees.

Under the new sec. all rights to all plants and trees vest in the occupancy raiyat, consequently the former rulings relating to trees have become obsolete

S 24. OBLIGATION ON RAIYAT TO PAY RENT.

——the mere non-payment of rent for a certain period does not bar a landlord's right to have the rent assessed and to recover rent from his tenant 28 C. L. J 254.

——where the landlord's paper shewed that rent was payable

the entry of the amount

rd *maf* and sometimes the

of rent was resumable.

——where the suit as originally framed is not one for rent under s. 24 but is a suit for recovery of rent at rates agreed upon by all the utbandi tenants the plff. cannot claim a fair and equitable rent in appeal on the ground that the defts having the right of occupancy by continuous possession of 12 years are liable to pay a fair and equitable rent under s. 24 50 C. L. J. 294 : 1929 Cal. 614.

S. 25. PROTECTION FROM EVICTION.

——ordinarily a suit for ejectment of a tenant cannot be maintained unless the tenancy has been determined i.e. unless there has been a previous notice to quit or a demand for possession. 11 C. W. N 225 34 C 57 : 5 C. L J. 181.

——in case of one consolidated jama for agricultural and non agricultural land the tenant cannot be evicted from the agricultural land in which he has acquired a right of occupancy. 33 C. 459

——cultivation of indigo is an agricultural purpose, but the manufacturing indigo cakes is not agricultural purpose. 31 C 172 : 9 C W N. 87.

——whether the existence of an indigo factory renders agricultural land unfit for the purpose of tenancy is a question of fact 34 C. 718 : 11 C. W. N. 794 · 6 C. L. J. 14 : 9 Bom L. R. 750 : 17 M. L. J 361 : 2 M L T 399, P. C.

——although a liberal construction may be adopted it cannot extend to a complete change in the mode of enjoyment 3 C 781 : 2 C. L R 294

——making a tank in the holding building on it improperly, or changing the character of the cultivation does not necessarily operate as a forfeiture rendering the tenant liable to be ejected. 9 C 699.

... ermanent lease may have ... nnot thereby cause sub... 5, 11 C. W. N. 527 : 31 C

——in a suit for ejectment on the ground that the raiyat has used the land in a manner which has rendered it unfit for the purpose of tenancy, the suit must include all the lands of the holding. 2 C L J. 369.

——acquiescence and waiver disentitle the landlord to eject the tenant 7 W R 495, 15 W. R. 360, 23 W. R 298, 9 C. 609, 27 C 570, 28 C 693 · 5 C W N. 634 P. C.

... tenancy must join in the suit ... 25, 35 C. 807 : 7 C. L. J. 483, ... C 412, 2 C W. N 229. ... vict the occupancy tenants

1925 Cal 1169

See other cases under acquiescence and waiver.

For notice and limitation, see s. 155.

S. 26 DEVOLUTION OF OCCUPANCY RIGHT ON DEATH.

... a suit by the ... in such case ... evant. 44 C

... that although the other prop... y of an occupancy ... ie Crown, his occupancy ... xtinguished. 4 Pat 774;

S 26. Devolution of occupancy right on death—*contd.*

——occupancy right cannot be bequeathed unless there is local custom. 18 C W N 1020, 1291, 12 C W. N. 1086 8 C. L. J. 261 *Dist.*

——when occupancy raiyat dies without heir the holding vests in the landlord free of all incumbrances 13 C. W N. 12 8 C L. J. 324 : 1 I. C 155, 117 I. C. 630 (Pat)

——when on the death of the last male owner an occupancy

——an heir of an occupancy raiyat can claim recognition 27 C. 451 : 4 C. W N 608

——the provision of this sec. does not apply to ordinary holdings 18 C W. N. 828 19 C L J 505 F B.

——heirs not in possession are liable to pay rent unless they surrender 19 C 790.

——some of the heirs may represent others 37 C 75

S. 26. A (Application of ss. 26 B to 26 J).

New provision as to the transferability of occupancy holding.

S. 27. (Presumption as to fair and equitable rent)

S. 28. (Restriction on enhancement of money rent).

S. 29 ENHANCEMENT OF RENT

——this sec applies only to the case of an occupancy raiyat. 90 I. C. 929 (Pat)

——this sec. which restricts enhancement of rent to 2 annas in the rupee does not apply to an application under s. 105 to fix a fair and equitable rent 89 I C 951 (C)

——the limit of 2 as cannot be exceeded although the excess might be a very small one and for all practical purposes might be disregarded 1929 Cal 531, 1929 Cal 658

——alteration of money-rent to rent-in kind with money value at an enhanced rate is void 23 C L J 635

——agreement to pay rent-in-kind instead of money is vaild. 18 C L. J. 74, 33 C. 220, 17 C L J 590, 22 C. 658, Dist., but see below 10 C. W. N 144, 14 C W. N 693, 19 C L J 333

——this sec. applies even when money-rent is enhanced by the addition of rent-in-kind 37 C. 610 14 C W N 693, but it has been held that this sec deals with enhancement of money-rent only 19 C L. J. 333

18 C. L J 502, 44 I. C. 574 (C).

S. 29. Enhancement of rent—contd.

——a zemindar holding under the permanent settlement has a right from time to time to raise the rent of all rent-paying land within his zamindaries according to the current rates unless he is precluded from the exercise of such right by a contract binding on him or by the law in force Where the lease is ambiguous rule based on the conduct and actings of parties is to be applied. 42 C L J 172; 1925 Cal. 1248 (32 C. L. J. 19. 13 M. I. A. 248 P. C.) *Fol.*

——when there is no writing registered the Legislature allows the landlord to realise rent at the increased rate at which it has been actually paid for a continuous period of not less than three years immediately preceding, but such enhancement is not permanent and the realisation must be immediately preceding 37 C L J 489 1923 Cal 600 · 72 I C. 136

——s 50 contemplates a case where the tenancy *is held* at a certain rate and s. 29 deals with a case when rent has been actually *paid* for a period of three years. 37 C. L. 7. 489.

——requisition of s. 29, prov. 1 —meaning of continual payment for three years 23 C. L J 209

——kabulyat contravening s 29 *is void.* 9 C. L. J. 343; 36 C. 604, *26 C W. N 758 · 49 C. 875.*

——contract to pay enhanced rent is not divisible and not enforcible to the extent lawful. 24 C 895: 1 C W. N. 448, 33 C. 607, 9 C. L. J. 343, 36 C. 604; 2 I C. 828 and it is void though acted upon for some period *9 C. L. J. 243. 30 C. 604; 29 C 823.*

——when a *kabulyat* contravenes s. 29, the landlord is to justify the enhancement 26 C. W. N 758: 49 C. 875, 36 C. 604 *fol.*

——a *kabulyat* is not bad if it is to take effect for a period prior to *the date of execution The word rent in* the sec may include rent for a previous period which was already due but not paid. 62 I C. 619.

——s 29 (1) does not contravene s. 29 (b), 24 C. 895

——*s. 29 (1) does not control cl. (b),* 9 C. W. N. 265: 1 C. L J 10 *. 32 C* 395 F B. so realisation for three years is of no avail. 14 C W. N 335: 11 C. L. J 56.

——allowance for a time is valid. 19 C. W. N. 867

——*kabulyat deciding dispute* as to rent is valid though illegally enhanced 19 C W N 321, 11 C. L. J 106, *D.,* 18 C *333, 32 C* 395; 9 C W. N 265, and 28 C 90. *F* But the fact that the tenant has been exonerated from certain liability under a previous contract cannot validate the illegal stipulation. 33 C. 607: 11 C W. N. 65; 4 C. L J 320

——when a *bona fide* settlement is arrived at to end the litigation between the parties it is valid 1929 Pat. 568: 118 I C. 723: 10 Pat. L. T 717 *F.* B.

——a compromise decree *in contravention of s.* 29 is a nullity, 17 C W. N. 496.

——landlord must prove the *bona fide* dispute. 19 C. W N. 321: 21 C L J. 325, 11 C. L. J. 106: 5 I. C. 39.

S. 29. Enhancement of rent—*contd.*

——the sec. is imperative and by including a fictitious *jama* in a kabulyat the provision of the sec. cannot be got over. 87 I. C. 567: 1925 Cal. 1262.

——the rule of law is a very strict one which the courts of law should not allow to be defeated or evaded Enhancement in a manner not allowed by law is prohibited even when such enhanced rent has been illegally realised for 3 years 75 I C. 22 1924 Pat. 820.

——the legislature allows the landlord to realise the rent at increased rate provided rent at that rate has been actually paid for *continuous period of not less than 3 years immediately preceding* the period of claim. 37 C. L. J. 489 72 I C 136, 1923 Cal. 600

——enhancement by way of compromise in a suit for ejectment after the expiry of a lease is not valid. 4 Pat L. T 301: 71 I. C. 143, 72 I. C 40, but see, 1 Pat L. R. 43 · 69 I C. 616

——enhancement of rent for improvement by landlord is allowed so long as the improvement subsists 28 C L J 209

——s 91 Evi. Act does not preclude landlord from proving improvement in cosideration of which the enhanced rate was agreed upon though not entered in the kabulyat 11 C. W N 621, 33 C. 607: 4 C. L J 320

—[illegible] on has procee- [illegible] be enforced.

[illegible] of converting pasture lands into arable lands, is valid. 1 C L. J 78n.

——when area was increased by private measurement and the tenant agreed to pay rent at Re 1—12½ in place of Re 6¼, it was illegal 28 C L J. 142, 22 C. L J 88, *Dis*

——*s 29 does not apply on the substantial addition to old holding.* 23 C W N 24n, 22 C L J 82.

——this section applies in case of increase in rate and not to increase in amount for increase in area 26 C 233, 3 C L. J 74 n.

[illegible] ...lement with [illegible] non-*transfer*- [illegible] but who is afterwards recognised as tenant on payment of fixed rent 69 I C. 414, 39 C. 663, 23 C W. N 23 n

——this sec does not apply when original holdings are split up or new holdings are formed by addition 14 C W N 335 11 C L. J. 56, 13 C W. N. 410, 962, 22 C L. J 81, 88, 39 C 663, 13 C. W N. 203 n

——this sec. is no bar when the tenant takes a settlement of an addit[illegible] and a new renta[illegible] . 763 [illegible] land with an e[illegible] 1925 Cal. 389 [illegible]

S. 29. Enhancement of rent—*contd.*

——but consolidation of distinct holdings with separate rentals is not creation of new holdings and rent can be enhanced only within the limits of this sec 3 Pat 825 : 84 I. C. 361 : 6 Pat L T. 537 : 1925 Pat. 185

——kabulyat for enhancement, consolidating three jamas, is bad. 13 C. W N 303 n

——division of holding between brothers does not form new holdings 23 C L J 580, 11 C. L. J. 56, 14 C. L. J. 110

——this sec. does not apply to a contract before B. T. Act, 25 C 281, nor to a contract in a kabulyat which is executed for increased rates for increase of area. 3 C. L J. 74 n.

——this sec. does not apply when a compromise of contract changes the status of the occupancy raiyat. 37 I. C. 797 (Pat), 4 P L J. 667, 52 I C 20

——a compromise decree passed in contravention of s. 29 is not a nullity but is operative and binding until vacated by appropriate proceedings 1928 Cal. 606 : 113 I. C 570 D. 1929 Cal. 133.

——agreement to pay rent at an enhanced rate after the expiry of the term of the tenancy is valid 18 C. L J. 74, 17 C L J. 590, 45 I C. 901 (Pat)

——this sec applies to co-sharer landlords as well as to sole landlord. 10 C. L. J. 87

——a joint tenant executing kabulyat at an enhanced rate is entitled to apportion the rent among the co-tenants. 6 C W. N. 111

——the provisions of cl. (b) are not retrospective. 21 C 658

——s 29 (iii), agreement to pay enhancement for a particular crop is valid. 33 C 607 n, 9 C W N 62 · 4 C. L. J. 320.

——onus of illegality is on tenant 13 C. W. N. 181

——but it is shifted on the landlord. 9 C. L J. 343, 26 C. W. N. 758 . 49 C 875.

——landlord must prove improvement under cl. (b). 11 C. L J 1

——rent-collection papers are not independent evidence of rate of rent unless they are proved by the persons who have made the collection 71 I. C. 300.

Allowance.

——for a time is valid. 19 C W. N 867.

——contract of prospective increment is invalid 18 C. W. N. 738 . 18 C L J. 502, 13 C W N. 202n

——landlord's acceptance of rent at low rate for sometime will not bind him 20 C. W. N. 347, 680, 16 C W. N. 242, 496, 37 C. 393 : 18 C W. N. 66 P. C.

——where the provision for *hajat* made in the Kabuliyat was on the ground that certain lands were *patit* and subsequently the lands ceasing to be so the landlord sued for the entire rent, the suit was not one for enhancement and s. 29 did not apply. 33 C. W. N 312. but the landlord cannot withdraw the *hajat* concession unless he can show that the land which was *patit* has since then come under cultivation. 33 C. W. N. 311 : 1929 Cal. 397.

S. 30 ENHANCEMENT OF RENT BY SUIT.

Applicability of the sec.

——holding under this sec. means an entire holding 2 C. W. N. 44 650, 2 C. L. J 10 40 C 29. 16 C. W. N 877. 16 C. L. J. 9, 25 C. 917, 24 C W N. 1022. 2 P L. J 553; 40 I C 585

——in a suit for enhancement of rent the plff as owners of an und[illegible] land in the occupa-[illegible] 91 I C 846.

[illegible] ght together 11 [illegible]

——rent payable partly in kind and partly in money cannot be enhanced under this sec 24 C. L J. 373 35 I C. 618, 8 Pat L T 224 · 98 I. C 935 : 1927 Pat 108, 101 I. C. 511 1927 Pat 207 8 Pat. L. T. 564

——suit both for enhancement and arrears at enhanced rate is maintainable. 5 C W. N 880

—[illegible] estrict the enhancement to the l[illegible] So the rent of homestead land [illegible] N 962: 36 C L. J. 305: 70 I [illegible]

——enhancement can be claimed even for land yielding no crop. 79 I C 567 1925 Cal 399.

——but a single Judge of the Patna H C has held that where there is a house on a portion of the land with the acquiescence of the landlord the enhancement cannot include that portion also, it should be limited to the land only. 8 Pat L T. 495 106 I C 422

——unless the prevailing rate is proved to be at a higher rate no enhancement for the rise in staple food crops will be allowed under s 30 (b). 1923 Pat 345 75 I C 411.

——an enhancement under s 30 (b) is made upon general grounds As to whether in any particular case enhancement should be allowed depends on the circumstances of the case 36 C L. J. 305 27 C. W N 962.

——the question whether land is good or bad has nothing to do with the question of the enhancement under s 30 (b). 1929 Pat. 348 10 Pat L. T 388.

——a suit for enhancement of rent proceeds on the assumption that a rent is now paid and a suit for the determination of a fair and equitable rent proceeds on the assumption that no rent has hitherto been paid by the tenant. 2 Pat. L T. 642

——a claim for enhancement of rent is a recurring cause of action and limitation runs from the date of refusal. Art. 131 L. Act applies to such cases 2 Pat. L J 124

——the right of landlord to claim enhancement of rent under s 30 is not affected by a covenant in the kabulyat executed prior to the Act that if at the time of any future survey any excess area is discovered the tenant should be liable to pay enhanced rent on the different kinds of land 88 I. C 377 : 1925 Cal. 1209

——*a suit for enhancement of rent under s 30 on the ground of* rise in prices cannot be altered so as to claim enhancement on the

Applicability of the sec.—*contd.*

footing of a kabuliyat containing an agreement for enhancement of rent. 30 C W. N. 1038 ; 1926 Cal 1207 : 97 I. C. 753

——in a suit for rent the pliff as owners of an undivided share of an estate can treat the excess land in the occupation of the tenant of the estate as a separate holding. 91 I C. 846, (C).

——in the case of a claim for enhancement under s 30 (b) it is the duty of the court to refer to the price lists prepared under s. 39 whether the parties to the suit produced them or not. 1926 Cal 661 91 I C 734, 37 C. 742 ; 14 C W. N. 914.

——s. 188 is no bar to a suit for enhancement under s 30 by a co-shebait, the right to sue for enhancement vests in the shebait and not in the idol. 24 I. C. 260, 10 C. W. N. 42 . 2 C L J 577.

Who can sue ?

——co-sharer cannot 17 C 695, 2 C W. N. 44 : 23 C 917, 15 C W. N 74 38 C. 270 : 13 C. L J. 51 P C., 16 C. L J. 427 19 I C 197, 18 C. W. N. 942, 21 C. W. N 371.

——*farmer can* 23 W. R 228.

——ijardar can. 2 C 474, 23 C W. N. 945 . 30 C. L J 140 54 I C 850

——Hindu widow can 20 C 498 P C

Onus.

——is upon the defendant to prove that he *is a raiyat at fixed* rate. 5 C. W. N 880.

——tenant is not bound to produce his rent-receipts *when the* Zemindar's own papers are in his favour. 22 C W. N 999.

——when *the plaintiffs succeeded in showing that the holdings*, as recorded in the record of rights did not *exist in that condition* during the previous years, the tenants were to show that their holdings were made up of the other holdings on which *uniform rent* was *being paid all along.* (1923) Pat 339.

Procedure

——"land of similar description and with *similar advantages*" refers to the time of inception of tenancy. 2 W. R. (Act X) 40 *contra*, to the time of suing for enhancement 1 C. L. R. 549, 7 W. R 97.

——"*prevailing rate*" means the rate generally prevalent or the rate paid by the majority of the raiyats in the neighbourhood 9 W R. 83, 6 W. R (Act X) 45, 1 C. W N. 179n.

——"prevailing rate" is not the average rate. 1 W. R. 59, 21 W. R 157, 21 C. 986.

——where there is no prevailing rate but the rates are varying the lowest rate may be taken for enhancement. 1 C W. N. 310

——*if the landlord does not object, the adoption of the lowest* rate cannot be challenged by the tenant. 15 C. W. N. 56 n.

——rent *illegally settled cannot be a standard.* 37 C. 742 14 C W. N. 914.

——arbitrators may settle fair and equitable rate. 6 C W. N. 611.

Procedure—*contd.*

——the court is to refer to the pricelist prepared under s 39, whether parties produce them or not 37 C. 742 : 14 C. W N. 914 : 6 I. C 506, 15 C W. N. 56 n.

——reference may be made to reliable private compilation of price lists 19 C W N 140 n, 29 C. L J. 253, 21 C L J. 483

——the civil court has no jurisdiction to entertain a suit for enhancement of rent when an application under sec 105 has been withdrawn or dismissed for non-prosecution 24 C W N. 1020, *Contra* 28 C L J 254, 40 C. 428, 17 C W. N 467

——the decennial periods must not even partially coincide 11 C. W. N 380.

——the court is bound to decree enhancement under s 30 (b) unless it exercises discretion under s 35 57 I. C. 115 (c)

——in a suit for enhancement of rent under s. 30 (a) if the court deputes a Sub-Deputy Collector to hold a local inquiry and make a report but the court finds it insufficient, it should direct a further inquiry to be made 86 I C 533 1925 Cal 898.

——in a suit for enhancement under s 30, rent for back period cannot be decreed 21 C L. J. 309, 5 C W. N 880 *Dist*

——suit under this sec may be referred to arbitration 6 C W. N. 614

——an application made under s 105 for settlement of rent and withdrawn bars a subsequent suit for enhancement in the civil court. [illegible] evenue officer has jurisdiction with liberty to bring a suit in [illegible] W. N. 1022 *Ref.* 48 C 157 : 24 [illegible] 467, 24 C L J 79, 28 C. L J. 254 *considered.*

——application made but withdrawn is to be treated as never made. 28 C L. J. 254, 40 C 428.

——an application under s 105 whether withdrawn or dismissed for non-prosecution bars a civil suit by s 109, 24 C. W N 1020, 28 C L. J. 254, 40 C. 428 17 C. L J 467 17 C. W. N 467, *Dissented from and commented*

——decision under s. 105, is not *res judicata.* 23 C 257, 17 C. 721 *Dist contra.* 24 C. W. N 1020.

Ss 31-35 RULES OF ENHANCEMENT

——the expression "previous rent" in s. 32 and existing rent in s. 105 mean the same thing. 32 C W N 999

——the civil court should indicate to the Revenue Officer holding the investigation what it is that the court precisely requires 37 C. 742 : 14 C. W. N. 914

——the decennial periods must not even partially coincide. 11 C L J. 380

——words used in s 32 appear to be mandatory but that sec. should be read along with sec. 35 which gives the court discretion to enhancement while s. 32 lays down the procedure by which the enhancement is to be calculated 1928 Cal. 570 · 109 I. C 305.

Applicability of the sec.—*contd*

footing of a kabuliyat containing an agreement for enhancement of rent. 30 C W. N. 1038 · 1926 Cal. 1207 : 97 I. C. 753

——in a suit for rent the pliff. as owners of an undivided share of an estate can treat the excess land in the occupation of the tenant of the estate as a separate holding 91 I C 846, (C).

——in the case of a claim for enhancement under s 30 (b) it is the duty of the court to refer to the price lists prepared under s 39 whether the parties to the suit produced them or not 1926 Cal 661 91 I C. 734, 37 C. 742 14 C W. N. 914.

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——ijardar can 2 C. 474, 23 C W. N. 945 30 C L. J. 140 : 54 I C. 850.

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Procedure

——"land of similar description and with similar advantages" refers to the time of inception of tenancy. 2 W. R. (Act X) 43 *contra.*, to the time of suing for enhancement. I C. L R 549. 7 W. R 97

——"prevailing rate" means the rate generally prevalent or the rate paid by the majority of the raiyats in the neighbourhood. 9 W. R. 83, 6 W R (Act X) 45, I C W. N. 179n.

——"prevailing rate" is not the average rate. I W. R. 53, 21 W. R 157, 21 C 986.

——where there is no prevailing rate but the rates are varying the lowest rate may be taken for enhancement. I C W N. 310

——if the landlord does not object, the adoption of the lowest rate cannot be challenged by the tenant. 15 C. W. N. 56 n.

——rent illegally settled cannot be a standard. 37 C. 742 . 14 C W N 914.

——arbitrators may settle fair and equitable rate. 6 C. W. N. 614.

S. 38. Reduction of Rent.—*contd.*

——a tenant is entitled to reduction of rent in cases where it cannot be shown that the failure to supply water has taken place while the rent was as high as the present figure 1915 M. W. N. 791 : 32 I. C 809.

S. 39. PRICE-LIST

——it is the duty of the court to refer to the price list 37 C 742 : 14 C. W. N. 914, 91 I C 42, whether the parties to the suit produced them or not. 91 I C 734 (c)

S. 40. COMMUTATION.—*(Repealed)*

S. 41. NON-OCCUPANCY RAIYAT.

[illegible] 9, 8 C L J. 537, 13 C. [illegible] W. N 681, 38 C. 444 [illegible] between khudkast and [illegible] F. B, 24 C. 207 : 1 C. W N. 89 *overruled.*

——the mere fact that the lessee of a proprietor's private land is neither a fixed raiyat nor an occupancy raiyat, does not raise a presumption that he is a non-occupancy raiyat 26 C W N 822, P. C 1 Pat 340.

S. 42 INITIAL RENT OF NON-OCCUPANCY RAIYAT

——although only the occupancy raiyat is authorised under sec 33 to apply for abatement of rent, yet the principle laid down there sohuld be considered in all cases 20 C 579 p 586

S. 43. ENHANCEMENT OF RENT OF NON-OCCUPANCY RAIYAT

——rent of *churland*tor of Govt Khasmahal may be enhanced according to agreements. 14 C. W N 470 11 C L. J 364 37 C 449.

——enhancement of rent means enhancement in amount and not alteration in kind 18 C L J 74, 33 C 200

——stipulation to pay rent in kind after the expiry of the term of the lease is enforcible. 18 C. L J. 74 17 C. L. J 590, but the stipulation to pay rent at an enhanced rate is penal 22 C 658, 13 C. W. N. 276n.

——where there was an agreement that a portion of the rent reserved in the lease would remain in suspension and after the expiry of the lease the tenant continued to hold at the lower sum, and the tenant was sued for the full rent reserved, held that the agreement did not contravene the provisions relating to non-occupancy raiyat 20 C W. N 347.

Ss 44 EJECTMENT OF NON-OCCUPANCY RAIYAT.

——transfer of possession or denial of title does not operate as forfeiture 1 C W N 158.

——a lease executed during the continuance of occupation is not a lease under sec. 44 Cl. (c) and a non-occupancy raiyat cannot be ejected on its expiration. 9 C W. N. 287n.

Ss. 44. Ejectment of non-occupancy raiyat.—*contd.*

——a *non-occupancy* raiyat whose lease has expired is liable to ejectment under the general law as trespasser. 3 Pat. L. J. 1

——under the B. T. Act there is no tenant *from* year to year and the tenant is a non-occupancy raiyat who does not hold under a lease for time, he cannot be ejected under s. 44. 20 C. W. N. 258.

——where after the expiry of a lease the tenant held over for some time and subsequently another lease was executed, in a suit for ejectment under s. 44, on the ground the time had expired, held that s 47 would be a bar. 79 I. C. 648

——when a homestead land ceases to be such and is let out for cultivation and cereals and vegetables are grown upon it, it is governed by the B. T. and the lessee is a non-occupancy raiyat liable to be ejected only on any of the grounds specified in s 44 1923 Pat 94.

——non-occupancy raiyat inducted into the land by *ijaradar* is not liable to ejectment after the expiry of the *ijara* lease except *under this sec,* 10 C L. J. 55.

——non-occupancy raiyat cannot be ejected without notice to quit even after the expiry of the lease 13 C. W. N. 276 n.

S. 46 DETERMINING FAIR AND EQUITABLE RENT.

——a suit for the determination of a fair and equitable rent proceeds on the assumption that no rent has hitherto been *settled* and paid so when the landlord claims fair rent in respect of past years for which rent has already accrued due, a suit for determination of fair and equitable rent does not lie 4 *Pat.* 604; 6 P L. T. 367 : 1925 Pat. 559, 29 C. 247 *Fol.*

——sub-section (9) is not exhaustive. 27 C. 476 : 4 C. W. N 3[illegible]

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W. N. 558

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——a suit under this sec., involves determining of the *status* of a tenant and also involves the fixing of a fair and equitable rent and therefore comes under the express words of s *111.* 88 I C. 670 : 1925 Cal. 1211.

——the proceeding under s. 46 are not merely *proceedings for* [illegible] table rent assessed by the court,

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non-occupancy raiyat on the ground *of his refusal* to agree to enhancement of rent has been noted in 55 *C.* 659 : 1928 Cal. 533 : 111 I. C. 222.

[illegible] 46 (7) is not the agreement

the agreement arrived at

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ected to pay that rent and

S. 46. Determining fair and equitable rent.—*contd.*

not to be ejected from the holding. 43 C. L. J. 45 : 92 I C 37 1926 Cal. 693

——the liability of the non-occupancy tenant to pay enhanced rent attaches from the time when the tenant agrees to pay the rent so determined and is not dependant on the decree which merely stops short after determining what are fair and equitable rent. 1929 Cal. 334.

——*Quarae.*—whether the sec. contemplates one decree or two decrees. 55 C 659 . 1928 Cal. 533 111 I C 222.

S. 47. MEANING OF "ADMITTED TO OCCUPATION"

——a lease during occupation is not a lease admitting the raiyat to occupation and he cannot be ejected on its expiry 9 C. W. N. 278 n

S. 48. (Liability of under-raiyat to pay rent).

This sec. is new providing that the under-raiyat is to pay the contractual rent, provided the rent or its rate be not less than that payable by the raiyat to his landlord

S 48-A (Enhancement of rent of under raiyat).

S. 48-B (Enhancement by contract).

S. 48-C (Ejectment of under-rlayat).

S. 48-D (Enhancement of rent)

S. 48-E (Application for restitution by under-raiyat)

S. 48-F (Incidents of holding of under-raiyat)

S. 48-G (Occupancy rights of under-raiyat)

S. 48-H (Provisions as to salami restriction)

S. 49 (Mortgage by under-raiyat).

Ss 49-A to 49-O (Restriction on alienation of land by aboriginals).

S. 49-F. APPLICATION TO COLLECTOR FOR TRANSFER IN CERTAIN CASES.

——the power of an aboriginal to effect a mortgage is restricted by s 49 E sub-sec. (2) and the provisions under s 49 F cannot enlarge the power to effect mortgage in any other way than by a complete usufructuary mortgage 68 I. C 301

S. 49-K. RESTRICTIONS ON SALE OF TENANT'S RIGHT UNDER ORDER OF COURT

——the sale of a tenure held by an aboriginal in execution of a money decree in contravention of s 49 K is a nullity and not merely an irregular one. It being a nullity neither Art. 12 nor Art 166 applied to an application to set it aside. 51 C 224 : 28 C. W N 556 83 I. C. 848 : 1924 Cal 638.

S 50. RULES AND PRESUMPTION AS TO FIXITY OF RENT.

Scope and Applicability of this section.

——the words "at the time of permanent settlement" relate to the date of the Permanent Settlement and not to the time when the

Scope and Applicability of this section.—contd.

settlement with the proprietors actually took place. 1926 Pat. [illegible]: 7 Pat. L. T. 679 : 109 I. C. 125.

——s. 50 (2) applies irrespective of any contract between the parties if the rent has actually not been changed. 1926 Cal 1177: 96 I. C. 76 : 3[illegible] C. W. N. 105.

——presumption of fixity of rent under s. 50 (2) is by its terms limited to its application to suits or proceedings under the B. T. Act. A suit for ejectment does not fall within that description. 15 C. [illegible] 778, 5 C. L. J. 413 : 4 C. W. N. 159 n, 7 C. W. N. 102, [illegible] C. L. J. 380 : 16 C. W. N. 939 : 3 C. L. J. 62 n. But it has been ruled that even in cases where s. 50 is not directly applicable, the court may act on a presumption similar to the one of arising under the section if the facts justify the necessary inference. 27 C. L. J. 54, 1924 Cal 302 : 73 I. C. 416 : 43 C. L. J. 164. (13 C. L. J. 415, 418, 18 C. L. J. 193)

— where the presumption under s. 50 (2) does not apply the court may consider the facts in view of all the circumstances and determine whether it was not a just inference that the rent of the holding is fixed. 1926 Cal 887 : 94 I. C. 310.

— it has no application in suits which are not suits under this Act, but suits under the general law for ejectment of an alleged trespasser. But a presumtion may arise apart from the Act that where there has been a uniform payment of rent for more than 20 years the original contract was a contract to hold at fixed rates. 43, C. L. J. 104 : 94 I. C. 740.

——the presumption under s. 50 (2) can only be availed of in a suit or proceeding under the B. T. Act when the plff. sues for recovery of possession alleging that the deft. is a trespasser and the deft. claimed to be a tenant, the rent could not be said to be one under this Act until the fact of the deft's tenancy was made out and the fact was to be made out independently of s. 50. 85 I. C. 636 : 1925 Cal 761.

— s. 50 contemplates a case where the tenancy is held at a certain rate and s. 29 deals with a case where rent has been actually paid for a period of three years. 37 C. L. J. 489 : 1923 C. 600 : 72 I. C. 136.

—where by a contract of tenancy subsequently entered into between the parties, the landlord is entitled to get rent at the rate payable for the cultivated lands of the village s. 50 does not apply. 36 C. L. J. 333 : 1923 C. 141 : 70 I. C. 437.

—where the kabuliyat states that if excess area is found in the possession of the tenant he will pay rent for that excess land at the higher rate paid by the neighbouring tenants, it does not propose to alter the rent within s. 50 : 97 I. C. 46.

[illegible] an agreement in a kabuliyat to pay enhanced rent at some future time does not constitute a change in the rate of rent and the agreement does not rebut the presumption under s. 50 (2). 30 C. W. N. [illegible] : [illegible] I. C. 753 : 1926 Cal. 1207.

Scope and applicability of this section—*contd.*

——presumption under the sec. is applicable to tenure-holder or a raiyat holding at a rent payable partly in cash and partly in kind or entirely in kind. 27 C. W N. 115 36 C L J. 220, 37 C. L. J. 52, 1923 C 74 : 72 I. C. 663.

——an occupancy raiyat is not excluded from the category of raiyat for the purpose of the presumption under this sec Section 50 does not create a raiyat at fixed rate but it furnishes a rule of evidence (26 C. W. N 15 : 34 C. L J. 233, 24 C 152) *Ref*, and *Relied*. Actual payment for 20 years need not be proved 27 C. W N. 740 (36 C. L J. 336, 49 C 661 : 35 C. L J 309). *Ref*

——whether there is one or a series of tenancies, or the land is held under the same or different landlords, is immaterial 97 I C. 546 · 1927 Cal 75

——apart from s 50 a presumption as to fixity of rent cannot arise merely from the payment of rent at a fixed rate for a few decades. 91 I. C. 878

——when a kabuliyat is materially altered it is not admissible in evidence to prove enhancement of rent 50 C L J 173

——assuming there was a contract to pay rent in future according to the prevailing rate the tenant is not precluded from deriving the benefit of the presumption under this sec 109 I. C 376 (C)

Application of s 115 B. T. Act.

——s. 50 does not contemplate a case in which a raiyat is seeking to get the benefit of the presumption for a period subsequent to the time when the record was framed The expression "thereafter" clearly signifies after the particulars have been finally recorded after recourse to all the provisions contained in Chap. X for the attainment of finality in this respect 49 C 519 . 36 C. L J 291, 37 C. 30 F. B.

——s 115 B T Act, does not come into operation until all possible proceedings under Chap. X have been exhausted. 27 C W N 740, 37 C. 30 · 13 C W N. 1149 F. B. *Ref* 36 C 336 *Ref*

——presumption under s. 50 arises if entries in the Record of [illegible] 115 does not stand as a [illegible] I C 989 1925 Cal. 208

[illegible] s. 50 only ceases to apply [illegible] by the order of the [illegible] cord of rights to be [illegible] at 443 78 I C 605 :

——in view of the s 115 the tenants are not entitled to the benefit of the presumption under this s 2 Pat. 92 1923 P 324, 80 I C. 926 (Pat). 45 C. 913, 1 Pat L J 67 *not fol* 37 C 30 *fol.*

——where it had been recorded in the Record of Rights that the tenancy was not *mokurari* the presumption under this sec could not apply. It cannot be held in a case brought under the B T Act that any presumption arises as to the fixity of rent from mere payment of the same rate of rent for a number of years apart from the presumption arising under s. 50 of the Act. To hold otherwise would

Application of s. 115 B. T. Act—*contd.*

be to require every landlord to enhance the rent of every tenan under him at certain intervals of time which he might not himsel desire to do. 51 C. 454 : 1924 Cal. 660.

——where the tenants set up that the tenancy was *mourasi makurari* and the court found the *jama* was fixed after the *Permanent Settlement*, the tenants could still establish that there was a contract that the rent of the tenure should not be enhanced inspite of the absence of *presumption* under s. 50 29 C. W. N 723 : 88 I. C. 433 : 1925 Cal. 954.

Change or variation of rent.

——slight variation before *20* years will not affect the presumption. 19 C. W. N. 117, 1 W. R. 239, 248, *18 C. L. J. 76*, 2 W. R *Act X 74*, 6 W. R. Act X 50, 2 W. R *Act X 93, 4 W. R. 33*

[illegible] explained does
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C.

——tenant is to explain apparent variations of rent since the date of Permanent Settlement 23 C. W. N. 201.

——if the tenant cannot explain the variation the inference [illegible] a change in the rate of rent 90 I C. 602
[illegible] here is nothing
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B. Ghose, J)

rebut the pre-
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[illegible] it is not necessary that
44 C L. J. 3 . 1926 Cal.
1214 : 97 I. C. 1007.

Division, consolidation or addition of rent or new tenancy

[illegible] of rent does not affect the presump-
tion [illegible] *W N. 201, 15 C W. N.*
890, 2 [illegible] W. N 949, 19 C. W. N.
44 *cor* [illegible], 13 C. W. N. 410, 22 C. W. N 321, 22 C. W. N. 904, 18 C L J. [illegible], 44 I. C. 595 *In these latter* cases new tenancies were held to be created which *depend upon* the intention of the parties 11 C. L. J. 56.

——once it is shown that *any of the* constituent part of the tenure was not held at an *uniform rent, no presumption* can arise as to the tenure having been held at an *uniform* rent from the time of the Permanent Settlement 23 C W. N. p. 216.

——a sub-division or amalgamation of tenures *does not* affect the presumption. 36 C. L *J. 389 : 1923 C.* 261 : 74 I. C 383, 35 C L J 382

——where there is an old tenancy with a definite rent held for more than 20 years at a uniform rent and subsequently an additional [illegible] taken up at an extra rental but both the *jamas* are paid

Division, consolidation or addition of rent or new tenancy —contd.

together the fixity of rent of the old tenancy continues 1926 Cal. 710 : 92 I. C 107.

——where after a tenure is divided the different parts of division are held at a proportionate rent and the aggregate rent equals the *original rent the tenure holder is entitled to the benefit of sec. 50 (2).* 78 I C 744 (c).

——sub-division of tenure does not affect the presumption to be drawn under s 50 (2) 1925 Cal 498.

——the addition of other parcels as well as the increase in the rental change the incidence of the original holding creating a new tenancy and the presumption under s. 50 does not apply. 1927 Cal. 493 : 101 I C. 347

——where a landlord purchases the holding at a rent sale and then resettles it with the original tenant it constitutes a new tenancy and the presumption under s 50 does not apply 1928 Cal. 169 : 106 I C 136.

——where a tenant transfers a portion of his holding and the landlord recognises the transferee as his tenant a new tenancy is created and the presumption under s 50 does not apply. 1928 Cal. 169 : 106 I. C 136

Proof of uniform payment.

——s 50 contemplates a case where the tenancy is *held* at a certain rate and s 29 deals with a case where rent has been actually paid for a period of 3 years. 37 C L J 489 . 1923 C 600 . 72 I. C. 136.

——tenant need not prove the uniformity for 20 years by producing rent-receipts but he may prove it by Zeminder's papers, 21 C. W. N. 116 n. or otherwise 7 W R 284, 2 W R Act X 60.

——production of 20 year's receipts by tenant shifts the onus on landlord. 22 C. W N. 126, 31 C L J 11, this may be rebutted by proving contract. 31 C L. J 13, 78

——the tenant is to prove uniformity of rent for 20 years 4 C. L. J. 37.

——the tenant is not to establish actual payment of rent during the twenty years at an uniform rate 35 C. L J. 309 49 C. 661, 1927 Cal. 48 · 97 I C 513, 27 C L J 281, 3 B L R App. 10, 19 W R. 100 *fol*. by production of rent receipts 37 C L. J 598 : 73 I C 77 . 1923 C. 665

——when the record of raiyat shows fixity of rent the landlord is to rebut it. *1926 Cal 1222 96 I C 884*

——produce-rent though varies with the amount of production is yet fixed if it bears a fixed proportion to the produce. 36 C L. J. 220.

——the presumption arises whether the rent is payable in kind or partly payable in kind or in money. 37 C. L. J. 52 : 73 I. C 416, 36 C. L. J 220 : 72 I. C. 663 : 27 C W N 1151

——the landlord must rebut the presumption. 75 I. C. 556 **P. C.**

What constitutes holding-over—*contd.*

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the tenants may be indicated by acceptance of rent or by c
which justifies an inference to that effect 24 C. L. J
C. L. J. 473.

——acceptance of rent for a quarter does not imply a p
that the tenant will be allowed to stay for the whole year
L. J. 167.

——there is no such thing as tenancy by sufferance in
69 I. C. 504 (C.)

——the fact that the landlord tolerates the continuar
[illegible] , does not
, 34 C. 396
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who continues in occupation after the expiry of the term of a
make him a tenant whose tenancy is to be terminated by a not
quit. 24 C. L. J. 30.

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rent [illegible] 540.

——when first lease is valid and subsequent leases are inval
[illegible]

not make him a tenant whose tenancy is to be terminated
notice. 24 C. L. J 30, 34 C 386 F., 20 C. L J. 448 *Dist*

Effect of holding-over.

——where a tenant holds over he is not a trespasser 5 W.
17, 17 W. R 152, 7 C. 710 but after the notice to quit he become
trespasser. 14 C. W. N. 297, 8 C. L. J. 533.

——in a case of holding over a new tenancy commences
I. C. 589

——the first [illegible] notice to vac
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[illegible] 954.

——when agricultural tenant holds over, his tenancy is fro
year to year, 28 C. 237 p. 233, *contra.* 2 C. W. N. 303.

Effect of holding-over—*contd.*

——when a lease for residential purpose or for shop is held over it is a monthly lease and liable to be ejected at 15 days notice 20 C. L J. 448, 20 C L J 455 19 C W N 489

——in case of covenant for renewal the new lease should be presumed to be for the terms of the old lease except as regards the terms of renewal 26 C. W N. 901 · 35 C L. J 87

——where there is no covenant for renewal, if the option does not state the terms of the renewal, the new lease would be for that same period and on the same terms as the original lease in respect of all the essential conditions thereof, except as to the covenant for renewal itself. 27 C. L J 443, 16 C L J 217, 20 C. W. N 248

——where the terms of the lease were "if I agree to the enhancement of rent to be fixed at the time of the next settlement in future, the Govt will have the power to settle the lands with me or if I do not agree then with others," held that the clause in the lease was in essence a covenant for renewal 27 C L J 447

——right of occupancy can be acquired by holding over after expiry of the lease 33 C 459

——when the tenant holds over and is dispossessed by third person, the possession of the trespasser is not adverse to the landlord 24 C W N 116 n., 10 C. W N 343 *Dissented from*, 8 W R 650 and 21 C. W N. 1001 *Fol*

time begins to run against the lease and Art 139 Sch 11 of L J. 615, 31 A. 514, 21 Bom. 501,

6 M. 444

——interest at the old rate is allowable. 28 C 227, 2 C W. N. 525, 24 C 37

——a landlord is entitled to claim damages against a tenant who holds over, either for breach of his contract to yield up peaceful possession or for trespass. It is also well settled that the measure of damages for trespass whether the claim is founded on contract or on tort, is not the value of the land but the real damages sustained, which may be considerable or merely nominal, 1924 Cal. 240

S. 52. ALTERATION OF RENT FOR AREA.

Alteration of rent for area (general).

——sec 52 would seem to be concerned with cases of alteration of area and not miscalculation of area, nor is it easy to suppose that it intended to provide an exceptional form of relief against mutual mistake. 28 C W. N 264

——the sec. is not exhaustive 15 C L. J 310.

——single suit may be brought under sec 30 and 52 11 C. W. N 1154

——boundaries 14 C W. N. 268, 15 W R. 3 W R 476, 13 W. R 350, 16 W

——intention o 247, 16 C. L. J. 182 p 185.

What constitutes holding-over—*contd*

has remained without right as the tenant cannot be said to hold ove unless the landlord assents to the continuance of his possessio 24 C. L. J. 30, 20 C. L. J. 448 *fol.* 2 W. R. 73 *Dist*

—assent of landlord to the continuance or the occupation c the tenants may be indicated by acceptance of rent or by conduc which justifies an inference to that effect. 24 C. L. J. 30, 2 C. L. J. 473

—acceptance of rent for a quarter does not imply a promise that the tenant will be allowed to stay for the whole year 17 C. L. J. 167.

—there is no such thing as tenancy by sufferance in India. 69 I. C. 504 (C)

—the fact that the landlord tolerates the continuance of occupation of the tenant after the expiry of the term, does not make his former tenant his tenant in future 24 C. L. J. 30, 34 C. 396

—nor does the fact of serving of notice to quit on the person who continues in occupation after the expiry of the term of a lease, make him a tenant whose tenancy is to be terminated by a notice to quit. 24 C. L. J. 30.

... holding over only if when ... o pays rent

... Lab'e for

—when first lease is valid and subsequent leases are invalid, it will be holding over 18 C. W. N. 858

—(Act VIII B. C. of 1862, Sec. 53), on the determination of a lease lessee is bound to give up possession and without the consent of the landlord he cannot hold over; the serving of notice to quit on a person who continues in occupation after expiry of term, does not make him a tenant whose tenancy is to be terminated by notice 24 C. L. J. 30, 34 C. 386 *F.*, 20 C. L. J. 448 *Dist*

Effect of holding-over.

... is not a trespasser. 5 W. R. 17, 17 ... quit he becomes a tresp. ...

... tenancy commences 65 I. C. 589.

—the first deft. when holding over was given notice to vacate. He sublet the premises and in addition to the rent, received a premium of Rs. 250. In a suit by the landlord for mesne profits he was entitled to a decree for the premium as well as the rent due 25 ...

... ds on the same rent ... parties come to a ... 6, 2 C. W. N. 503, 25 ...

... is tenancy is from ... 503

Effect of holding-over—*contd.*

——when a lease for residential purpose or for shop is held over it is a monthly lease and liable to be ejected at 15 days notice 20 C. L J. 448, 20 C L J 455 · 19 C W N 489

——in case of covenant for renewal the new lease should be presumed to be for the terms of the old lease except as regards the terms of renewal 26 C W N. 901 ; 35 C L J 87

——where there is no covenant for renewal, if the option does not state the terms of the renewal, the new lease would be for that same period and on the same terms as the original lease in respect of all the essential conditions thereof, except as to the covenant for renewal itself 27 C L. J 443, 16 C L J 217, 20 C W. N 248.

——where the terms of the lease were "if I agree to the enhancement of rent to be fixed at the time of the next settlement in future, the Govt will have the power to settle the lands with me or if I do not agree then with others," held that the clause in the lease was in essence a covenant for renewal 27 C L J. 447

——right of occupancy can be acquired by holding over after expiry of the lease 33 C 459

——when the tenant holds over and is dispossessed by third person, the possession of the trespasser is not adverse to the landlord. 24 C. W N 116 n., 10 C W N 343 *Dissented from* 8 W R 650 and 21 C W N. 1001 *Fol*

... time begins to run against the lease and Art 139 Sch 11 of L J 615, 31 A 514, 21 Bom. 501,

... M. 4-4

——interest at the old rate is allowable. 28 C 227, 2 C W N. 525, 24 C 37

——a landlord is entitled to claim damages against a tenant who holds over, either for breach of his contract to yield up peaceful possession or for trespass. It is also well settled that the measure of damages for trespass whether the claim is founded on contract or on tort, is not the value of the land but the real damages sustained, which may be considerable or merely nominal, 1924 Cal 240

S 52. ALTERATION OF RENT FOR AREA.

Alteration of rent for area (general).

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——intention [illegible] 247, 16 C. L J. 182 p. 185.

Alteration of rent for area (general) —*contd.*

——extrinsic evidence to prove actual area was not allowed 18 C W. N. 66; 19 C. L. J. 95 P. C.

[illegible] on which the claim [illegible]

——the measurements made for the purpose of the Estate Partition Act is in a different position from the measurement recorded under the B. T. Act. *55 C. 680*; 1928 Cal. 853 : 111 I. C. 107.

——a suit for the determination of a fair and equitable rent proceeds on the assumption that no rent has hitherto been paid by [illegible]

——where there is a stipulation in the kabuliyat as [illegible] standard of measurement of land, as to the rate of rent, the rent is not fixed but depends upon the survey having regard to the class of land. 30 C W. N. 643 1926 Cal 848 : 95 I. C. 1055

Additional rent for additional area

——plaintiff must show that the defendant is holding land in excess of what he is paying *rent for*. 24 C. 251, 1 C. W. N. 310, 10 C. W. N. 46, 6 C. W. N. 318, 5 C. L. J. 538, 2 C L. J. *125*, 20 C. 573, 24 C. W. N. 76 n , 14 C L. J. 146, 18 C. L. J. 511, 31 C. L. J. 68 1928 *Cal. 169 : 106 I. C. 136.*

——the landlord may discharge the onus in two *ways : (1) by* proving that the tenant is in possession of excess land *outside the* boundary of the land originally settled with him, *(2) by proving* that at the original settlement, rent was agreed to be paid *on some* unit measurement and by proving that existing rent *is less than* the rent payable under such agreement. Proof of *excess area by* landlord shifts the onus on the tenant. 22 C. W. N *826.*

——it is not necessary for the landlord to prove *the area of the* holding at the inception, he is simply to prove that *the assessment* was on the basis of certain area and the defendant *is in possession of excess land.* *25 C. W. N. 204* ; 62 I. C. 453, 5 Pat. 157 , 1926 Pat. 197 : 7 Pat. L. T. 375

——in a suit for increase of rent *for increase in area* it is not necessary for the landlord to prove the area *of the holding at the* time of the inception of the tenancy and this *claim* is not to be dismissed on the ground that there is *no evidence* to prove the initial area. 25 C. W. N. 204 : 62 *I. C.* 453.

Additional rent for additional area—*contd*

——a landlord can have an enquiry at any time as to the area in tenant's occupation and can claim back rent. 85 I. C. 162: 1925 *Cal.* 463.

——the landlord is only to prove what was the area upon which rent has been paid and what is the increased area upon which he claims and the court will give him a decree in respect of the excess. 41 I. C. 961

376

——when there is written contract the landlord is not to prove the origin of tenancy, no burden is on landlord. 30 C. L J 121, 5 C. L. J 538 *Dist*

——the landlord has to prove the excess and he has also to prove what area of land was originally let and the tenant is to show that the rent was consolidated rent for all la nds within the specified boundary 28 C W. N 264 . 50 C. 957

——excess area may be acquired by a tenant (*a*) by encroachment on waste or unoccupied land of the same estate belonging to his landlord, (*b*) by alluvion, or (*c*) by encroachment on the lands of a third person The tenancy may be created (1) by reference to boundaries, (2) by the grant of a block of land described otherwise than by reference to boundaries, (3) by reference to the area In cases 1 and 2, any reference to the area is merely descriptive and will not affect the liability for the rent reserved In case 3, the area is of the essence of the contract and any subsequent excess found upon measurement renders the raiyat liable to pay additional rent, 5 Pat 157 , 90 I C. 862

——all that the landlord has to show is that the present area is greater than that for which rent was last paid The onus is then shifted on the tenant to show that the excess land used previously to belong to the holding and was lost by diluvion or otherwise. 90 I C 862, 5 Pat 157.

——the landlord is bound to prove what the area of the land was at the inception, by what standard the area was found and that there has been an excess by that standard 35 C L J 161, 62 I C 699

——when rent is assessed upon standard measurement the landlord is entitled to additional rent for excess area unless the rent is consolidated 15 C W N, 921

——s 52 (1) (a) does not limit the tenant's liability to pay additional rent for excess area So when the origin is unknown the tenant is bound to pay additional rent for excess area found in the record of rights 1 Pat 459 (20 C 579, 6 C W N. 318, 5 C. L J 538, 10 C. W N. 46) *Dist*. (25 C W. N. 206, 16 C. L J 182) *Ref*.

Additional rent for additional area—*contd.*

——question of original condition arises when the claim alteration of rent for excess area is considered 28 C W. N. 264

——if the contract is for a certain area at a certain rate, t area is of the essence of the contract and if excess is found measurement, additional rent is payable 90 I. C 862.

——areas described in the *dakhilas* cannot be relied on C. W. N. 264.

——*jamabandi* papers prepared by the landlord though not bin ing on the tenant are admissible in evidence to show that assessmen was according to area. 90 I. C. 862.

——the right [illegible] W N 360 12 C. W. [illegible] 904, 21 C 216, 7 [illegible] his sec is no barred by sec 37

——standard [illegible] to contin 2 C L J 125, but not so where the *kabulyat* is consisten 32 C. L J. 202

——back rent for additional area is maintainable 29 C 247 Mere realisation of admitted rent for the years before suit does not preclude landlord recovering additional rent for those years unless there was special understanding 21 C W. N 534. 21 C. L J. 128.

——sec 52 is not governed by sec 188, 20 C. W N 703, 21 C W. N. 321, 27 C 70 P. C, 26 C. 238, 19 C. 755, 7 C W N. 670, 3 C. W. N 225

——a suit for assessment of rent of the encroached portion only is not a suit under sec. 52 and sec. 188 does not apply. 4 C W N. 508, 14 C 201, 203, 15 C. 47, so also when the suit is under a Kabulyat before the B. T. Act. 7 C. W. N 93, 670.

——when stipulation in the kabulyat is to pay rent according to area the suit is not for enhancement and cosharer landlord can maintain it 21 C. W. N. 321, 21 C. W. N. 34, 25 C. L J. 128 19 C. 755, F. 18 C. W. N. 942. *Dist.*

——the tenant is entitled to accreted land 21 C. W N 253 F. B., and the accreted land is liable for rent 18 C. W. N. 1236.

——with respect to the accreted land the landlord can treat him as tenant or as trespasser. 16 C. W. N. 634, 2 C. L J 125, 25 C. 302. But after treating him as tenant the landlord cannot change position 4 C. W. N. 508, 13 C. W. N. 635.

——in order to make the tenant liable for additional rent for accretions to his tenure such rent must be settled under Chap X of the B. T. Act or the landlord must take proper proceedings so as to bring into operation s. 52 of the Act or any other appropriate provision of the law. 29 C. W. N. 505 : 87 I. C. 442 : 1925 Cal 719

Reduction of rent for reduction of area.

——where co-sharer landlord under an arrangement with other co-sharers and the tenant to bring a suit for the recovery of his share of rent separately brings such suit the tenants are entitled to apply for the reduction of rent for reduction of area 27 C 417, 21 C.

Reduction of rent for reduction of area—*contd*

L J. 315, 17 C 695, 33 C. 1010 *Ref* 2 Pat 183 4 Pat. L. T 689 : 1923 Pat 397 : 74 I C 454

——where there is separate collection of rent by a co-sharer, in a suit by him for his share of rent the tenant can claim abatement of rent 41 C L J. 330 : 88 I. C. 654 . 1925 Cal 783

——suit by tenant for reduction of rent on the ground of reduction of area against the stipulation in the kabulyat is maintainable 25 C. W N 361 · 33 C. L. J. 214 P C,

——a suit by the tenant for the reduction of the rent on the ground of reduction of area is maintainable although there is a stipulation in the lease precluding such reduction, if the land was not within the permanently settled area. s 179 not applying 25 C. W N 361 · 48 C 473 · 33 C L J 214 40 M L. J 232 14 L W 248 · 60 I C 1 P C

——where the terms of the kabulyat were, "any loss arising from leaving the lands fallow or from floods or drought will be mine, you will not have anything to do with it nor shall I be entitled to claim abatement of the stipulated rent on any account whatsoever, any such claim will not be entertained," held that abatement of rent could be claimed in the case of deficiency in area due to compulsory acquisition The words "on any account whatsoever" must be construed *ejusdem generis* with the previous provisions, so abatement of rent would not be claimable only in cases of losses of the same type as those enumerated. 51 C 1022 29 C. W. N 124 : 82 I. C. 315 · 1925 Cal 356

——where in a suit for rent the tenant claims abatement he has to show the extent of the area originally settled with him and the subsequent reduction in the area 85 I C 692 1925 Cal 1208

——in a suit for abatement of rent brought under s 52 of the B T Act, the plaintiff must show that there has been a diminution of area 75 I C 670

——the tenant must prove reduction in previous area to claim reduction in rent 1925 Cal 426

——a tenant may claim abatement by way of defence in a suit, he need not come forward as a plff 29 C W N 124 6 P L J. 665. 36 C L J 12 *Ref*

——abatement may be claimed by way of set-off in defence, 22 W R 117, 6 W R (Act. X) 26, 2 W R (Act X) 8, 16 W R 201, 2 C L R 5, 2 Hay 495, Marsh 558

——a tenant can claim reduction of rent in defence to a rent suit 2 Pat L T 569 63 I. C 219, 29 C L J 162, 16 W R. 201, 20 C 579, 22 W R 117 *fol*

——sec 52 B T Act is not the only sec under which tenant can claim abatement of rent 15 C. L J 310 6 Ind Cas 206

——s 52 B T Act is not exhaustive, a claim for abatement may be established otherwise than by measurement 14 C. W. N. 152n, 15 C L. J 310

——where the tenant does not obtain possession of some portion of lands let out to him he is not bound to pay rent for that portion

Reduction of rent for reduction of area—*contd.*

and need not bring separate suit under secs 38 and 52 B T Act 12 C W N 767.

——a tenant is entitled to abatement of rent in a rent suit when there is ouster by title paramount. 27 C. W. N 381; 39 C L J 257.

——when the rent is fixed in one lump rental and there has been a dispossession from a part of the holding the entire rent must be suspended 33 C W. N. 501: 52 I. A. 160, *for other cases of suspension of rent, see under the heading,* "suspension"

——when the question of quantity of land is not decided the matter is not *res-judicata* in a subsequent suit. 21 C 236

——lessee under a mukurari patta is entitled to corresponding abatement of rent reserved 21 C. 1005, But not so where the land is diluviated by the action of a river. 9 C. W. N. 886

——a tenant is entitled to abatement in respect of leased out land of which he did not get possession 27 C. W. N. 166, 2 C L R 5 *Ref*

——apportionment of rent for less area 21 C. 1005 P C 16 C W N. 606 15 C. L J 665: 39 C. 1016.

——where the lessee of a patni lease did not get possession of all the land comprised in the lease and his plea was that he could not be made liable for the rent until enquiry was made as to what reduction should be made upon a proper apportionment, s. 52 (1) (b) applied, and it was open to the court to enter upon enquiry as to the reduction according to area 36 C. L. J. 121

——a patnidar can claim abatement for lands absolutely lost. 7 C W N. 130, 2 W. R. Act X. 30, 1 W. R. 299, 9 C. 571.

——reduction can also be claimed on the ground that on a portion of the land an embankment was created. 16 C L J 225

——where the superior landlord of a tenure concedes to the land being taken by the Govt, tenant is entitled to an abatement in respect of the tenure 27 C. W N 381.

——as soon as diluvion is proved by tenant he is entitled to abatement and the onus shifts on the landlord. 25 C W. N. 323, 34 C L J. 35, 45 C. 554, 22 C. L. J. 569.

——in the case of a permanent tenure the parties to a lease can make a contract the result of which would be deprived the tenant of the benefit of sec. 52 B. T. Act. But where in a *kabulyat* the stipulation was "there shall never be any decrease or increase of rent fixed in the *kabulyat*" it was a condition usally expressed in a permanent lease at a fixed rate and that it did not deprive the tenant of his statutory advantage of an abatement of rent on diluvion 39 C L. J 431 1924 Cal 880.

——the agreement depriving the permanent tenure holder of the possession of s. 52 must be stated in clear terms. 47 C. L. J. 464: 1928 Cal. 406: 110 I. C 340, 33 C. W. N. 245: 1929 C 303, otherwise he will be entitled to the benefit of, s. 52. 33 C. W. N. 245: 1929 Cal 303.

——although question of limitation does not arise in connection with the plea of abatement the question of acquiescence and presumption arising therefrom, may arise. 27 C. W. N. 166

Reduction of rent for reduction of area—contd.

——a co-sharer cannot grant abatement of rent. 1 C W. N 415.

——co-sharer tenant cannot sue for abatement without making co-tenants parties 27 C. 417 . 4 C. W. N. 107, 55 C 676 · 1928 Cal. 548 : 111 I. C 111.

——the tenant is entitled to abatement of rent to the extent of the land which he had not got possession of but the tenant may forfeit that right by long acquiescence. 27 C W N 166

——acceptance of reduced rent does not in all cases entitled the tenant to claim abatement 12 C L J 439

——uniform abatement for 53 years 75 I C 502

——where lands in the occupation of the tenants during the years in question are indentical with the lands held by them in 1899 the mere fact that the area of the tenancy as stated in 1899 was found to be less in 1918 does not by itself, justify the conclusion that the tenant held at fixed rate which had to be applied to area ascertained by measurement in order to determine the rent payable by them. 40 C L. J. 62 1924 Cal. 1044

——where a certain quantity of land within definite boundaries is let out and the area is fixed not with reference to actual measurements but by approximate estimate and the rent fixed is a lump sum for the land within the boundaries s. 52 (b) of the B T Act. will *not apply* as *no question of deficiency of area can arise* 79 I C 978.

——A landlord granted a lease of a certain *mouza* lease deed describing the boundaries The tenants got into possession paying the rent stipulated. Subsequently it was discovered that certain lands in the possession of third parties formed part of the same *mouza* and thereupon the landlord began to collect rent from them. In a suit by the landlord against the lessees of the *mouza* for rent the [illegible] und with the strangers [illegible] abatement of rent and [illegible] to pay rent *Held* as [illegible] he lease deed there was [illegible] alid right for abatement 91 I C 686.

——the duty of the tenant under a perpetual tenure is to protect himself against illegal encroachments by others on the lands of which he has exclusive possession. If he fails to do so he cannot prejudice the landlord's claim for rent 52 C 417 1926 P C 97 : 52 I A 160 P C

——the purchaser in execution of a rent decree is bound by the agreement entered into by the defaulter not to claim abatement of rent. 35 C L J 292

——where [illegible] for arrears of rent, the [illegible] by an agreement between [illegible] effect that no abatement [illegible] I A 160 P C.

——where on account of gradual accretion of some lands contiguous to the lands of a *mirasi* tenure of the defendants who became

Reduction of rent for reduction of area—*contd*

entitled to those lands as an increment to their tenure and where the *landlords did* not include those lands in their suit for rent for the *miras.* and the accreted lands were brought under *diara* operation and were formed into a separate estate and settled with the proprietor and the revenue authorities determined the rent to ... ich accreted to his tenure increased rent, held that ... the rent claimed as there ... pay the rent settled by the *diara* officer. 29 C W N. 505.

S. 53 PAYMENT OF RENT

——the section indicates that there may be an agreement in modification of the provision for four instalments 97 C. W. N 810.

——rent falls due not from day to day but according to intervals contracted or stated in general law. 21 C 383.

——stipulation to pay rent by monthly kists is enforcible 7 C L J 24 n

—— ... usage of the locality or ... R. 99.

... instalment and in default ... nto before the enactment ... an enter into a contract for payment of money rent in modification of the provisions of four instalments 37 C. L. J. 222: 1923 Cal. 527: 73 I. C. 482, 18 C W N 175 *fol.*

Suspension of rent.

... the landlord to get rent; 162, 11 C. L J 591, 602, C. W. N. 51 n *Contra.*

...

——in case of oppression by landlord the tenant is entitled to damages as well 2 P. L. T. 642.

——when a tenure-holder cannot collect rent from his sub tenant ... superior landlord, the *latter is* ... if he acts under a *bona fide* ... ssession 11 C. L J. 606, 14 C.

...

——to constitute eviction, actual physical expulsion by force or violence is not necessary; any act of the landlord or his agent with the intention of depriving the tenant of the enjoyment of demised premises or any part thereof operates as an eviction. 25 C. L J 53 21 C. W N. 492.

——tenant is not liable for rent of land washed away. 24 C L. J 102.

——where land is lost by diluvion and reformed by alluvion and is settled with stranger by landlord, it is no eviction 9 C. L J. 575: 13 C. W. N. 853: 36 C. 856.

Suspension of rent—*contd.*

——dispossession not by the landlord but by other lessee does [illegible] I. C 781.
[illegible] sub-tenant but the [illegible] ant is liable to pay

——when lessee is prevented from taking possession by another essee, *(per Chitty J) it is not eviction by landlord, (per Vincent J.)* t is so. If the lessor fails to put the lessee in possession of the lemised land the lessee may surrender but cannot that he will old the land in his possession rent-free, for all time 13 C. W. N. '02 : 9 C. L. J 585 2 I C. 123

——though the lessor is bound to put the lessee in possession, ie is not bound to put a recalcitrant (showing repugnance) tenant nto possession 9 C L J 595

——eviction by title paramount would be a good defence to a uit for rent, if the party evicting, *had a good title*, and the tenant uitted *against his will* The same result would follow when the party seeking to evict would claim the rent and the tenant on such notice attorn to him. This doctrine of *quasi* eviction does not apply [illegible] the superior landlord by an [illegible] N 552
[illegible] continues till the tenant is

——the doctrine of suspension of payment of rent, where the [illegible] rt of the subject leased [illegible] the whole land leased, [illegible] no application where the [illegible] 52 C 417 1925 P C [illegible]

S. 54. TIME AND PLACE OF PAYMENT OF RENT.

——rent is to be regarded not as accruing from day to day, but as falling due only at stated times according to the contract of tenancy, *or in the absence of any contract, according to the general* law laid down in sec 33 B T. Act 21 C 383

——the tenant must go to the landlord's place for payment. 4 C. W. N 324

——*tender is kept good if the money is kept ready for payment* on demand Rent properly tendered is not arrear 35 C 34 11 C. W. N. 983 6 C L J 273 F B. 34 C 305.

——a conditional tender does not relieve the prayer of the obligation to pay interest. 27 C. W. N 299 P C, 37 C L J 222: 73 I. C 482

——a tender to be valid must include the entire amount due as principal and interest 37 C L J 222 · 73 I. C 482

——officer of the Zeminder cannot be compelled to take rent at any time and place 18 C. W. N 84

——the landlord cannot be asked to accept a small proportion of the rent due as the whole rent. 18 C W. N. 84.

S. 54 Time and place of payment of rent—*contd.*

——payment to some of the co-shares is not good against others. 17 C. L. J. 372, 6 C. L J. 383, 13 C. L J. 3, *contra* 2 W. R Act X 15.

——auction purchaser with notice is not entitled to the rent paid to the previous landlord in advance. 12 C. 555, 33 C 786

——asking for a receipt does not vitiate a tender 5 C. L J 273 : 34 C 305, 19 C. W. N. 112.

——cl. (3) deals with only cases of rent payable in instalments 68 I C 109 (c).

——to have the effect of a lien on the property arrear of rent must be notified in sale proclamation 4 C W. N. 497, 7 C W. N 40n 30 C. 213

——it cannot be contended that because rent is not paid in instalments it cannot fall into arrears. 5 Pat. L. J. 641 : 1920 Pat. p. 257.

——unless there is a special contract between the parties for apportionment of rent, the patnidar is bound to pay the whole rent of the year, even though the proprietory interest in the patni passed to him before the end of the year. 83 I C. 144

Tender

——where a tenant tendered a reduced amount of rent and interest on the plea that he was entitled to abatement for dispossession from certain portion, but no such ground was made out, the tender was not a good tender. 18 C. W. N. 66 P. C.

——a tender which has been validly made and improperly refused is kept good if the person who has made the tender has always kept the mony ready to be paid as demanded If the tender be kept good it will stop interest and no deposit under s. 62 B T. Act is nedessary. 35 C 34 : 11 C. W. N. 983 : 6 C. L J. 273 F. B

——rent which is properly tendered but improperly refused is not 'arrears,' see *above case*

——valid tender stops interest. 34 C. 305 : 5 C L. J. 270.

——a tender to be valid must be made in the current coin of the realm, a tender by a cheque is not a valid tender; but it is waived by the creditor when he rejects the tender on some other ground, see *above case.*

——a tender is not vitiated because a receipt is asked for see *above case.*

——when the amount tendered as full amount does not cover the interest on rent and interest on cesses, the landlord may refuse to accept 37 C. L. J. 222 : 6 M. I. A. 289 P C.

——a tender must be unconditional or at all events free from any condition to which the creditor may rightfully object 37 C L. J. 222

——s. 55 B. T. Act' does not deal with tender but with appropriation. 37 C. L. J 222.

S. 55 APPROPRIATION OF PAYMENT.

[illegible] the principal [illegible] nt A tender [illegible] any condition [illegible] I. 222 · 1923 C [illegible]

——the provisions of sec 55 of the B T Act are very different [illegible] 9 Contract Act [illegible] tion as well as applied to the [illegible] sec the debtor must declare the year or the year and the instalment to which he wishes the payment to be credited to the account of such year and instalment as the landlord thinks fit 11 C W N 939.

——where under an arrangement with the landlord the tenant paid a certain sum annually to Govt on behalf of the landlord, held that the landlord was entitled to credit to his account as he thought fit as there was no application of the amount so paid each year to the rent of that year within sec 55 of the B, T. Act. 11 C W N. 939

——where the payment was made on *Punyaha* day held that the entry indicated a payment made not on account of general arrear balance but on account of a special kist or instalment, that is the kist of the newly opened year 23 C W N 336

——rent does not necessarily include interest, so a sum paid as rent cannot be appropriated as interest 11 C W N. 110 . 5 C L. J. 69, 25 C 571, 575

——acceptance of rent under protest is of no avail 9 C 843

——where the rent-receipt is silent as to year, the court is to decide, 24 C 251

S 56 Receipts and accounts.

——rent-receipts may be proved by an illiterate tenant 24 C, 251, 7 W R 15, 12 W R. 34, 20 W R 264, *contra* 14 W. R. 211, 8 W. R 488.

——to raise the presumption under sub-sec. (4) authority of the person granting the receipt must be proved 24 C 169, it may be rebutted by proving the intention of the parties that the last receipt should not operate as a final discharge of the tenant of his liabilities 5 C L. J 27

Rent-receipt

——description in the dakhilas as tenant-at-will is not conclusive 25 C. W. N. 378, 24 C. W N 1 P C

——rent receipt stating tenant to be tenant-at-will is no proof against him unless his consent to it is proved 24 C. W. N. 1 P. C. 25 C. W N 378

Rent-receipt—*contd.*

——*the fact that rent-receipts were granted marfatdars* in the name of the original grantee was not conclusive to show that the *tenure was not transferable* 25 C. W. N 857.

——*rent receipt* may go in evidence without the proof of writing. 24 C 251, 14 C L 614 p 616. 7 W. R 15, 12 W. R. 34, 20 W. R. 264 *contra*, 14 W. R. 211, 8 W. R. 588.

——where a pleader purchased the homestead portion of an occupancy holding situated ... [illegible]

S. 58. PENALTIES FOR WITHHOLDING RECEIPTS ETC.

——the application of the sec is not limited to the case of payments by registered tenants. Where a landlord receives rent from *a person* whose name has not been registered and thus recognises him as his tenant he renders himself thereby liable to the penalty *in case he refuses to deliver a receipt* without reasonable ground I C W. N. 19 n.

——an omission to grant a receipt as provided by s 58 is an offence. 1 Pat L. J. 149, 9 C. W. N. 816 and a proceeding under this sec upon the complaint of the tenant is a criminal proceeding *1 Pat L J 149*

... s 58 to Sub-... section of

S 60 RECEIPT BY REGISTERED PROPRIETOR ETC.

Registration of name when necessary.

——every person succeeding to an estate must apply for ... 25 C 717

... to sec. 78 Land R Act. 86 I. C.

... registered ... nd tenant ... V. N 482,

... 9 C. 517, 9 C. 431.

——a manager appointed under s. 95 B T. Act must have his name registered 22 C 634.

——when the collection is joint one co-sharer having his name registered cannot sue for rent. 1 C. W. N. 214 n

——successor whose name is not registered may sue for arrears due to predecessor whose name was registered 26 C. 536 · 3 C W. N. 294, 27 C. 178, 2 C. W. N. 493

——it is sufficient to get the name registered *before decree*. 23 C. 87, F B, 1 C W. N. 712, 2 C. W. N. 493, 26 C. 712; 3 C. W. N 381, 8 C. L. J. 298.

——but actual registration of name is necessary. 5 C W. N. 263.

Registration of name when necessary—*contd.*

——the only person who is entitled to the benefit of this sec. is the proprietor who is registered under the L. R. Act; so a lessee from registered proprietor is not entitled to the benefit of this sec., 11 C. W. N. 128 n., and in a suit by lessee the tenant may plead payment to third person. 3 C. L. J 93 n.

——the tenant can disprove the title of the registered proprietor by the decision of the competent court 12 C W. N. 622.

——this sec or sec. 78 L R. Act does not apply to the suit for declaration of enhanced rate of rent 1 C W N 179 n.

——where there is written lease an unregistered proprietor can sue for rent as s 78 L R. Act is controlled by s. 81, 11 C L. J. 477, but where the rent was paid to a registered proprietor the suit of the unregistered proprietors upon written agreement was dismissed. 13 C L. J 693 : 38 C 512.

——s 81 L R Act has no application to a case where the written contract was between the tenant and proprietor from whom the plff. claims to have derived title as usufructuary mortgagee. 27 C L. J. 474

——when the registered proprietor has already been [illegible]
by a
201 :

usufructuary mortgagee is denied by the tenant 44 I C 129 (Pat).

——so long as the registered mortgagee s name continues on the Register a receipt granted by the mortgagor proprietor does not operate as a valid discharge under s. 78 of the L. R. Act or under this sec. 1 C W N 162 n.

——there is no bar to a registered proprietor suing for rent and obtaining a decree for rent in the face of an unexpunged entry in the register in the name of a former mortgagee. S 26 L. R Act is not a penal sec 11 C L J 147

——when a person who is registered mortgagee from the proprietor by way of an *ijara* sues for rent the tenant cannot plead tha[illegible] f the proprietor's interest.
43
3 P L. W 351 : 41 I C.
97,

——a co sharer landlord whose name is registered under the L. R. Act can maintain a separate suit for his share 41 I. C 359 (c).

——in a suit for rent by the plff whose name is registered as 16 ans. proprietor, the tenant cannot plead that part of the rent is due to a third person. 41 I. C 769.

——the bar under sec. 78 L R. Act does not cease to be applicable, merely because the plff establishes that the deft has previously paid rent to him amicably, or because he inducted the deft on the land, as there is no question of estoppel. 26 C. L. J. 90.

——where a registered proprietor who had a written contract with the tenant sold his estate to the plff whose name was not registered the suit was maintainable as s. 81 L. R. Act was applicable. 34 C L. J 119.

When deft. can raise objection.

——defendant cannot plead that the plaintiff whose name is registered is a benamdar. 8 C. W. N. 695.

——when plaintiff's name is registered, defendant cannot plead that rent is due to a third person. 6 Pat. L. T. 658 : 1919 Pat 201, 1 C W. N 318, 5 C W. N. 482 : but he can raise such plea if he has paid rent *bona fide* to a third person. 4 C. W. N. 606, or he can make a deposit under s 149 B T. Act, 6 Pat. L. J. 658 : 1919 Pat 201

——in a suit by a registered *thikadar* the tenant cannot plead payment to unregistered thikadar. 1926 Pat 532 : 96 I. C. 495

——when co-sharer's name is registered in some mouzas, tenant paying rent cannot question 8 C. W. N. 193 : 30 C 880, 8 C W. N. 193 · 30 C. 773, 38 C 512 : 13 C. L J. 693, but when some of the co-sharer's names are registered decree will be proportionate. 2 C W. N. 600 : 25 C. 787.

——the tenant can disprove the title of the registered proprietor by the decision of the competent court. 12 C. W. N. 622, 1921 Pat 201 . 2 Pat. L T 337 · 61 I C. 386, 6 Pat. L. J. 658 : 1919 Pat. 201.

——when a person has been registered as the owner of a certain land under the Bengal L. R. Act, the tenant of that land is precluded from pleading that the registered owner is not the true owner. 86 I. C 865 : 1925 Cal. 1173

——by this sec. a registered proprietor is the only person to whom the tenants are entitled to pay rent The tenants cannot set up the title of another proprietor on the ground that the latter had realised the rent for over 12 years in open assertion that the land belonged to his estate. 6 Pat. L. T. 214 ; 87 I. C. 439 · 1925 Pat. 473.

——in a suit by lessee from a registered proprietor the tenant may plead payment to third person. 3 C. L J. 93 n.

——this sec. applies even in a case where in a suit by a registered proprietor the tenant showed that the former proprietor had transferred his estate and the tenant was making payment of rent to the transferee after execution of a *kabulyat*. 68 I. C. 298 (Pat)

[illegible] where the deft does not set up the [illegible], that he himself has [illegible] 298 : 1929 Cal 337.

[illegible] written statement the same cannot be taken in appeal for the first time after cross examining the plff. or his witness on the point. 49 C L. J. 372 : 1929 Cal. 411

Registration of name when unnecessary.

——an ijaradar or putnidar need not get his name registered. 24 C W. N. 404, 1924 Cal. 124, 1 C. W. N. 92 n.

——so also a *receiver*. 2 C. W. N. 493.

——so also a *lessee* from proprietor. 3 C. L. J. 93 n.

——so also the *assignee* of a proprietor whose name has not been registered. 11 C. W. N. 141.

——but a manager must have his name registered. 22 C. 631.

Registration of name when unnecessary—*contd.*

——assignee of rent from an unregistered proprietor can sue without getting his name registered. 11 C. W. N. 141, 6 Pat L J. 109.

——when the suit is by an *ijaradar* neither s. 60 B. T. Act nor ss 78 and 79 of the Land Registration Act applies. The receipt which is to operate as a discharge of rent must be a receipt by the owner of entire estate and not only of a part of an estate, and "third person" in the concluding portion of this sec. means a third person whose name is not registered at all. 27 C W. N. 888 : 48 C. 1078

——an *ijaradar* is entitled to maintain a suit for the entire rent upon a written contract which had been executed by the tenant in favour of his lessor's predecessor alone whose name was registered as eight annas sharer inspite of the fact that the defendant's plea was that he paid rent to other eight annas co-sharer whose name was registered to the extent of eight annas 48 C 1078 : 27 C. W. N. 888, 24 I C. 866 *fol*. 27 C L J 474 and 38 C 512 *Dist*

——s 78 L R Act is no bar to suit for malikana which is not a claim for rent 8 C L. J. 300.

——when the resumed chakran lands are transferred to the zeminder the effect of it is not to impart to such lands the character of an "estate" for all purposes and sec. 78 L R. Act does not apply to a suit for rent by the zeminder. 18 C. W. N. 1158.

S. 61-64 DEPOSIT OF RENT, RECEIPT GRANTED BY COURT.

Procedure of payment to landlord.

——contracted money value of rent in kind may be deposited under sec. 61. 20 C. L. J 153 · 19 C. W N. 1143, (15 C. W. N. 249, 12 C. L. J. 649) *Ref.*

——when the amount deposited falls short of the amount actually due as in a case where Rs 216 is deposited in place of Rs. 223, the deposit is valid to the extent of the amount deposited 1927 Cal. 914 : 105 I C, 52.

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deposited.

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——the tenant can disprove the title of the registered proprietor by the decision of the competent court. 12 C. W. N. 622, 1921 Pat. 201 2 Pat. L T 337 · 61 I C. 386, 6 Pat. L J. 658 : 1919 Pat. 201

——when a person has been registered as the owner of a certain land under the Bengal L. R. Act, the tenant of that land is precluded from pleading that the registered owner is not the true owner. 86 I. C 865 : 1925 Cal. 1173.

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——in a suit by lessee from a registered proprietor the tenant may plead payment to third person. 3 C. L. J. 93 n.

——this sec. applies even in a case where in a suit by a registered proprietor the tenant showed that the former proprietor had transferred his estate and the tenant was making payment of rent to the transferee after execution of a *kabulyat* 68 I. C 288 (Pat)

——this sec. does not ... the deft. does not set up the ...self has ...l. 337 ...ent the ...examin- Cal. 431

Registration of name when unnecessary.

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——so also a *receiver*. 2 C. W. N. 493.

——so also a *lessee* from proprietor 3 C L. J. 93 n.

——so also the *assignee* of a proprietor whose name has not been registered. 11 C. W. N. 141.

——but a manager must have his name registered. 22 C. 634.

Procedure of payment to landlord—*contd.*

the tenant this is an improper refusal of a valid tender. 19 C. W. N. 112

——a tender improperly refused need not be followed by a deposit of rent in court under s 61, and such a tender, if kept good, is sufficient to stop interest running from the date of tender. 35 C. 34 : 6 C. L. J 273 : 11 C. W N 983 F. B., 34 C. 305 : 5 C L. J. 270 *approved*, 7 C. W. N. 720, *overruled*

——s. 62 provides in effect that the money tendered by the tenant shall only be received by the court if it appears to the court that the applicant was entitled under s 61 to make the deposit and if the court is so satisfied it shall receive the rent and give a receipt for it under the seal of the court. 4 Pat. 285 . 1925 P. H C. C. 41 . 86 I. C. 543 : 6 P L. T 562.

——once the receipt is granted under this sec. it shall operate as an acquittance for the amount of rent paid by the tenant and deposited in the same manner and to the same extent as if the amount of rent had been received by the person entitled thereto. *Above case*

——when a valid receipt is granted under s. 61 it must be presumed that the court was satisfied at the time of granting receipt *that the applicant was entitled under s. 61 to deposit the* rent. 4 Pat. 285 90 I C. 871 · 1925 P H C C 298.

——the provisions of sec 61 must be taken along with s. 62. 19 C. W. N. 1143 · 20 C L J 153.

——notice under sec 63 does not give rise to fresh cause of *action* 1 C L J. 114

——withdrawal of the deposited rent amounts to recognition 1917 Pat. 83 42 I C 826, 25 C 1 : 1 C W N. 433 . 24 I. A 164 P. C.

——the transferee of a permanent tenure making a deposit is entitled under s 63 to claim a receipt with his name thereon as that of the tenant 19 C W. N. 112.

64 A (Penalty for refusing to receive rent tendered by postal money order or deposited)

S. 65. ARREARS OF RENT, 1st CHARGE.

... laid down in the subsequent ... that the charge should be ... olding free of incumbrances.

——the word first charge is not used in the sense given to it in s 100 Tr. P. Act. 2 Pat. L. T. 603.

——a contract in contravention of this sec. is bad in law. 1 C. L J. 521

——land held by an under-raiyat is not a holding within the meaning of sec 3 cl. (9) and this sec. does not provide for a sale of such lands in execution of a decree for arrears of rent. 16 C. L. J. 539.

——rent is the first charge. 6 C. W. N. 834, 13 C W. N. 412, 33 C. 682, and purchaser at rent sale has priority over the purchaser

S. 65 Arrears of rent—contd.

at mortgage sale. 13 C W. N. 412; 9 C. L. J. 231, 6 C. W. N. 834.

——in a suit for rent the ... decree cannot limit ... be sold first 16 C. ... rt direct the manner ... 1 P. L J. 13?

——the landlord ... he decree for rent in ... her property, whether ... 492, 33 C 695; 4 C. ... 29, 8 C W. N. 575, ... C. L. J. 48n.

——notwithstanding ... that on default of ... realise the same by ... personally liable for ...

... person purchasing ... charged with the ... in possession from ... party to the suit for ...

... ser who purchases ... not liable to pay antecedent ... h arrears which occurred ... g and is an irregularity ... set aside the sale if he ... 2 Pat L T. 248, 21 C. ...

——purchaser in execution of rent-decree takes it free from all liabilities including the liabilities of arrears of rent falling due between the date ... sale, 20 C. L J 319. ... that it is sold saddled ... riod anterior to the date ... such period 6 C. W. N. 877.

——a sale in execution of a decree for arrears of rent of a non-... affect the interest of a ... the date of decree but ... landlord. 23 C. W. N. ...

——when tenure is sold in execution of one rent decree a portion of that cannot be sold in execution of another rent decree for prior period. 14 C. W. N. 1036.

——purchaser in execution of rent decree paying back rent is not entitled to contribution from old tenant. 6 C W. N 794.

——when a landlord sold an occupancy holding in execution of money decree he cannot sell it again for back rent. 3 C. W. N. 62, 18 C. L J. 29.

——a landlord who in execution of his money decree obtained subsequently to his rent decree, purchased the holding subject to

S. 65 Arrears of rent—contd

execute his rent decree, as to get his rent decree also subject to the rent charge, but the landlord who has purchased the holding in execution of his prior rent decree does not waive his right obtained under a subsequent rent decree, and in execution of the latter he can sell any other property of the tenant 2 Pat. L. T 603

——when the landlord obtained two rent decrees and sells the holding in execution of one of the decrees without notifying that there is another decree, and purchases it himself, he is not debarred from executing the other decree against the other properties of the Jt. Dr., 6 P. L. J 354

——there cannot be two first charges simultaneously against a tenure 8 C W. N. 531

——s. 65 applies to sales of *patni* for arrears held under this ct 35 C 331, 6 C. W N. 794, 22 C W. N. 131.

——a decree obtained by a Zaminder against his patnidar is a ecree for rent within the meaning of this sec although he had, revious to the institution of the suit sold his interest in the emindari 35 C 737 , 7 C L. J 552.

——when the rent payable by a patnidar has been transformed nto judgment-debt, it is first charge on the tenure , a sale under the character of the decree landlord is entitled in ion of sale proceeds in eposit with the Collector in satisfaction of his decree for rent for revious balance before a mortgagee can proceed to realise his dues. 3 C W. N 1001 20 C. L J. 1

——under s 117 cl (e) of the Patni Reg arrears of rent for a ver the rent of which the personal debts recoverable resale of the tenure 13

——the union of the causes of action for rent and money isentitles the plff from pursuing the procedure laid down in Ch. XII of the B. T Act, 33 C. 605

Rent suit and rent decree (general).

1) Rent suit

——s 3 B T Act defines the word "rent" in the sense in which t should be understood without any statutory definition 33 C. 140: 10 C W N 201 P. C.

1. Rent suit—*contd.*

——a suit for damages against tenant for wilfully omitting to raise crops is a suit for recovery of rent in as much as the share of the produce of the landlord was to be ascertained in the suit 16 C. W. N 89.

——a suit for damages for use and occupation was held to be indistinguishable from rent suit where the deft claimed to be a tenant and the suit was not cognizable by S. C. C., 2 Pat L J. 97.

——suit for damages is not rent suit. 19 C. W. N. 204 n

——one cultivating as a labourer is not tenant and a suit against him is not a rent suit. 20 C. W. N. 1110, 14 C. W. N 629, 23 C W. N 614, 32 C. L. J. 37, but see 1 C. W. N. 151, 55, 11 W R 25, 21 W. R. 124

——*bhagchasis, bargadars, bataidars, adhiars*, are not labourers or hired servants, they may or may not have interest in the lands. 21 C W. N. 505, *now it is settled that they have no interest in the land.* 5 Pat L. J. 641.

——suit for produce rent is rent suit.

——a suit by usufructuary mortgagee for rent is a rent suit 18 C. W N. 1016, 24 C. W. N. 229 p 242 F. B, 23 A. 338, 341, 27 A. 313, 19 A. 491, 20 A. 401.

——malikana is not rent 8 C. L. J. 300, 4 B L R 29

——rent includes roadcess payable by a tenant. 21 C. 722

——rent is the first charge 6 C. W. N. 834, 13 C W. N. 412 . 9 C L. J. 234, but the decree-holder is free to proceed against the person or other properties of the tenant 18 C L J 29, 15 C 492, 17 C. 301, 4 C. L. J. 219 : 33 C. 895, 8 C. W. N. 575, 5 C. L J 48 n.

——there cannot be two first charges simultaneously. 8 C W. N. 531 · 31 C. 550.

——rent includes road-cess payable by a tenant 21 C 722

——a decree for road-cess is a first charge upon the tenure 1 Pat L J. 161.

——but the liability to pay cess of a rent-free tenure is a liability to the Govt. and it is not a charge on the tenure 1 Pat. 218

——sums payable for plying boats in private ferry is not ren

——a contract to pay rent in sikka rupees should be maintained 14 C W. N. 994.

——drainage charges payable by tenant are recoverable as ren 41 C 753 (Pat)

——rent suit against tenant with alternative claim against co 11 C W N 57, 8 C W. N. 640.

——rent suit against tenant with alternative claim against co sharer is *prima facie* a rent suit and not a S C. C. suit. 18 C W N 180 n. and it is not bad in law 27 C. W. N. 716 It is also re suit when the claim is against both the tenant and the co shar landlord-purchaser of the tenant's interest in the tenure. C L. J 517.

——Govt. revenue agreed to be paid by the *patnidar* on beh of the Zemindar, though a part of the consideration of the pat was not considered to be a part of the *patni* rent. 10 C. W. N 20 33 C 140 3 C. L. J. 7.

1. Rent suit—*contd.*

——where a *niskar* was granted but the grantee was to pay to the grantor a proportionate share of the Govt. revenue payable by the grantor this amount was rent and the grantee was a tenant and not a co-proprietor. 38 C. 278.

——a claim for rent as debt, of which the limitation period has been extended under s. 19 L. Act by the tenant by his acknowledgment of liability in writing is a claim for rent and not for money and the decree may be executed as rent decree. 10 C. L. J 517.

——but a suit upon a bond for rent is not a suit for rent 4 C. L. J. 402.

——the union of the causes of action for rent and money disentitles the plff from pursuing the procedure laid down in Ch. XII of the B. T. Act. 33 C. 605

——rent to be paid to third person is also rent. 4 C. W. N. 3 29 C. 67 **F. B**, 2 C. W N 455, *approved* 32 C. 972. But when after adjustment of rent some money was left with the tenant to be paid to superior landlord, a suit to recover that money is not rent suit. 19 C. W. N 174, 32 C 169, 9 C W. N. 96

——where under arrangement rent was to be paid to superior landlord, it cannot be sued for by the immediate landlord. 4 C. L J 119.

—— [illegible] s a rent suit for the [illegible] 827 **F. B**, 4 C W N. [illegible] ot Art 2 of Sche III [illegible] V N. 605.

[illegible] t of the landlord is a landlord within B T Act. 7 C. L J 425 35 C 744.

——suit for arrears of rent comes under the C. P C and not B. T. Act 38 C 70 13 C. L J 51 **P. C**, 15 C. W N. 94, 35 C 331. 35 I C 73 12 C W N. 249. 7 C L J 139 **P. C**

——to take benefit of rent-decree under sec 148 A. B T Act, the suit must be for the 16 as. rent then due. 27 C. L. J. 101, 34 C. L J. 462

——the zemindars may form into a limited company. 16 C. W. N. 297.

(2) Rent decree.

——a decree obtained by a landlord against a tenant who ceased to be a tenant is not a rent decree 46 C 870.

——the court must look to the substance of the decree and not to the form 25 C. W N. 279, 42 C 56: 18 C. W. N. 1313. 41 I. A. 189 **P C.** App

——a decree which in substance is a money decree cannot by procedure in execution case be a rent decree. 20 C W. N. 108n.

[illegible] decree it will be rent decr[illegible] L J. 470 **F. B**, 3 C. W N. 6[illegible] 550.

P C [illegible] W. N. 747 41 C. 926 [illegible] st ceases before decree

2. Rent decree—*contd.*

it will not be *treated as rent decree.* (*This ruling refers to execution of decree only but it will be rent decree for other purposes* 29 C. L. J. 465). *Similar case.* 8 Pat. L. T. 224 : 98 I. C 995 : 1927 Pat. 108

——a sale in execution of a decree *for the whole rent obtained by a landlord who at the time of the suit is the sole registered proprietor operates* as a sale under Chap. LIV B. T. Act although it *subsequently transpires* as the result of litigation in a title suit that he is not the sole landlord. 11 C. L. J 140 : 14 C. W. N. 352.

——a landlord-assignee of a rent decree obtained by *ticcadar can execute it as rent decree.* 17 C. W. N. 276 : 40 C 462, F. B., 1 C W N 694 *Overruled*

——assignee of rent decree only cannot execute it even as *money decree* 20 C L. J 200, 1 C. L. J. 500.

——*if single* rent suit is brought against same deft for three separate tenancies, it will be rent decree and limitation for each *tenancy* is separate, 22 C W. N. 192. But if the suit be for one [illegible] 14 C. W. N. 335 11 C. L. J. [illegible] 34 C. 298 : 11 C W. N 497 : [illegible] C. W. N. 560, 26 C L. J. 118. [illegible] nto two or more, a sale in execution of a decree obtained in a *single suit* for rent is not a sale under this Act 22 C. W. N. 788.

——a decree against *some of the* joint tenants is not a rent decree. 11 C W. N 1026, 18 C W. N 170, *so also a* decree against some of the heirs of the original tenant. 4 C. W. N. 608.

——when one tenant represents his co-tenant, a decree against *him affects the interest of all.* 26 C W. N 138 : 63 I. C. 706, 37 C. 75, 7 C. W N 170

[illegible] matter of fact. 14 C. L. J. 180 [illegible] shares of the tenants amongst them is a rent decree. 33 C. 652

——a co-sharer obtaining a rent decree is not in a better position *than a stranger obtaining a money decree.* 3 C. W. N. 747, 18 C. W N 176 4 C L J. 68. He purchases only the right, title and interest of the Jt *Dr* 29 C. 218, 30 C. 550, 9 C. W. N 34, 26 C. 727, 17 C 390, 4 C. W. N. 571, 14 C. L. J. 68.

——but a co sharer suing for whole rent making others *proforma* defts is entitled to bring the tenure to sale. 35 C. 331 : 12 C W. N 349, 11 C W. N. 983 : 6 C. L. J. 273 P. C., 35 C. 744, 14 C. 203, 21 C 722, 1 Pat. L. J. 161.

——an exclusive claim of 16 ans. rent by a co-sharer is a suit for rent 25 C 324

——when two co-sharer landlords obtain separate *decrees* for rent for the same period making the other party-deft and the tenure is sold at the instance of one, the other co sharer cannot execute his decree by the sale of the same tenure, he *is to recover* the dues from the surplus sale *proceeds.* 16 C. W. N. 701.

2. Rent decree—*contd.*

——where a co-sharer landlord in execution of a decree for his share of the rent puts to sale his share in the holding, the other co-sharer in a decree for rent in a suit under s. 148 A may put the entire holding to sale even though the purchaser at the earlier sale is not made a party and such purchaser cannot claim any title against the subsequent purchaser 26 C W N. 639 : 35 C L. J 30.

——a co-sharer landlord can maintain a suit for recovery of his share of rent in arrears and enforce his claim under the provisions of the B T Act, against the original tenant and the other co-sharer landlord who had before suit purchased the tenure from the tenant, the consideration of the purchase being the amount of arrears due to him 10 C L J. 517

——separate collection by co-sharer from some tenants does not disentitle him to sue all subsequently 24 C W. N 144n

——where default was deliberately made by the tenure-holder with a view to avoid an under-tenant by rent sale, the purchaser who was in collusion, was held to be in a position of a purchaser by private sale 20 C L J 1, 18 W. R. 240

——where a person against whom a decree appertaining to a rent suit is passed does not take exception to the execution proceedings under Chap 14 of the B T Act on the ground that the decree is not a rent decree, he is precluded from doing so at a subsequent stage. 1927 Cal 825 103 I. C. 707

S 66 EJECTMENT FOR ARREARS.

The words "thirty days" have been substituted for the words "fifteen days" in sub sec. (2)

——the two secs (ss 65 and 66) taken together cover porticularly the remedies provided by law for the landlord to recover arrears of rent. One sec. is the exact corollary of the other The right to proceed to sale in one case, in the other to eject, is independent of the existence of the relationship of landlord and tenant at the time when the remedy provided by law is sought to be enforced 41 C. 926 P. C

——the section does not apply to arrears of produce rent 2 C. 374 (Act VIII, of 1869)

——this sec refers to the arrears of immediately preceding year 16 C W N 104, 20 C. W N 258 · 33 I C 54, 37 I C. 1006 (C), 2 C L. J 540, 14 C 33

——when the suit is brought before the expiry of the Bengalee year in respect of the arrears of rent for that year the landlord is not entitled to eject under this section 26 C 199.

——the decree need not incorporate the terms that the ejectment may be avoided by payment within 15 days. 26 C. 639 : 3 C. W. N. 628

——the effect of the decree is to terminate the connection of landlord and tenant completely and the tenant is dispossessed from the crops also. 5 C 135

S. 66 Ejectment for arrears—contd.

——if rent is claimed for two consecutive years ejectment cannot be decreed on the ground of forfeiture incurred at the end of the first year as the claim of the rent for second year acts as waiver of that right. 27 C. L. J 277.

——subsequent receipt or claim of rent acts as waiver 7 W. R. 142, I Hay 89, 14 C. 33, 1 Pat. L. J. 183 but the decree-holder may sue for rent of prior period. 10 C. L. J. 187, but a suit for compensation for use and occupation without asking for ejectment operates as waiver. 13 C W. N. 635

——when the suit is for rent of more than one year, decree for ejectment may be passed only for the arrear of the preceding years 2 C L J. 510, 14 C 33, 16 C W. N. 104.

——payment with protest is good payment. 17 W. R. 462

——deposit of less amount for error in the copy of the decree does not affect the tenant. 25 W. R. 27.

——an extention of time may be granted by the court after decree. 26 C 639 : 3 C. W. N. 628, and even if an application be made after the period of 15 days allowed by the decree 41 I. C 473 (C).

——an order extending the time is not appealable though it can be set right by an application for revision. 1929 Cal. 140 : 112 I. C. 124

——when the last day of deposit is a holiday, deposit on the opening day is valid. 10 C. W. N. 535 : 3 C L. J. 339, 8 W. R. 223, 18 C. 231, 631.

——when the decree has been executed deposit within fifteen days of the dismissal of the appeal is void. 23 C W. N 974 : 46 C 1023, (13 C. 13, 22 C. 467, 25 C. 311 : 1 C W. N. 671) considered. 15 C W. N. 1060.

——because "date of decree" means date of decree of the original court. 46 C 1032 · 23 C. W. N. 974 : 54 I C. 659.

S 67. INTEREST ON ARREARS.

——although sec. 179 of the B. T. Act, is not controlled by sec. 67 of the Act, yet a stipulation in *mukorari* lease to pay interest on arrears of rent at a rate which is unconscionable is penal 21 C. W N 112

——a stipulation in a *mukorari* lease to pay 75 p. c interest on ... 900 p. c. is penal. 21 C. W. N 108. ... to pay more than as provid- ... 3 ; 29 C 674 F. B. 3 C. W. N ... pproved.

——under sec. 169 B. T. Act the D. Hr. landlord is entitled to interest on arrears of rent paid to him from the balance of sale proceeds. 22 C. W. N. 323

——in the absence of evidence of undue influence on the part of the landlord the rate of interest mentioned in the contract cannot be interfered with. 48 C. 93 : 57 I. C. 1004, 23 C. W. N. 233, 23 C. W. N 130, 24 C. W. N. 444 *Ref.* 21 C. W. N. 108 not fol.

S. 67. Interest on arrears—*contd.*

——when interest stipulated in the kabulyat executed by a cultivating raiyat was Rs. 50 p. c. p. a. the rate was exorbitant. 34 C. L. J. 369, *contra*. 41 C. L J 453 : 1925 Cal. 732

——stipulation by a tenant to pay interest at 300 p. c. per annum cannot be given effect to 23 C. W. N 291

——a tenant of agricultural land is not liable to pay interest more than what is mentioned in the sec. where he holds over after the expiry of the kabulyat before the B. T. Act 34 C L. J 369.

——where a kabulyat was executed even prior to the B. T. Act, a landlord suing for arrears of rent cannot claim more interest than what is fixed in s 67. 91 I C. 459 (C).

——when a tenant holds over he is not to pay interest more than 12 p. c. per annum as provided in sec. 67, B. T. Act. 34 C L. J. 369, 2 C W. N. 525, 28 C. 227, 68 I. C 109, 24 C. 27, 2 C. W N. 525, *contra*. 2 C. W. N 303, where the lease terminated before the B. T. Act

——where a tenant in a kabulyat for one year stipulated to pay interest at the rate of 75 p c and he proved that the landlord had assured him that this covenant would not be enforced, the tenant when holding over was not bound by the stipulation of interest. 20 C. W. N 1067

——s. 67 does not apply when the kabulyat was executed before the B T. Act and the interest on arrears must be calculated as provided in the contract But where the holding has been sold in execution of a rent decree the purchaser takes it with the ordinary incidents of a tenancy. The stipulation to pay an exorbitant rate of interest is not an incident of a tenancy which would attach to it even after a sale for arrears. Incident of the term of the tenancy in such case is determined by the usual and unusual terms of the tenancy. 27 C W. N. 502 37 C. L J, 333 1923 Cal 559 . 72 I C. 719, 26 C. 315 24 C. 37 *Rel*.

——in a rent suit the landlord was held to be entitled to recover interest at the stipulated rate of 75 p c although it was exorbitant. 35 C. L J 209

——under sec. 178 a contract beween landlord and tenant cannot affect sec 67. 14 C L J. 170, 18 C L J 176, 17 C. W. N. 820 : 18 C. L J 175, 22 C. 214 P. C *Expl*

——this sec. does not apply to a stipulation entered into a mortgage bond executed by the tenant for arrears of rent. 2 Pat L J. 367

——the fact that the landlord cannot prove a stipulation to pay interest does not disentitle him to get interest under s 67 at the rate of 12½ p. c p a. 117 I. C 180

——a landlord, under a lease which was executed prior to B T. Act. and which terminated after the said date cannot recover interest at more than 12 p. c per annum even though the lease provided at 75%. 28 C. 227 2 C. W. N. 525.

——in the absence of evidence that any undue advantage was taken by the landlord of his position, the rate of interest mentioned in the contract cannot be questioned. 38 C. 93

S. 67. Interest on arrears—contd.

——where a jama or tenure is sold for arrears and is purchase by co-sharer decree-holder, the remaining landlords are entitled t interest on arrears as stipulated in the kabulyat by which the jam was created 32 C 258 ; 9 C. W. N. 175, F. B.

——kabulyat being executed before the B. T. Act, at interest more than 12 p c. and tenant being purchaser, stipulation as to interest must be given effect to 11 C. W. N. 215.

——excess rate of interest is not to be decreed. 20 C. W. N. 1067, 6 C W. N. 242, *Contra* Contract rate though very high should be decreed. 17 C. L J. 50

[illegible] interest is penal. 21 C W N 108, 112.

[illegible] ies when the rent is

[illegible] ge office still rent

[illegible] 7. 4 C W. N 334

[illegible] arily include interest,

so if a sum be paid by a tenant as rent and the landlord receives it as such he cannot be permitted to apply that money towards any interest which might then be due. 11 C. W. N. 110 ; 5 C. L J 69.

——where the lease was silent as to whether the interest was *per mensem* or *per annum* extrinsic evidence was not admissible 41 C 342 . 19 C L. J. 66 . 18 C. W. N. 592. *contra* W. R 1864 P 397, 14 C W N. 1100.

——where the lease is a subsisting one the purchaser is bound to pay interest in accordance with the lease 9 C. W N. 175 ; 32 C 258 F B., 11 C. W. N. 215, 48 C. 93, 7 C. L. J. 24 n , 13 C W. N 962 : 10 C L. J 45.

——an exorbitant rate would not be an ordinary incident of a tenancy and would not continue to be attached to the tenancy after a sale for arrears of rent. 3 C. W. N. 194 : 26 C. 215, 7 C. W. N. 203 : 30 C. 213.

——lease being executed before the B. T. Act, division of the holding does not affect the contract. 13 C. W. N. 962 : 10 C. L. J. 45

[illegible] fixed rate in execution

[illegible] the rate and

[illegible] abulyat 48 C.

[illegible] L. J 212, but

——a high rate is not *per se* penal. [illegible]

compound interest is penal. 2 Pat. L. J. 283.

——where the rates of interest were found to be penal 3 C W N. 194 · 26 C 315, 12 C. 225 P. C , 33 C. 683 : 3 C. L. J 391, 20 C. W N. 408, 42 C 690 : 19 C. W. N. 809 : 19 C. W. N. 775 · 21 C L. J. 79 : 42 C. 652, 25 C. L. J. 24, 22 C. L. J. 352, where 75 p c. was not found to be so 17 C. L. J. 50, 22 C. W. N. 124 n.

[illegible] cases where the rent is payable

[illegible] 3 C. L. J. 391 , 1919 Pat 242

[illegible] several sums to the landlord

[illegible] interest. 8 C. W N. 116 .

30 C 1056.

S. 67. Interest on arrears—*contd.*

—s. 67 does not apply to Bhowali rent, but the court can grant interest at its descretion 22 C. 214, 4 P. L. J. 282 50 I. C. 506 8 C W N 158 9 C W N 121

there is not evidence
nnot be charged under
3 I C. 395 . 1925 Pat
795 : 4 Pat. L. J. 282.

nt 1919 Pat. 242.
should be allowed up
than 12½ p c should
674 : 5 C W. N. 438
820, 18 C L J 176

—where during the years in suit the deft had paid several sums to the landlord, held that interest and not damages ought to have been allowed. 30 C 1066 · 8 C W N 118.

—if a tender is improperly refused but kept good it stops the running of interest from the date of tender. 11 C W. N. 983 : 35 C. 34 : 34 C. L J 273, 34 C. 305.

—an erroneous decision in the former suit as to the rate of interest does not operate as *res-judicata*. 32 C 749 9 C W. N. 467 : 1 C L. J. 176.

S. 68. POWER TO AWARD DAMAGES TO PLFF. OR DEFT.

Damages.

—tenants are liable for damages on road and public work cesses. 8 C. 290.

—granting of damages up to institution of suit will not bar interests being granted from the date of decree. 21 C 132.

—s 68 unlike s. 67 is not retrospective 1919 Pat. 242 4 P. L. J 282

—damages more than 25 P. C cannot be recovered 9 C. W. N. 122

—if damage is not allowed interest should be granted. 23 C. W. N 156 n

—in case of longstanding dispute as to enhancement, damage should not be allowed. 23 C. L. J 209 34 I C. 783

—where owing to dispute between the landlord and tenant the former would not himself realise rent in the midst of the dispute the landlord is not entitled to damages 4 Pat. L J 282.

—where during the years in suit the deft. had paid several sums to the landlord, interest and not damages ought to have been allowed 33 C. 1066 8 C. W. N 118.

Ss. 69 to 71 (Relating to appraisement) have been repealed.

S. 72. LIABILITY OF RENT ON CHANGE OF TRANSFER OF LANDLORD'S INTEREST.

—the tenants need not get notice of transfer from the transferee himself, a notice from the transferor is not inoperative in

S. 72. Liability of rent on change or transfer of landlord's interest—contd

making the tenant *liable to pay rent to the transferee* 7 C W. N. 454

——*If the tenant had actual notice of the transfer the transferee is entitled to the rent paid to the transferor although the transferee did not serve any notice.* 23 C. W. N. 355; 49 I. C. 933

——*where the transferee did not give the requisite notice, the tenant was held not liable for rent paid to the transferor landlord.* 29 C L J 204, 23 C W. N. 68n, 40 I. C. 655.

——sub sec 1 of s 72 *does not require that the notice contemplated therein should be given in any particular manner.* 25 C 445: 2 C W. N 108

——Rule 3 Chap 1 of the Rules made by Local Govt under cl. (2), s 189 Act VIII of 1885, *is intended to apply only to those cases where the Act speaks of the service of a notice and not merely of the giving of a notice. It may apply to cases where the Act speaks of the giving of a notice, if such notice is required to be given in the prescribed manner. In certain cases, under certain circumstances it may be only directory and mandatory.* 25 C. 445: 2 C W N 108.

——the object of sub-sec 2 of s 72 *is to relieve the transferee from the necessity of giving notice to such tenant individually. It says that a general notice published in the manner required by law shall be sufficient notice It does not say that such a notice shall be a necessary notice* 7 C W. N 454.

——*where the landlord's interest is transferred, a tenant is not liable to pay rent to such transferee only if he has already paid the rent due to his old landlord and that without notice of the transfer.* 91 I C 726, 1926 Cal. 515.

——*Quaere* if the *knowledge of one joint tenant can be imputed to his co-tenants for the purpose of this sec.* 91 I. C. 726

S 73. LIABILITY FOR RENT AFTER TRANSFER OF OCCUPANCY HOLDING

... occupancy holding ... landlord, ... for rent.

——a suit by the transferee of an *occupancy right transferable by custom to have his name registered in the landlord's serishta and to have his vendor's name expunged, is not maintainable under the B. T. Act, though he can sue under the Specific Relief Act to have it declared that he has acquired certain rights. But if the object of the latter suit is to have it declared that the transferee is so responsible to landlord, such a declaration cannot be obtained without the service of the notice prescribed by this sec* 24 C. 642.

S. 73. Liability for rent after transfer of occupancy holding —*contd.*

——where the assignee of a lease brought a suit to have it declared that the lease was permanent, heritable and transferable one and also that the rent was fixed in perpetuity and that the landlord was bound to recognise the plff as tenant, held that the

——the transferee of a portion of a non-transferable occupancy holding can recover possession from the landlord who has forcibly dispossessed him. 18 C W. N. 97 19 C L J 52 F. B., 48 I C. 359 (Pat), 9 C W N. 843

As to the cases of recognition see "*Recognition*".

——where a tenant transferred his jote and agreed to pay the rent up to the date of sale, the transferee was entitled to get from the transferor the amount when the landlord had obtained a decree against the transferor for rent due for the period prior to the purchase and also for a period subs equent thereto and in execution thereof a portion of the prope rty had been sold. 7 C. W. .905

——where a certain property is hypothecated as security for nt of a tenure, on a transfer of the tenure the mortgage or charge f the property hypothecated is extinguished. 29 C L J 476.

S 74. ABWABS OF ILLEGAL CESSES

——ss 74 and 179, B T Act—s. 74 does not control s 179—tipulation to pay abwab in a permanent mukurari lease is valid 6 C 611 ; 3 C W N 608, 22 C 680, 1929 Pat 307 10 Pat L T. 329 Pat 655. But when the lease was before B. T Act it is not ecoverable. 10 C. W. N 527 4 C L J 527, 1929 Pat. 307 10 'at. L T. 329 8 Pat. 655

791 tc
eyond
when
payabl
must depend on the circumstances of each particular case whether the sum claimed is really part of the rent agreed upon to be paid as consideration for the lease 32 C. W N 260 : 47 C L J 90 : 106 I C 571 : 26 A. L J 19 : 8 Pat. L T. 813 54 M. L J. 293 : 1927 P C 250

——the term "actual rent" in the sec cannot mean either a fair and equitable rent or rent at the customary or pargana rate above case

——stipulation in a *mourasi*-makurari kabulyat for the delivery of ghee and goat annually which does not form a part of the rent, is abwab and is not recoverable as such. S 3 of the Putni Regulation

S. 74. Abwabs or illegal cesses—*contd.*

does not restrict the application of the general law against abwab 26 C. W. N. 634 : 22 C. 688, 21 C. W. N. 959, *Ref.* 26 C 611, 10 C. W. N 527.

——stipulation to pay an abwab (certain number of jackfruit) under a permanent ... lease is ... 179 B T. Act

——a kabuliyat must be construed as a whole to see if a certain item therein is an abwab where it provided for rent at a certain rate and a certain amount for *dak* and *bhet* expenses and the total payable in instalments, the latter were not abwabs. 51 C. 643 : 1924 Cal. 877 79 I C. 346.

——collection charges are not abwabs and are recoverable if the condition forms part of the lease. 8 C. 730, 31 C. 834 : 8 C. W. N. 529.

——landlord's agent is liable to pay the landlord any sum collected as kharcha or illegal cesses. 30 C. 1011 : 7 C. W. N 535

——stipulation to deliver *bhet* as an integral part of rent is not abwab. 25 C W. N. 72n.

——abwabs, which are illegal. 11 C. 175 F. B., 17 C. 131 P. C., 17 C. 726 F. B., 26 C. 611 : 3 C. W. N. 608, 7 C. W. N. 203, 33 C 683, 10 C. W. N. 527 : 4 C. L J. 527, 12 C. W. N, 175, 5 W. R (Act X) 80 7 W. R. 453, 11 W. R. 395, 24 W. R. 90, 3 C L. J. 331 : 33 C 683, 23 W. R. 447, 12 W. R. 29, 25 W R 8, 14 W. R. 447, 7 C L J 251

——if tenancy was created before 1836 *batta* is *primafacie* not abwab, otherwise it is, 7 C. L J. 202, 251; 6 C. L. J. 637, 6 C L J 667.

——road cess and public works cess are not, and a contract to pay more than is payable is legal. 33 C. 683, 9 C. W. N. 23n, 3 C. L J. 337, 391.

——dak-cess is not. 1 C. L. J. 110n.

——road-cess is not abwab but various other cesses like embankment cesses, costs of acquittance, etc. are abwabs and stipulation in a kabuliyat to pay them is void. 4 Pat. 404 : 86 I C 597 · 1925 Pat. 421

——a lessee is bound to pay the rent mentioned in his kabuliyat as the annual rental including road-cess, embankment cess etc ... his lessor does not ... W. N 260 : 47 C L. ...).

——stipulation to pay interest is not. 12 C. L J 593

——enhancement of rent in consideration of *salami* is not 16 C. L. J. 71, 19 C. L. J 333.

——price of present and unpaid labour is. 16 C. L. J. 215.

——particular sum which is the consideration of the tenancy not an abwab. 18 C. L. J. 83.

.74. Abwabs or illegal cesses—*contd.*

——though *abwabs* have been abolished under the Bengal Regu-
tions for many years, the right to *Bankar*, *Jhalkar* and *Phalkar*
as always an exception and rent in respect of fruit trees or other
lasses of trees can be charged in addition to the ordinary rent
nder an agreement or custom. 78 I C. 463

——the payment of *abwab* for a large number of years without
bjection does not prevent the question of its legality being raised
n a subsequent suit for the same. "Abwab" discussed. 85 I. C.
70 (C).

——not taking any objection in the previous suit does not operate
s *res judicata* as to abwab 28 C. 17, 24 C 711, 17 C 726, but when
n the previous suit certain cesses were disallowed as not recoverable
nder the law in a second suit the former decision operated as *res
udicata*. 9 C. W. N. 469.

——Peshkbosh is not. 28 C L. J 283: 45 C 866 22 C. W. N.
24: 44 I. C. 497.

——Puja expense is an abwab. 3 C. L. J. 391 but see 25 C. W.
N. 72n.

——*Dahiyak* is not an illegal cess or *abwab*. 3 Pat L R. 109

——where a consolidated rent was noted at the head of a
abulyat the several items excepting what was stated to be *jama*
rent) which were taken into consideration in arriving at the total
amount were not *abwabs* or illegal exactions by the landlord 37
I. C. 965 (C)

——if on a fair construction the sum can be claimed as part of
the total rent the tenant is bound to pay it. 40 C 806 16 C. L J.
296: 17 I. C. 177

——a sum payable as an equivalent of the articles and labour
stipulated to be payable in a *Kabulyat*, is in the nature of an
imposition. 40 C 806 16 C. L. J 296. 17 I. C 177

——a contract to render gratuitous service in lieu of rent is
governed by the Transfer of Property Act and not by this Act 49
C L J. 189 1929 Cal. 224: 115 I C 34

——stipulation in a patni lease executed before the Act came
into operation to supply wood for the cooking of a certain idol is
abwab 15 C W. N. 568: 9 I C 47, (33 C 683, 10 C. W N 527,
12 C. W. N. 175) *fol*, 26 C. 611 *Dist.*

——where the consideration for the use and occupation of land
was a certain amount of rent in cash and the price of certain
articles, the latter must be considered as part of the rent 52 I. C.
119 (Pat)

——where the stipulation in the Kabulyat is to contribute two
he-goats every year and the value of the goats is included in the
rental it does not amount to an abwab 54 C 799. 32 C. W. N. 81,
46 C L. J. 297: 1927 Cal. 857 · 105 I C. 279.

S 74. Abwabs or Illegal cesses—*contd.*

under a contract. 9 C. W. N. 23n, 33 C. 683 : 3 C. L J 391, 3 C. L. J 322 but the present law is to be found in sub-sec. (2) and (3) of s. 74.

S 75. PENALTY FOR EXACTING ABWAB.

——limitation of *six months is* applicable only when *penalty* is claimed, *but the* excess amount may be recovered under the *Ordinary Limitation Act* 17 C. W. N. 374.

——a suit to recover the excess amount under this sec. lies in

the land lord any *khurcha* or illegal m is maintainable

and the agent *cannot plead that the realisation being unlawful he is* not liable to account for the money. 30 C. 1011 : 7. C. W. N. 535, 25 W. R. 8, *doubted and expld.*

Ss. 76-78 AND 80 TO 83. (IMPROVEMENTS.) *S. 79 repealed.*

By clause (f) of s 76 the tenant is now allowed to erect dwelling-houses whether of masonery, bricks, stone or any other material whatsoever, for the tenant and his family together with all necessary out offices.

——when raiyat can erect building or dig tanks by way of improvement. 24 C L. J. 85, 14 C. W. N. 68, 39 C 511, 10 C L J 595, 37 I. C. 999 (C)

rovement ies which of s 78

does not another and his

——but a raiyat cannot convert the whole agricultural land ... 25 W R 220

ects building termination

——digging of tank for the purpose of providing good drinking water did not come within the provisions of the sec it must be excavated for the purpose of agriculture or for the use of men and cattle employed in agriculture 16 C. L. J. 127 : 17 I C. 115.

—— *where tenure-holder undertakes* not to excavate and his sub lessee unawares of the restrictive covenant *excavates* a tank the tenure-holder is liable for damages to his landlord 20 C. L. J. 551 : 19 C. W. N. 1197.

——this sec. controls previous secs of the Act including s. 178, consequently a *permanent tenure-holder* who holds his *lease* under *a restrictive covenant not to* excavate a tank may *impose* a simila

Ss. 76-78 and 80 to 83. (Improvements)—*contd.*

restriction on a raiyat and the latter will not therefore be entitled to excavate a tank although the same may be an improvement. 20 C. L J. 551 : 19 C. W. N. 1197.

——if a tenant excavates a tank in contravention of an agreement, the damages which should be awarded to the landlord should be merely nominal in case the tank is an improvement and is beneficial. In this case the amount of damage was fixed for Rs. 5 plus an amount of nazar which the tenant would have to pay to the landlord for such permission 62 I. C. 779 (C)

——where there is a breach of a covenant not to excavate any tank the landlord, though he may not suffer any actual damages, is entitled to nominal damages which are not necessarily small damages. 20 C. L J. 551

——a suit by the co sharer landlord for compelling the tenant to fill up the tank he has wrongfully excavated and for damages in the alternative is not governed by s 188, B T Act 16 C. L J 127.

——a tenant is entitled to carry out the necessary repairs which ought to have been carried out by the landlord and deduct the amount from the rent 43 C L J. 94.

S. 84. ACQUISITION OF LAND

——the purpose must have a direct relation to the good of the holding 18 C W N. 271 F B.

——that the revenue would be increased is no ground for acquisition 9 C W. N 472

[illegible] is sought to be acquired [illegible] d of the holding, and the [illegible] the necessity for executing [illegible] are not sufficient grounds. [illegible] F B

——order under this sec. is not appealable 18 C W. N. 271 F. B, 19 C. 485.

——a person who is not an immediate landlord cannot apply under this sec. 9 C. W N. 472

[illegible] the civil [illegible] . N 472. [illegible] according [illegible] vent of a [illegible] to adopt

S. 85. (Subletting.) *Repealed*

S 86 SURRENDER AND RELINQUISHMENT

Distinction between Surrender, Abandonment and Relinquishment.

Surrender and abandonment

——the position of a landlord is stronger in the case of abandonment than in the case of surrender by a rayat. In the case of

Distinction between Surrender, Abandonment and Relinquishment—*contd.*

abandonment no title is acquired by the landlord through the raiyat as in the case of purchase. 18 C. L. J 193.

——a surrender by a raiyat after giving usufructuary mortgage of the part of his holding may be looked upon as a transfer or grant, so whichever binds the raiyat binds the landlord and he cannot evict the transferee 22 C. W. N. 965.

——a Hindu widow can abandon a raiyati holding but a surrender by a Hindu widow is an act of transfer which has to be justified by legal necessity. 63 I. C. 211, but a surrender by Hindu widow is valid if it is for pious purposes or for legal necessity. 4 P. L J 548 : 50 I C 872.

Relinquishment.

——the right of relinquishment is a privilege given to tenants, by means of which they may restrict the lease, and establish the tenure upon a new basis, or may extinguish the lease altogether, and the tenants cannot avail themselves of that privilege to any extent unless they strictly observe the conditions which are either expressed or are implied in the lease itself 26 C. 29 : 2 C. W. N. 697 : 25 I. A. 210, P. C.

——relinquishment of permanent tenure cannot ordinarily be made at the option of the holder. 20 W. R 383, 9 C. 671.

——but if the zeminder accepts it, it cannot be reclaimed W. R Sp no 1864, 270, but an acceptance of such relinquishment amounts to a transfer of interest, so in a suit by the zemindar for recovery of possession against the trespasser limitation runs when the possession of the latter became adverse to the tenure-holder and not from the date of relinquishment. 26 C. 460.

——on failure of heir, permanent tenures escheat to the Crown 1 C. 391 : 15 W. R 549

——a *mokurari* right may be relinquished 19 I C. 124 (C), 14 C 109.

——the mere notice is not sufficient to relieve the tenant from liability to pay rent, he must actually relinquish the property, 1 W. R. 20 : 7 W. R. 250.

How surrender or relinquishment may be effected.

——a surrender or relinquishment of a lease need not be in writing 22 C. W. N 441.

——it may be orally made 28 C. 256 : 5 C. W. N. 351, 14 C. 1 P. C, 11 W R. 53.

——a surrender may be inferred from the acts and conducts the porties. 1919 Pat 88, 28 C. 256 : 5 C. W. N. 351, 1864 W.R. 270. C. L. J. 220.

——even where the original lease was a written and registered one oral surrender was held to be valid, 47 C. 129, as no written document is necessary for effecting a surrender in this country 28 C. L. J. 220, 22 C. W. N, 100n, 13 C. L. J. 284.

——a Kabulyat executed by the raiyat for the remaining portion of his holding after transfer of part amounts to surrender. 17 C

How surrender or relinquishment may be effected—*contd.*

W. N. 1101, 22 C. W. N 967, in Dist. in 24 C.W N. 571, 573; but such surrender has been held to be ineffective by the Full Bench 48 C. 605 : 25 C. W. N. 29 : 32 C. L. J. 280 F. B.

——by claiming or accepting remission of rent in respect of lands washed away from time to time by an action of the river, a tenant may be held to abandon or agree to abandon his rights to such lands on their reformation *in situ*, 18 C W. N. 369 P. C

Effect of relinquishment by co-tenant or in favour of co-proprietor.

——a relinquishment by co tenant enures to the benefit of the landlord and does not enlarge the right of the other co-tenants not relinquishing. 8 C. W N. 315, 20 C. W N. 28n., and such partial relinquishment is valid so far as the share of the tenant relinquishing. 15 C W N. 680 and *it may take effect at a future date.* 15 C W.N. 680.

——but relinquishment by a tenant to a part proprietor is invalid, 2 P. L. T. 163; 58 J. C. 955

Liability of heirs for rent in case of no surrender

——the heirs of an occupancy raiyat are liable to pay rent whether they occupy the land or not unless they surrender the holding. 19 C. 790.

Effect of surrender after transfer of a part or whole or after mortgage

——ordinarily a portion or the whole of the holding may be surrendered, 2 C. L. J. 570, and *the landlord is entitled to re-enter* notwithstanding the existence of subordinate rights which the raiyat may have created upon that or the knowledge of the landlord of any incumbrance created by the raiyat, 17 C. W N 698, 12 C. W N 878, [illegible]

[illegible] occupancy [illegible] 18 C. W. *N. N. 698* [illegible] where such [illegible] purchaser of the part of the holding

——but where no fraud on the part of the landlord is established he can evict the part-transferee after accepting surrender of the part sold Such surrender may be by raiyat's taking new settlement of the rest, *22 C. W N 967, 43 C 878.*

——the transferor of a part of a holding cannot surrender that part. 25 C L. J 480, 22 C W. N 965, 67 I C, 91, 24 C. W. N. 571 573, *25 C. W N. 29 32 C. L J 236 48 C. 605* F B *which sets the point at rest.*

——but the Patna Full Bench dissenting from the Calcutta Full Bench has held that a surrender of a non-transferable occupancy holding [illegible] *his landlord after the sale of a* [illegible] andlord to take khas possession [illegible] L. T. 581 75 I. C. 794 F. B. [illegible] N 971 : 27 I. C. 61 F. B *Ref.* [illegible] 286 F. B. *Diss*

Effect of surrender after transfer of a part or whole or after mortgage—contd

——a co-sharer cannot sue for *khas' possession of* the transferred portion *of* a holding which has been alloted to him on partition 1 P. L. W 19 : 38 I C. 72, 2 P. L. J. 225, 39 I C 98

——surrender of holding by raiyat after giving usufructuary *mortgage of part is* not binding against mortgagee, and does not entitle *the landlord* to eject the mortgagee. 19 C W. N. 268

——*such surrender* may be looked upon as a transfer or grant, so whatever binds the raiyat *binds the landlord and* he cannot *evict transferee*, 22 C. W. N. 965, 21 C L. J. 185, 63 I. C. 500 (Pat)

Sub-sec. 6. Incumbrance.

This sub sec. has been amended protecting the under raiyati right.

—— [illegible] mitation of the rights of the *tenant* [illegible] a sale is not an *incum-brance* [illegible] 223 : 11 C. L. J. 16, 29 *C L. J.* [illegible]

[illegible] holding to the [illegible] under [illegible] rred [illegible] 172,

12 C. W N 878 *Ref.*

——cl. (6) was introduced for the purpose of invalidating *surrenders made* so as to defeat the claims of incumbrances. 38 I. C 537

Effect of surrender by Hindu Widow.

——Hindu widow can abandon a raiyati holding but *surrender by a Hindu* widow is an act of transfer which has to *be justified by* legal necessity, 63 I. C. 211

——surrender by Hindu widow is valid if it *is for* pious purposes or for legal necessity. 4 P. L. J. 548 : 50 I. C. 872

S. 87 ABANDONMENT.

Scope of the section.

——the provisions of s 87 of the Act is not exhaustive as to the abandonment of holding. 33 C. W. N. 1023, 28 C. W N. 603, 79 497 ; 39 C. L. J. 356, 18 C L J 193, 3 C. W. N. 46, 19 C. W. N 7 4 C. W. N. 193, 5 Pat. L. T. 407 : 75 I. C. 841 : 3 Pat. 126.

——whether there has been abandonment or not is a ques of fact in each case, 71 I. C. 304 (C), 27 C. W. N. 802 *Ref.* 7. C *J.* 72.

——this sec. deals with the case of voluntary abandonment a raiyat of his holding, it has no application to the case of *vaca caused by* the death of a raiyat. 11 C. L. J. 433.

——the same principle which governs the case of a *raiyat* governs the case of an under-raiyat with regard to circumstan entitling the landlord to re-enter. 48 C. L. J. 390 ; 114 I. C. 153. I *Cal.* 120.

What amounts to abandonment.

——abandonment is the effect of the Act of the tenant in vacating the holding without making arrangement for payment of his rent and for cultivating the land. 7 C. L. J. 72; 12 C. W. N. 899.

——when non-transferable occupancy right has been transferred and the raiyat possesses the land as sub-lessee, landlord cannot [illegible]

[illegible]

prevent possession but in a suit properly framed the landlord could get a declaration that the purchaser had acquired no right against him. 28 C. W N. 602 78 I C. 497 : 39 C L J 356 . 1924 Cal. 900

[illegible]

bu [illegible]

ev. [illegible]

abandonment the tenant must be proved to have left the village. All that is necessary to constitute abandonment is to show that the raiyat has ceased to cultivate the holding by himself or by some other persons or he had made no arrangement for payment of rent. 48 C L J 390

——as long as the tenancy subsists the landlord cannot enter 18 C L. J. 257

——when after the sale in execution of a money decree the tenant remained in possession the landlord could not eject him as there was no abandonment. 10 C L. J 147, 97 I. C 302.

——the owner cannot get khas possession of an abandoned holding when the estate is in the possession of the ijaradar. 1 P L. W. 405 · 39 I. C. 596

——the landlord must prove (1) that the raiyat voluntarily aban[illegible] (2) that he did [illegible] he ceased to cul[illegible] other person. 191[illegible] I. C. 908, 89 I C. 802

——when a raiyat without giving notice goes away from the land in his occupation and neither cultivates nor pays rent, the landlord is justified in assuming that the land has been relinquished and the raiyat has no right to ask to be re-instated on the ground that he never formally relinquished the land 30 C. L. J. 13

——by *claiming or accepting remission of rent in respect of* lands washed away from time to time by an action of the river, a

What amounts to abandonment—*contd.*

tenant may be held to abandon or agree to abandon his rights to such lands on their reformation *in situ*. 18 C. W. N. 369 P. C.

——*discontinuance* of residence in the village amounts to abandonment of the homestead 1 P. L. J. 502; 36 I. C. 653

——but the abandonment of the house does not constitute abandonment of the land on which the house stands 34 I. C. 644 Pat

——this sec contemplates of cases in which there is cultivation *of the* holding by the tenant but in cases where the land is partly homestead and partly horticultural the question of ceasing of cultivation of the holding does not arise. 15 C. W. N. 79n.

——when a tenant having no transferable interest transfers his interest and puts the transferee in possession the original tenancy may be treated as abandoned and when the transferee takes possession of the land he is no better than a tresspasser so

[illegible]

give rise to the inference of abandonment. [illegible]

——where the sons of the *original* raiyat left the village after the death of their father for three months and subsequently sold a portion of the holding and sublet the rest but in the meantime the landlord had settled the land with their party, there was no abandonment and *the settlement* by the landlord was invalid. 32 C W. C N 1111 · 1928 Cal 891 : 114 I. C. 482

——where raiyat selling his whole jote remains in homestead portion which is $\frac{1}{16}$th part of the jote and makes no arrangement for rent it is abandonment. 22 C. W. N. 753 : 29 C. L. J 1, 22 C W. N 873 : 7 C L. J. 303.

——unless the entire holding has been transferred there has been no forfeiture. 17 C. W. N. 698, 2 C. L. J. 369.

——where the transfer is of a part only of a non-transferable [illegible] has not consented, is not ordinarily [illegible] ng unless there has [illegible] sec. 87 or a relinquish-

[illegible]

Surrender.

——when the mortgagor is dispossessed by *the landlord* but [illegible] to recover possession his inaction is *equivalent* to [illegible] not affect the right [illegible] 11 I. C. 991. *contra*

[illegible]

——a tenant cannot relinquish his tenancy before the expiration of the terms. 1923 Cal 63.

Surrender—*contd.*

——where there has all along been payment or offer of payment by the tenant there can be no question of abandonment of the holding. 1923 C 181.

——an *ex-parte* decree obtained by a landlord against the heirs of the tenant proves the subsistence of the tenancy. 1923 C. 270.

——a covenant by the tenant not to transfer the land without the landlord's consent runs with the land, consequently a transferee of the lessee is bound by that covenant 37 C L. J 538 : 1923 Cal. 679 : 74 I. C. 555

Covenant to renew 69 I. C. 600.

——when a tenant surrendered the tenancy the sub-tenancy was also determined thereby. 6 N L J. 234 · 1923 Nag. 26[illegible]: 73 I. C 15.

——where the term of a tenancy under which rent is payable periodically is brought to a premature termination, the lessor is entitled to damages and to rent for unexpired term of the lease Even the acceptance of surrender does not preclude him from suing for damages for breach of the contract, it does not destroy the existing cause of action. 72 I C. 98 (C).

If mortgage operates as abandonment

——execution of mortgage does not amount to abandonment. 16 C W. N. 322, 13 C. W N 242, but by the sale in execution of mortgage decree the tenancy ceases 12 C. W. N. 899, 7 C. L. J 72.

——mere usufructuary mortgage does not amount to abandonment. 49 C. 989, 42 C 172, 40 C 870, 17 C W. N. 802, 5 Pat L. T. 407 : 75 I C 841 3 Pat. 126 *contra* 10 C W. N 499 · 3 C L. J. 222, 10 C. W N. 719 · 4 C. L. J 306, 12 C W. N. 878, 13 C. W. N. 242.

——it is principally a question of fact Where an occupancy raiyat after executing a usufructuary mortgage left the village and cut off all connection with the holding there was abandonment. 17 C. W. N. 802, 15 C W. N. 79n.

——where a raiyat executed a usufructuary mortgage and delivered possession to the mortgagee, the case was remanded for the determination of the questions as to whether there was relinquishment of the holding or a repudiation of the tenancy, 47 I. C. 332.

Payment of rent.

——mere non payment of rent is not evidence of abandonment but non-payment of rent coupled with non-occupation of land is [illegible] 30 C. L. J. 13

pays the
33
he cannot
J 73, 4 C.

W N 493, 12 C. W N. 899.

——non-payment of rent coupled with non-occupation is evidence of abandonment. 24 C. W. N. 717, 30 C L. J 13: 51 I C 356

[illegible] occupancy
pays rent
[illegible] disposal

Effect of partition amongst landlords.

——a co-sharer cannot sue for khas possession of the transferred portion of a holding which has been allotted to him on partition. 1 P. L. W. 19 · 38 I. C. 72, 2 P. L. J. 225 ; 39 I. C. 98.

Effect of partition amongst tenants

——where there are several tenants in a holding and each of [illegible] each of those portions
transfer of one of the
so as to entitle the
N. 717, 13 C. W N

120 (note) *fol*

Service of notice.

——it is not service of notice under this sec. that terminates the tenancy, but rather the voluntary abandonment by the tenant coupled with acts on the part of the landlord indicating that he considers the tenancy at an end. 11 C. L. J. 433, 1 C. W. N 198

——by the service of notice under this sec. it becomes obligatory upon the tenant to have a speedy determination of the question whether there has been an abandonment or not. 11 C. L. J. 433, 7 C L. J. 72.

——this sec does not require personal service to be effected upon the tenant, but it requires that the notice therein mentioned should be published according to the rules prescribed by the Local Govt. 6 C W. N. 28 n.

——where a holding is actually abandoned the landlord is [illegible] notice under s. 87. 47 I. C 147, 4 C.
[illegible] 33, 24 C. 212.
[illegible] of the holding after service
his own risk He cannot be said to have taken possession in due course of law and the tenant can bring a suit for possession under s 9 of the Sp R. Act on the ground that there was no abandonment. 11 C. L. J. 433

S. 88. SUB-DIVISION OF TENANCY.

New provision has been added enabling the Civil Court to direct the division of tenancy or distribution of rent on the application of the tenant

——receipt of rent granted by landlord, or agent having authority, with recital that he accepts partial rent for partial holding, amounts to consent in sub division 2 C W. N. 375: 25 C 531 F B, 2 C. W N 378 n 25 C. 533n Otherwise not 31 C 1020: 8 C. W. N. 923, 1918 Pat 210, no extraneous evidence is admissible. 8 C. W N. 923. 31 C 1026.

——landlord's tashildar's acceptance of proportionate rent does not amount to sub-division 6 C. W N 823, 1 C L. J 90n · 10 C W. N. 216, 31 C 1026 8 C W N 923. 10 C W. N. 216

——a *thikadar* is not an agent of the landlord within the meaning of sec 88 B. T. Act He holds under a lease and collects money for himself and not for the landlord. So when he assents to splitting up of the holding for the benefit of the estate and this is followed by an apportionment of rent, it is binding on the landlord 1925 Pat. 796 89 I C 21 · 7 Pat L T, 73

——'express consent' in writing within the meaning of sec. 88 as amended by Act I B C. of 1907 means a consent opposed to one which is to be implied from the document *Jamawasil baki* papers are not landlord's rent roll within the meaning of the proviso Roadcess return of co-sharer cannot be taken in evidence as principal evidence of consent in writing 22 C W N 693, 4 P L. W 316 45 I C 294

——s 88 does not apply to co-sharer landlord who is still joint with his co-owners 1918 Pat 210

—— [illegible] be denied by eithe [illegible]

—— [illegible] equires the consent [illegible]

—— [illegible] ly of joint landlord [illegible] ody of the landlords does not come within the scope of sec 88 45 I. C. 294 (Pat)

[illegible] that he is not bound to any [illegible] lding. It is also quite [illegible] made by the tenants, [illegible]

[illegible] continuity of a transferable [illegible] by consolidation 24 C. L. [illegible] (Act X) Rut. 53, 17 C L. J.

——whether the sub-division creates new holding must depend upon the intention of the parties 11 C L. J. 56 14 C. W. N. 335, 41 I. C 691 (C). 14 C L J 110

——whether there has been a division of a tenancy as is recognised by s 88 is a question not of fact but of law; where rent receipt mentioned one rental for the entire holding the mere fact that there was separate realisation of rent would not lead to

S. 88. Sub-division of tenancy—*contd.*

inference of sub-division under s. 88. 49 C. L. J. 299, 1929 *Cal.* 366, per Mukerji J.

——[illegible] tenure has [illegible] case Rent [illegible] tenancy. The [illegible] the question whether the parties have come to a fresh agreement and must be determined by the familiar consideration which attach to such a problem. 1929 P. C. 171.

——when the question arises as to whether old tenancy has been sub-divided or new tenancies have been created, it depends upon the intention of the parties 11 C. L. J. 56 : 14 C. W. N. 335, 14 C. L. J. 110, 24 C. L. J. 275.

——a sub-division of the holding or distribution of rent cannot be binding on the landlord, unless his consent in writing has been obtained to the sub-division. 13 C. L. J. 267

——a landlord cannot break holding without the consent of tenant. 22 W. R. 336.

——where the shares of the tenants in the *patni* as well as those of rent payble by each in his own share are separately shown in the rent receipts granted to several tenants, *held that* the rent payable by different tenants is distributed amongst *them* and there is a sub-division of the tenure consented by the *landlord* 13 C. L. J 174.

——mere consolidation of a number of separate raiyati *holdings* [illegible] and convert *them* into a [illegible] agreed at *the time* that [illegible] 23 *C.* W. N 201, 15 [illegible]

——the "express consent in writing" may be given *by a* receipt and in each case the adequacy of the consent *must be* gathered from all the circumstances 45 I. C 294 · *1918 Pat. L. W.* 216

——where a sale is only of a part of a holding at fixed rate the landlord is bound to recognise the purchase, as such a *sale* constitutes a division of the holding. 47 I. C 334.

——the mere fact that a tenant agrees to pay rent *separately* to one of the co-sharer landlords would not constitute *a* separate tenancy. Where however there is a separate kabulyat in favour of one of the co-sharer landlords it may be *held that* there is separate tenancy. 65 I. C. 469.

[illegible] transferable tenure [illegible] W. N. 1012 *110 not fol.*

S. 89. EJECTMENT.

——inspite of provision in a lease that on breach of *certain* covenant the landlord would be entitled to khas possession without recourse to law, the landlord is bound by this sec *13 C. L. J. 672*: 6 I. C. 147.

S. 89. Ejectment—*contd*

——on the termination of tenancy the landlord is entitled to re-enter and to the standing crops. 11 C. L. J. 87.

——where it was stipulated that after the expiry of an *ijara* a fair rent should be settled and that until a fair rent was settled the old rent would continue, held that the landlord was entitled to recover possession in a suit for possession. 48 C. 460 P. C.

——*a landlord has no cause of action to sue for khas possession* of lands forming part of his tenant's holding until the tenancies are determined, but he can get a decree declaring his title to the land and giving him possession through the tenants by the receipt of rent. 1925 Cal. 155 : 82 I C 22.

——upon general principles a suit for ejectment cannot be maintained, unless the tenancy has been determined, i e, unless there has been a previous notice or a demand for possession. 34 C 57 : 11 C. W. N. 225 : 5 C L. J. 181.

——a landlord cannot break up his tenant's tenure by declaring that he has no longer any right to a portion of it although he has still right in the remainder. 33 C L J. 513.

——a suit for ejectment cannot be brought with respect to a part of the holding. 36 I. C 283, 23 C. W. N. 77 29 C L J. 117 P. C.

——a suit for ejectment by a person having a legal title can be met by one in possession under an agreement not formally executed and registered, though a suit for specific performance is barred 28 C. L J. 77

——when tenancy is created by all the co-sharers, a co-sharer is not competent to obtain a partial ejectment of the tenant to the extent of his share unless the tenancy has been determined by all. 31 C. 786, (7 C. 414, 2 C. W. N. 229, 20 W R 126) *Dist.*

——where the relation of joint landlords continues, the tenancy of the lessees cannot be put to an end except by all the lessors acting together. 35 C. 807 7 C. L J. 483.

——there is no authorit [illegible]
a landlord does not for a [illegible]
the expiry of the tenant's [illegible]
was allowed to hold over [illegible]

——a lessee can eject a tenant brought by his lessor on the land during the continuance of his lease 2 Pat. L J 713

[illegible]

——in a suit for ejectment of defts. as trespassers rent cannot be decreed 10 C. W. N. 166

——when the plff.'s title was admitted in a suit for ejectment and deft. claimed to be a tenant the onus is on the deft to prove the tenancy set up by him. 18 C L. J. 544.

S 89 Ejectment—*contd.*

——where title of the plff. is proved or admitted the deft is to prove his right to retain possession 85 I. C. 636 (c), 9 C. W N. 144, 8 C L. J 170, *Ref.*, 13 C. W. N. 661 *Dist.* 7 C. L J 553; 8 C L. J. 170, 8 C. L. J 513

——plff is to prove that his land is *zerat* or *khas land* 13 C. W N. 66, 6 C W N 105, 3 C. W N. 763, 10 C. W. N. 434.

——it is not the law that because the deft. is found to be a tenant of some land under the plff. the burden is thereby cast upon the plff to establish that the land he seeks to recover is outside the tenancy of the deft. The burden is on the deft to prove the tenancy under which he claims to hold it. 13 C W. N. 144, 19 C W. N 149, 3 C. W N. 763 *Expld.* 1920 Pat. 39.

... deft. sets up of proof as to the zemindars

——in case of plff admitting that the land to be recovered has been encroached by the deft. tenant, the burden of proof of encroachment is on the landlord. 9 C. 813: 12 C. L R. 457, 19 C. W N 140

——in an ejectment suit, plff. must prove not only title but also possession within 12 years. 17 C. W N. 389 P. C.

——in a suit for ejectment plff. must recover on the strength of his own title and cannot depend on the weakness of the adversary 17 C W. N. 669, P. C, 23 C L. J. 151, 16 C 473 P. C.

——when the deft alleges that he holds a permanent tenure the burden of proving that fact lies on him and it is not the plff. to show that the deft is not a tenure holder but a raiyat. 4 C. W N 159 n, 6 C W N 105

——in a suit for ejectment when the deft sets up a tenure by right of purchase from the former tenant, he must prove his title. 7 C. L J 553

... was admitted brought a suit to ... r service of notice, the onus was 42 I. C. 262 (c), (7 C. L J 553, ... L. J 277: 21 I. C 481) *fol*

——a demand for possession is sufficient for a tenant at will 34 C. 57 5 C. L J. 181: 11 C W. N. 225.

... tenancy at will the notice to quit need not ... 9 I C. 795

... otice to quit is necessary.

... lease the lessee is bound to ... d on default the lessor may

... in default of compliance the ... at a certain rate, it was a

S. 89. **Ejectment**—*contd.*

—the landlord is relieved of the obligation to give notice to quit where the tenant repudiates the tenancy for the first time in the written statement 36 C. 927.

—a notice to quit is not bad because it includes some lands outside the tenancy. 25 C 36 2 C W. N. 106

—in a suit for ejectment where no party sets up a tenancy the suit cannot be dismissed for want of notice where the court finds that the deft is a tenant. 9 C W N. 460

—in case of service tenure when the service tenure-holder refuses to perform the services, notice to quit is necessary. 2 C. L. J 403, 4 C 67, 22 C. 938

For other cases see, "*Ejectment*"

Ss. 90-92 MEASUREMENTS.

—landlord has the right to sue for measurement 7 C W. N. 93.

—landlord is not debarred to measure because the land is in he occupation of under-tenure holder 8 W R. 149, 9 W R. 151, C 681, 9 C L R. 444, or a *makurarıdar* 7 C W N 93

—co-sharer cannot measure. 7 C W N 93, 15 W R 522, 6 W R. 126, 18 W R 332, 19 W. R. 280, *contra*, 10 C 36; 3 C L. R. 323

—but where there is separate kabulyat in favour of one set of andlords they cease to be joint landlords and are entitled to make n application for measurement. 35 C 417

—a court cannot deal with question of standard of measurement under ss. 90 and 91. 17 C L J 50, 18 I. C 621

—every landlord has the right to measure even if there be ntermediate mokurıridars 7 C W N 93

—in a proceeding under this sec the order should be limited o one directing in the words of s 91 2 C W. N. 351.

—proceeding under the sec. is not a suit, and order made nder it is not a decree and is not appealable 2 C. W N 351, nor decision under this sec is *resjudicata* 19 C. W N 160 (*note*)

—non-attending tenant can rebut the correctness of the measurement made in his absence 2 C W N. 351

—in a suit for possession of accreted lands found upon measurement ... the tenant, the tenant ... ind of the incorrectness ... ut they were entitled to ... the property was which ... C

—decision in a proceeding under ss 90, and 91 B T. Act, oes not operate as *resjudicata* 19 C W N. 160n. (2 C W. N. 51, 17 C. L. J 50), *Fol*

S. 93-100. COMMON MANAGER.

—co-owner having dispute may apply for common manager although their collection is separate, District Judge has the discretion to appoint, 11 C. W. N. 1143, but he cannot appoint a

S 89 Ejectment -*contd.*

——where title of the plff. is proved or admitted the deft is to prove his right to retain possession. 85 I. C 636 (c), 9 C. W N. 141 8 C L J 170, *Ref*, 13 C. W N. 661 *Dist*, 7 C L J 553 8 C L. J. 170 8 C L J 513

——plff is to prove that his land is *zerat* or *khas land* 13 C. W N 66, 6 C W N 105, 3 C W N. 703, 10 C. W. N 434.

——it is not the law that because the deft. is found to be a tenant of some land under the plff. the burden is thereby cast upon the plff to establish that the land he seeks to recover is outside the tenancy of the deft The burden is on the deft to prove the tenancy under which he claims to hold it 19 C W. N 144, 19 C W N 149 3 C W N 763 *Expld*. 1920 Pat. 39.

——when the zemindar sues for ejectment and the deft sets up *Shikmi* which is admitted or proved, the burden of proof as to whether the land is included within the *Shikmi* is on the zemindar 3 C W. N 763

——in case of plff admitting that the land to be recovered has been encroached by the deft. tenant, the burden of proof of encroachment is on the landlord. 9 C 813: 12 C. L. R. 457, 19 C. W N 140

——in an ejectment suit. plff must prove not only title but also possession within 12 years 17 C W N 389 P. C

——in a suit for ejectment plff. must recover on the strength of his own title and cannot depend on the weakness of the adversary 17 C W N 669, P. C, 23 C L J. 151, 16 C. 473 P. C.

——when the deft. alleges that he holds a permanent tenure the burden of proving that fact lies on him and it is not the plff. to show that the deft is not a tenure holder but a raiyat. 4 C. W N 159 n, 6 C W N 105

——in a suit for ejectment when the deft sets up a tenure by right of purchase from the former tenant, he must prove his title 7 C. L J 553

——when the plff whose title was admitted brought a suit to eject an alleged under-raiyat after service of notice, the onus was on the deft to prove higher interest 42 I C. 262 (c), (7 C. L J 553, 8 C L. J 170, 18 C W N. 297 18 C. L. J 277: 21 I. C. 481) *fol*

——a demand for possession is sufficient for a tenant at will 34 C 57 5 C. L J 181 · 11 C W. N 225.

——in regard to a tenancy at will the notice to quit need not be anything more than a reasonable one. 39 I. C. 795

——for the ejectment of a licensee no notice to quit is necessary. 27 C L J 523

——on the determination of a lease the lessee is bound to surrender possession to the lessor and on default the lessor may eject him without notice 24 C L. J. 30.

——where the notice directed that in default of compliance the tenant would be charged with damages at a certain rate, it was a good notice 12 C W. N. 1059.

93-100. Common Manager—*contd.*

——an order rejecting an application under s 93 is not appeal in as much as the application is not a suit between landlord tenant within s. 143 14 C. 312.

——notice must be served upon all the co-owners, appointment not be made with regard to some of *mouzahs* comprising an ite. 6 C. L. J 216

——a common manager has power to mortgage, sell or lease out perty with the consent of the District Judge. 4 C W N 769, W. N. 225, 31 C 305 P. C and can sue for possession of land W. N. 214, and also can defend suit 14 C L J 61, 16 C. W. 36

——while the common management exists the powers of the owners must be regarded as in abeyance 4 C W N 769

——an interest which a mortgagee or a purchaser would acquire n a co-owner during the period of management would be subject any charge on the estate that might properly be incurred by the nager during that period 31 C 305 8 C. W. N 225 P C.

——a common manager cannot be sued without the leave of the urt appointing him 24 C W N 138, 40 C 150 17 C W. N 846, an application for execution may be made and a suit for rent y be brought without sanction 82 I C 327, 1925 C 334

——before a common manager is sued notice under s. 80 C. P C. uld be served upon him as he is a public officer under s 2 (17) (d) P. C. 24 C W N. 138

——the appointment does not take away from the co-owner his wer of dealing with his own share 8 C. W N 226 31 C 305, P. C, t the co-owners cannot collect rents. 22 C. 634, nor their lessees, C. 522

——a co-sharer can mortgage his share 23 C W N 308, C. L. J. 297 50 I C 790

——District Judge cannot appoint successor 10 C W N. 437, *ntra*, 7 C. L J 109, *but see the next case.*

——in case of removal or death or resignation of a common anager the District Judge has inherent power to appoint his ccessor 35 C L J 75 64 I C 819.

——regular suit lies to set aside an appointment 6 C L J 216.

——an application for the appointment of a common manager der s. 93 is an original proceeding contemplated in s. 141 C. P C. which the procedure under Or 41 R 4 (Appointment of Receiver) applicable 43 C 986 20 C. W. N 1009

——the ... ger under s 95 is com- ... given and possession

... of properties in the ... of common manager. [illegible] : 13 C. L. J 487, 17 C. W. N. 581, 21 C. W. N. 240, 36 I. C. 448, 34 I C. 83 (c), or during e pendency of a proceeding. 43 C. 936 ; 20 C W N. 1009

——common manager is in the possession of a Receiver 17 C. W. N. 846 : 40 C 150,

Ss 93-100. Common Manager—contd.

——portion of an estate cannot be released 24 C. W N. 138 30 C L J 279, 26 I C. 498, 30 C. L. J. 261, 6 C L. J 216

——where a share of one of the owners was sold in execution proceedings to which the *common manager appointed under s* 95 was a party, the authority of the common manager continued to exist as regards the entire property even after the sale and the purchasers were not entitled to collect rents separately. 1937 Pat. 331 · 104 I C 672 8 Pat L T 611

——District Judge has *authority to investigate* accounts and enforce payment of any sum due by common manager 24 C W N 138 14 C L J 445, 20 C L, J 113, 123.

——a suit for accounts against a common manager is not maintainable without the sanction of the court which appointed him 30 C L J 279 24 C W N 138

——a suit by a common manager against an ex-common manager for account is maintainable 30 C L J. 263

——a suit for account against a common manager is not maintainable without the sanction of the court appointing him 30 C L J 279 24 C W N 138

——where a common manager was appointed and the estate released and it was found that the common manager's account had not been properly rendered and passed by the Dt Judge, he could be sued for account with the permission of the Dt. Judge 44 C 800

——proceedings in connection with the appointment of a common manager under s. 95 come within s. 141 C. P C. and hence Or 9 R 13 will apply to them 91 I. C 741

——the word estate in s 95 (a) means all that the holder is entitled to by way of reformation or accretion. 35 C L. J. 205

——s 97 gives the Court of Wards power to sue in the case of an estate which comes to it under the provision of s 95 (a) of the Act 34 C L. J 205.

——s 97 gives power to the Court of Wards to sue in regard to an estate which comes into its management under s 95 34 C. L J 205

——permission of the Dr Judge *for a reference to arbitration* by the Court of Wards is not necessary. 51 I C. 999 (c)

——when the title of a co-owner is in dispute the Dt Judge may under s 98 sub sec (3) direct the common manager to retain the disputed share of the rent in his hand 17 C. W N. 445.

——where there is an order of the *Dt Judge* for the payment of the dues of the retired common manager, no question of limitation arises in a suit by the retired common manager for his remuneration 46 I C. 686 (c)

——in an application before the District Judge for restoration of the management of the *estate to the* co-owners, the common manager is not a necessary party. 24 C. W. N. 927 : 59 I C 191.

——when powers conferred by law are defined by rules, the rule should not be interpreted as to restrict those powers, except such, as in terms expressed or implied can be clearly inferred from the wordings used. 30 C. L. J. 263

S. 101. POWER TO ORDER SURVEY & PREPARATION OF RECORD OF RIGHTS.

—Chapter X of the B T Act has under-gone several amendments and it cannot be said that the successive amendments have made the law clearer of comprehension or easier of practical application. 37 C 30 F.B

—the provisions of this Chapter are somewhat obscure 21 C. 776 and carelessly drafted 14 C W. N 812

·o decide a question of properties under his ·sted under s 189 (b) under the B T Act

—the term "local area" is not defined in this Act, and is obviously comprehensive enough to include an entire District 21 C. L J. 489.

—Bengal Tenancy Act is a law for agricultural landlords and tenants, so the non agricultural tenancies do not come within the purview of this chapter. 46 C 441, 27 C. 205 : 4 C W N 76, 9 C. W N 141, 19 C 489, 19 C W N 35

—*chandina* or *bazar* lands are non-agricultural and Record of Rights cannot be prepared of such lands 26 C W N 483 34 C. L J 504

—for the preparation of Record of Rights under s 101 (1) a survey is indispensably necessary and that will be in accordance with the Bengal Survey Act 1875 5 Pat L J 681

—"to entertain a suit or application" within s 111 merely means the consideration of a suit or application and it equally applies to a suit instituted before the declaration under s 101 is made and to suits instituted after such a declaration has been made. 88 I. C 670 : 1925 Cal 1211

S 102. PARTICULARS TO BE RECORDED

—the terms "occupier" and "occupant" in clauses (a) and (c) were *added to cover the case indicated in cl (i) added at the same time* 14 C W N 812

—the making of an entry of "settled raiyat" is sufficient compliance with s 102 cl (b) and when such an entry is made the presu... 115, 29 C. W. N

...he ... o determine 47 I. ... W N 517 :

—when there is a dispute between two neighbouring proprietors the case comes within s 102 (*dd*). 45 I C 781

—the existence of a right of way cannot be regarded as a condition or incident of a tenency, a dispute concerning a right

S. 102. Particulars to be recorded—contd.

——the Settlement Officer can record any custom which is the incident of any tenancy. 103 I C. 471 : 1927 Pat. 376

——if the entries in the record of rights do not record particulars under the provision of sec 102, cl. (b) or do not record them rightly, then the presumption under s 50 B. T. Act arises and s. 115 has no application 40 C L. J. 248 : 29 C. W. N 209 84 I C. 989 1925 Cal. 208, 27 C. W. N. 740, 1924 Pat. 443 : 73 I. C 605 : 3 Pat 120

——s 102 cl (i) not mandatory 40 C. L. J. 248 : 29 C W N. 209 84 I C 989.

——*prima facie* where a particular right is not stated to exist in the khatian under this sec. presumably it does not exist 109 I C. 229.

——the Settlement Officer is authorised by cl (j) to decide, when the land is claimed rent free, whether or not rent is actually paid and if not paid, whether or not the occupant is entitled to hold the land without payment of rent, and if so, entitled, under what authority 43 C 547 : 20 C W. N. 275 22 C L J. 155

——the Settlement Officer can record that the tenants are entitled to remission of rent 97 I C 590.

——in case of dispossession from a portion by the landlord the Settlement Officer is correct in showing that no rent is payable 21 C W N 492

——entries made in the settlement khewats, even if they do not come under s 102 are relevant under s 35 Evi Act 40 C L J 331 82 I C 886

——although the presumption under s. 103 B. is not strictly applicable to non-agricultural land to the extent to which it is applicable with regard to agricultural lands, still such entry raises some presumption with regard to the fact recorded. 25 C W. N. 516, 26 C W N. 483 . 34 C. L. J 504, 104 I. C. 514 (Pat)

——the entry in the record of rights describing the tenancies as "Kaimi settled raiyats" is not an entry in compliance with the provision of s. 102 cl (b) and it does not take away the presumption arising under s 50, 1927 Cal. 546 : 101 I C 45.

S. 103. POWER OF REVENUE OFFICER TO RECORD PARTICULARS ON APPLICATION OF PROPRIETORS ETC.

——on an application by a proprietor or tenant of an estate under s 103 for the preparation of a Record of Rights the Revenue Officer is competent to make a survey and measurement of the lands without the orders of Government under s. 101 and the procedure to be adopted by him shall be the same as in the case of proceeding under s. 101. 30 C 339 : 7 C. W. N. 33.

——s. 103 authorises one or more of several proprietors or tenure-holders to apply to a Settlement Officer to ascertain and record all or any particulars specified in s. 102 . s. 188 is not bar though it is bar to an application under s. 105 by co-sharer. 21 C. L J 305.

S. 103 Power of Revenue Officer to record particulars on application of proprietors etc —*contd.*

——proceedings under s. 103 are not excluded from the category of Record of Rights merely because some only of the particulars set forth in s. 102 are to be excluded. 9 C. L J. 67n, 32 C. 518.

——whether a record of particulars made in a proceeding under s. 103 constitutes a "Record of Rights" or not must depend upon whether the particulars recorded include a right or not *32 C. 516*: 9 C. W. N 504 · 1 C. L. J 239

——[illegible] 102 Act VIII of 1885 when [illegible] to a Record of Rights [illegible] Consequently, the pro- [illegible] rent under s 105 after making *the record of particulars under s 103 are legal above case.*

——the material difference between the old sec 103 and the present sec is that under the former the Revenue Officer recorded the particulars specified in s 102 i e, all the particulars, while under the present section the applicants can select *above case.*

S 103 A PRELIMINARY PUBLICATION. AMENDMENT AND FINAL PUBLICATION OF R OF R.

——the Act gives the tenants ample opportunity for the correction of mistakes in the Record of Rights 35 C 176 12 C. W. N. 122 . 7 C L J 103

——before the passing of the Act 1 (B C) of 1907, an entry in a finally published Record of Rights that lands held by the tenants were mal lands or that the status of the tenants was that of a settled raiyat could not be corrected by the settlement officer except in a suit under s 106 *above case*

——a settlement Officer has inherent jurisdiction to correct an obvious error or incidental slip even after the final publication. 17 C. W N 625.

——an inference can be drawn from the finally published Record but not from *khasra* paper or from any material upon which the finally settled Record of Rights is founded 1923 Cal. 194, 67 I. C. 871.

——draft record is not admissible in evidence 18 C. W N 896, 25 C L. J. 690 21 C W N 996, 34 I C. 857, 55 I C 922, *contra*, they are admissible in evidence though no presumption arises therefrom 2 Pat 814.

——where in proceedings under s 103 A the revenue authorities directed the name of the deft to be entered, such entry was valuable evidence of possession and it enures for the purposes of limitation in favour of the deft 47 C L J 347 109 I C 241 : 1928 Cal. 298

——[illegible] objection under s 103-A [illegible] operate as *res-judicata* [illegible] objector against the

S. 103-B. PRESUMPTION OF CORRECTNESS OF RECORD FINALLY PUBLISHED.

General

——draft record is not admissible in evidence 18 C. W. N 896, 25 C L J 690 21 C. W. N 936 34 I C. 857, 55 I. C 821 contra, they are admissible in evidence though no presumption arises therefrom 2 Pat 814

——record finally published after the institution of rent suit is admissible in evidence 4 C L J 519, 19 C L. J. 348

——but it is not until the Record of Rights is finally published that a presumption of correctness arises 34 I C. 857.

——sec 103 (B) does not control sec. 113. 21 C W N 546

——sec 103 B applies to all entries in the record of rights and creates a presumption of correctness in regard to them while sec 113 applies to those cases only where the rent of a tenure or holding has been actually settled under this chapter 21 C W. N 546

——suit for alteration of rent within 3 months after final publication will not be dismissed but stayed 19 C W. N 1141

——Settlement Officer can amend order 17 C. W N 625, but cannot alter an entry 35 C 176

——omission of the Settlement Officer to record any tenure or under-tenure cannot affect the right of the parties 18 C. W N 997.

——disputes can only be decided by the presentation of a plaint on stamped paper under sec 106 12 C. W N 122. 7 C. L J 103

——the existence of certificate is conclusive evidence of the publication of the record and the publication is the conclusive evidence that the record has been duly made. 12 C. W. N. 107n

——an entry in a record of rights is presumed to be correct until the contrary is proved 18 C L. J. 78. 11 C. W. N. 153

Presumption.

——settlement record should not be lightly dealt with 5 C L. J 92

——in a conflict between entry in record and a kabulyat, (13 C W N 181) and in a conflict between previous civil court decree and subsequent entry, (5 C L J 92, 13 C. L. J 653) both should be considered In the former case decree was passed on the basis of the kabulyat showing a higher rate than that entered subsequently in the record

——where there are two record of rights prepared at different times entries in both of them will be presumed to be correct entries of existing state of things. 1927 Pat. 164 : 100 I. C. 701 : 8 Pat L T 121 · 6 Pat. 342

——an entry cannot override the statutory prohibition contained in s 20 of the Cess Act 1 Pat L. J. 521 : nor it can have the effect of overruling the well settled principles of law. 40 I. C. 997, (Pat)

——record of rights cannot nullify the effect of a previous decision between the parties. 35 C. L. J. 200 : 60 I C 389 (c)

——entry is presumption of possession 21 C W. N. 175, 19 C W N 172n, 12 C. W. N. 8, even before final publication 47 C. L. J. 347 109 I C. 241 : 1928 Cal. 298.

Presumption—*contd.*

——record as published is to be taken for granted and if necessary, the record is to be questioned under s 106, 35 C 176 12 C. W. N. 122 : 7 C L. J 103

——the presumption is rebuttable one 11 C W N. 153., 5 C. L J 181

——presumption is that the entries were correct at the time of preparation of record 13 C W N 181, 18 C L. J 76, 10 C. W N. 908, 110 I. C 445 1928 Cal 751

——procedure is conclusive but entry can be rebutted. 19 C W. N 35

——entry of *khudkast* right of plff is to be rebutted by dft 23 C. W. N. 301.

——entry as to Shikimi right gives rise to the presumption of the existence of that right 1927 Pat 376 103, I C. 471.

——there is no limitation as to the nature of the suit to which the provisions of s. 193 B applies 9 C L J 83 13 C. W. N 111.

——the presumption as to the correctness of the entries will operate even in a suit to declare the entries incorrect. 13 C. W. N 111 . 9 C. L J 83

——it may be evidence of hostile title 15 C L J. 203, 16 C. W N. 929.

——an entry as to area is not conclusive under s 104 (j) and it can only be presumed to be correct under s 103 (b) until the contrary is proved. 98 I C 498 1927 Cal. 214

——the presumption of correctness attached to entries in record of rights does not arise with regard to an entry relating to a boundary where there is a bonafide controversy between conterminous estate holders and the owners were not before the Revenue Officer at the time the Record of Rights was prepared 1925 Cal. 1253 86 I C 767

——when the entry is made in favour of both parties to the extent of 8 as., to that extent each party can rely as furnishing presumptive evidenee 16 C W N 91n

——an entry in the Record of Rights is as presumptive evidence between landlords of neighbouring estates as between landlord and tenant A survey is of indispensable necessity for the preparation of a Record of Rights under sec 101 (1) and it must be conducted with all the publicity and notice to all the parties concerned. 5 Pat L J. 681 2 Pat L T 81 59 I C 298

——the entry operates in the same way between landlord and tenant as between landlords of the same or neighbouring estates and between tenant and tenant. 30 C W. N. 689: 1926 Cal 862 96 I. C. 959, 5 Pat 393

——a Record of Rights finally published is assumed under s. 103 to be correct untill it is shown by evidence to be incorrect 61 I C 420, 34 C. L J. 133, 44 C L. J : 265 · 1927 Cal 49, 1926 P. C 60 · 5 Pat 735 : 97 I C 217 : 7 Pat L T 483 P. C

——the mere fact that a suit has been brought under s 106 B. T. Act, does not weaken the presumption of correctness of the Record 61 I C. 420.

Presumption—*contd.*

——an entry in regard to non-agricultural land raises some presumption with regard to the rent recorded in it 28 C W. N. 516 80 I C 805 1924 Cal 667, 26 C W. N. 483 : 34 C. L J 504, 78 I C 169, 1925 Cal 404, 104 I. C. 514 (Pat.)

——entries relating to land not within the scope of the Act, is not of much weight 26 C W N. 483 : 65 I. C 4, 46 C. 441 *Dissented.*

——entries as to the rights of tenants to appropriate *fruits and* timber of trees do not carry the presumption of correctness under s 103 (b) They are only pieces of evidence *admissible under s* 35 Evi Act 89 I C 1020.

——an entry raises a presumption *of* correctness and is not a starting point for the computation of the period of limitation 35 C L J 19

——an entry in the Record of Rights does not prevent a tenant *in a rent to plead suspension of rent on the* ground that he has been dispossessed from a portion of the holding 27 C. W. N 982.

——*the presumption cannot arise from* the Khasra papers upon which the finally published record is founded 1923 Cal. 194, 67 I C 871.

——an entry in the record of rights that if inundation takes place the raiyats are to get a reteable deduction of rent is an *entry* of local custom and under s 103-B is presumed to be correct till the landlord proves that no such custom exists. Such a *custom* is neither vague nor unreasonable. 78 I C. 836 : 1925 Cal 564

——where suit for rent was decreed at the rate *admitted by* the tenant not considering the entry in the Settlement Record, in a subsequent suit for rent the *khatain should be considered* 14 C W N. 364

——an entry in the column of the *Record of Rights* that a *tenure* was under temporary settlement for thirty years is *conclusive evidence that the settlement was made duly* under the Regulation. 13 C. W. N 235 9 C L. J. 265 4 I. C. 49

——*where a certain tract of land* was recorded within the area of dft 's patni taluk held that although the general rule *is* that onus in such case would be on the plff, the presumption would not apply 34 C. L J. 133

——an entry in the record as to whether a certain land is liable for rent or not is presumed to be correct until *it is proved* by evidence to be incorrect The mere fact that rent has not been paid is not by itself sufficient to prove that no *rent is payable.* 31 C W N. 32 · 1927 Cal 1 : 99 I. C. 189.

Rebuttal of presumption.

——entry does not save a person relying on the entry, from producing and proving document on which the entry was based. Evidence of facts documentary or oral of a date prior to publication of record is to be considered in determining *the correctness of the* entry 9 C L J 284 . 4 I. C. 54, 75 I. C 427 (P), 1 Pat L. J 67, *12 C W. N. 904, 22 C L. J. 140, 56 I. C. 40*

——the question whether the presumption is rebutted by a kabulyat *is more a question of fact* than of law. 65 I. C 527 (C)

Rebuttal of presumption—*contd.*

—entry may be rebutted by evidence of what happened before the record was made 20 C. W. N 185, 31 C W N 192: 1927 Cal. 268: 100 I C. 7.

—if the entry is based on material which in law does not ... e party is not limited ... 107

... erroneous is on the

—the presumption being statutory the fact that both parties allege that the entry is incorrect in certain respects will not take away the statutory presumption attached to it 1927 Pat 164: 100 I. C 701: 8 Pat L. T 121: 6 Pat 342

—the evidence for rebutting the presumption mentioned in sec. 103, sub-sec (3) may be external to the settlement proceedings or may be apparent on the face of those proceedings. Where from the settlement of reasons it was seen that the Revenue Officer did not determine the existing rent, the presumption was rebutted. 29 C. W N 517 87 I C 1014 1925 Cal 799, 27 C L J 107.

—presumption is not rebutted by a pending proceeding under sec 106 B. T Act 19 C W N 211 n

—the presumption arising under the sec in favour of correct- ... that certain lands were by ... nd rebutted upon ... l of the Zemindar, ... 925 36 C L. J ... I C. 984, P. C

—but where evidence had been adduced by each party in support of his case and the relevant facts were before the court, the question of burden of proof was immaterial and importance should not be attached to the question on whom initial onus lay. 34 C. L. J 133.

—the presumption of correctness of the entry in the Record ... by Road cess returns ... g 48 of 1793. 27 C.

... should be taken to rebut a presumption 1 Pat 167 75 I C 427

... rebutted merely by showing that the

...

—where the entry was that no rent was actually paid but the occupant *was not entitled to hold without payment of* rent and it was proved that since the grant to the predecessor of the

Rebuttal of presumption—*contd.*

occupant no rent had ever been paid, held, that the entry as regards the liability to payment of rent was sufficiently rebutted by the proved possession without payment of rent. 45 C. 574, 47 I. C. 763

——the entry in the record of right that certain *land is liable* for the payment of rent is presumed to be correct untill the contrary is proved. The mere fact that rent has not been paid is not by itself sufficient to prove that no rent is payable. 31 C. W. N. 35: 1927 Cal 1: 99 I. C 189.

——In a suit by plffs. alleging to be tenure-holders, for possession as against the landlord, the latter relied on an entry in the Record of Rights that some third person was the tenant under him (the deft.) But the deft. did not prove that he ever collected rent from that third person while the plffs let in evidence that both prior and subsequent to the Record of Rights they had realised rent from that third person throngh Court and out of Court, *held the* presumption about the entry was rebutted by the plffs 91 I. C. 608 (C).

... declaration of *khud kasht* right was ... nus was on the ... 304.

... ssion contained ... *can have the* ... s of law. 40 I. C. 937 (Pat)

... to the rate of rent is sufficient ... 282.

... of 1845 diputed lands ... ut in the Cadastral ... of the plff's Mouza ... session *of the lands* ... ere in *possession of* ... 324 Pat 213.

... as to whether the ... vidence, *is* a matter obviously within the competence of a final court of fact and incapable of being revised in second appeal 22 C. W. N. 449

Suit against entry.

——no regular suit lies to alter or correct entry. *35 C.* 1013: 12 C. W. N. 1032: 8 C. L. J. 322, 11 C. W N 48, *13 C.* W. N 111. (Chota Nagpur T. Act) *Contra*, such a suit in substance lies. 13 C. W. N. 181, 5 I. C. 266

——where a tenant was recorded as *kaemi raiyat* and brought a suit for a declaration that he was a raiyat at *fixed rate*, the suit was not one under the B. T. Act but under the *general* law of the country. 1 Pat L J. 67, and evidence of long payment *of rent* at an unchanged rate is admissible although *s* 50 of the B. T. Act does not apply to such suits. 1 Pat. L. J. 67, 35 *C.* 763 · 12 C. W N 432, 12 C. L. J. 108

For other cases see s. 111 A.

Limitation applicable to such suits.

——in a suit to set aside an entry made by Revenue Officer, Art. 14 of the L Act (1 year) does not apply. 11 C W. N. 48 30 C. 20

——Art. 120 of the L Act (6 years) applies 28 C. 676, 23 C. W. N. 883.

——mere entry does not give rise) to any cause of action. 23 C. L J. 561.

——in a suit for declaration of status against entry under sec. 111 A, no fixed time is prescribed 19 C. W. N. 1017, 15 C. W. N. 896

——if there is a regular challenge to the plff's right to his knowledge, 6 years rule of limitation applies But inspite of the challenge if the plff. retains possession he may bring his suit at any time within 6 years of any new challenge affecting him 2 Pat. L J. 493.

—[illegible] ancement of rent it is [illegible] entry as to the fixity [illegible] eclaratory suit under [illegible] for confirmation of possession escape the six year's rule Limitation runs from the date of publication of adverse entry 2 Pat L J 73, 72 I C. 781, 1 P L J 73

——where there are two consecutive finally published Records of Rights prejudicial to the plff. it is competent to bring a suit for declaration against the second record only and time runs from the publication of that record 1918 Pat. 225 3 Pat L J 361.

For other cases see s 111 A.

S. 104. SETTLEMENT OF RENTS AND PREPARATION OF SETTLEMENT RENT-ROLL.

——the irrebuttable presumption in favour of an entry under s. 104 does not apply where the proceedings of the settlement officer were carried on without jurisdiction 36 C L J 124 70 I. C. 822 1922 Cal 274, (17 C W N. 155, 23 C W N. 516, 46 C 90 23 C. W N 860) *Ref.*

——an entry in a record of right is conclusive unless altered by means of a suit under s. 104 H within six months from the date of the certificate of final publication or if an appeal has been presented to a revenue authority under s 103 then within 6 months of the disposal of such appeal 49 C. 1026 35 C L J 304: 67 I. C. 375. 1922 Cal 101, 35 C L J 14

——entry as to settled rent under sec 104 A to H is conclusive if no suit is brought under s. 104 H 17 C W N 153, 13 C. W. N. 210, 23 C W. N 516, 33 I C 420 (c), 51 I C 981 (c)

——a contract contained in a solenama under which a tenant is liable to pay at a certain rate cannot be affected by the settlement at a different rate under the Diara Act XXXI of 1858 But the rent settled under this Chap, is the same as under the Diara Act the tenant will be bound to pay the rent settled under the Chap. 63 I. C. 719

S 104. Settlement of rent and preparation of settlement rent-roll—*contd.*

——in a suit under s. 104 A by a person who was entered as a *tenure-holder for a* declaration that he was a raiyat, the onus *was upon him to prove* that he was a rayat 23 C. W. N. 649 P C.

——*s.* 15 (2) of the Limitation Act does not apply to suits under s 104 H. 45 C 934 · 27 C. L J. 374

——notice to Secretary of State is to be served like under sec. 80 C. P C 18 C L J 566.

——*suit against Secretary* of State must be brought within 6 months. 28 C L. J. 537, 27 C. L J 374, *F.*

——period of six months under s. 104 H cannot be extended. 27 C L. J. 374 · 45 I. C 238

——*such* suits must be brought within six months from the date of final publication 12 C. W. N. 107 n.

——if the period of six months expires on a day when the court *closed*, the suit may be instituted when the court re opens 1924 Cal. 464

——a suit under s 111 A can be maintained although a suit under *s 104 H* may be time-barred. 65 I. C. 669, 45 C. 615 *f.d.*

——a suit for the recovery of possession of land must be brought *within* s[illegible] publication of the Record of Righ[illegible]

——[illegible] uit for a declaration that he was [illegible] the suit came within the proviso to s. 111 A and not under *s.* 104 H and was not barred by *limitation*, though more than six months passed from the *date of final* publication 19 C. W. N. 1017. 15 C. W. N 896

——when the period of six months expires on a holiday *the suit* may be brought on the opening day. 40 C L. J. 233

——sec 104-H only contemplates a case where a person *has* been aggrieved so far as an entry of rent is concerned. 40 *C. L J.* [illegible] re governed by the special [illegible]. 23 C. W. N. 649 *P. C* [illegible] itside the scope of s 104 H [illegible] A Art. 120 of the *L. Act* applies. 45 C. 645 23 C W. N. 649 P. C., 45 C 934, *27 C. L. J.* 374, 46 *C.* 199 ; 22 C W N. 802.

——in filing a suit against Secretary of State for India *under* s. 104 H, the pl(f. is not entitled to exclude from the *period of* limitation, the period of two months during which a notice *given* to the Secretary of State is current. 46 I. C. 899 (c), *22 C. W. N.* 802, 46 C 199, 45 C. 934 , 27 C. L. J 374.

——the time of requisite notice cannot be extended *22 C.* W. N 817 · 28 C L. J. 536, 45 C. 934 ; 27 C. L. J 374, *22 C. W N.* 802 · *46 C* 199.

——under raiyats are not necessary parties in the *determination* of the question whether the entry of rent showing the rent *payable* by the pl(f to the Secretary of State is or is not *correct* 16 C. L. J 381, 383, 385 : 17 C. W. N. 835, 21 C. W. *N.* 427, 17 C. L J. 425

S. 104. Settlement of rent and preparation of settlement rent-roll—*contd.*

——settlement of rent under sec 104 has the force of a decree and operates as *res-judicata* 11 C W N, 1028, 1 C. L J 310, 29 C 252, 38 C. 278, 30 C. L. J. 1, 23 C W. N 860.

——clauses (a) to (g) of sub-sec (3) of sec. 104-A are designed to safeguard the Government revenue and to attach reasonable finality to the fixation of rental 3 C L. J 133

——the only relief which a plaintiff can claim in a suit under sec 104 H, is as to the amount of rent and not as regards status and the Secretary of State is a necessary party and not an under-tenant. 16 C L J 385 : 17 C W N 835

——s 104 H confers finality on the rent settled The defendant cannot in a rent suit urge the plea of title contrary to the entry in the Record of Rights 60 I C 501 (c)

——a suit for recovery of possession of land must be brought within six months from the date of final publication of Record of Rights under s 104 H. 40 C L. J 235

——a suit under s 104 H. does not lie on the ground that an enhancement of rent made by reason of a rise in the price of staple food crops should not have been made. 23 C W N. 383

——the special conditions and incidents of the tenancy mentioned in s 104 H. (3) (g) refer to the special conditions and incidents mentioned in s 102 (h), whilst the rent payble comes under s 102 (e) *above case*

——a plff under s. 104 H is competent to sue as to the entry of rent and not for a declaration that a tenant has not acquired right of occupancy 16 C. L. J 385 : 17 C W N 835 *contra* 16 C L J. 383 and 17 C L J 426, where the latter has been held to be consequential relief

——in a suit under s 104 H, by tenants who have been recorded as tenure-holders to have themselves recorded as raiyats, the court cannot disturb the rent settled unless the plffs succeed in showing under s 104 H 3 (e) that in the Record of Rights their status has been wrongly recorded. 21 C W N 505

——the only way in which a Record of Rights under ss 104 A to 104 F. can be altered is by a suit under s 104 H. 38 I. C 341 (c), 17 C. W N 153

——an entry as to rent settled under Part II Chap X cannot be challenged otherwise than by a suit under s 104 H Entries as to other matters including the quantities of land are not conclusive. 27 C W N. 982 35 C L. 304

——s 104 H contemplates a case where a person has been aggrieved as far as an entry of rent is concerned Therefore if a person is not really affected by an entry of rent in the Record of Rights he would not be entitled to claim a revision of rent under cl (4) of that sec even if he can bring his case under any of the sub-clauses of cl (3) of s 104 H 1924 Cal 464.

——s 104 H sub-sec (3) allows a suit amongst others on the grounds, (d) that land has been wrongly recorded as part of an estate

S. 104. Settlement of rent and preparation of settlement rent-roll—*contd.*

or tenancy, and (c) that the tenant belongs to a class different from that *to which he is* shown in the record of rights as belonging. 26 C. W. N. 100 : 63 I. C. 892.

——entry in the finally published ... as regards rent u... N. 516, 850 *fol.* 1...

——s 104 J ... payable 36 C. L. J. 124 : 70 I. C. 822.

——s 104 J precludes any evidence from being given to contradict the statement as to the rent mentioned in the Rent Roll. *20 C W. N 860 : 46 C. 90.*

——although the entry as to rent settled is conclusive under s 104 J, any other entry such as that a person is a tenant in possession *through his tenants*, is not irrebuttable but *shall be presumed to be* correct until it is proved by evidences to be incorrect. 1923 Cal 808 *33 C W. N 385 : 115 I C. 45*

——the Secretary of State was not competent *to recover rent* in excess of the rent entered in the Record of Rights although the entry was r... 49 C. 1026 ...

——an ... proceeding ... 37 C. L J 492.

——it is not competent to a civil court to *revise the fixed rent* in the Settlement Rent Roll 70 I. C. 207.

——effect of entry in Record of Rights. 49 C. 1026, *and presumption* thereunder. 70 I C. 822

——where new estate is constituted of lands found by *accretion* by the Revenue authorities and rent is fixed by *them and no* proceedings are taken to obtain a reversal or modification *of the* decision the tenants are bound under s 192 read with s *104 to* pay the rent so fixed. 60 I. C 391 (c).

S. 105. SETTLEMENT OF RENT.

——though the land in occupation of a tenant *may not be an* entire holding, it may be the subject of proceedings *under the sec* 48 C L J 590.

——suit for fair and equitable rent is maintainable *in civil court* 18 C. W. N. 466.

——*correctness of entry* can be impugned under *this sec 18 C* W. N. 268.

——where the tenancy is not agricultural *sec* 105 *does not* apply. 19 C W N. 35 : 27 I. C. 446, 46 C. 441, 22 C. W N. 1160.

——tank can be leased for agricultural purposes *and in respect* thereof a fair and equitable rent can be assessed *under. s.* 105 58 C 534.

——s 29 B. T. Act does not apply to a proceeding *under this* sec. 89 I. C. 951.

S. 105. Settlement of rent—*contd.*

——settlement officer can investigate questions which would otherwise be determined under sec 106 But where the matter is not the subject of investigation under sec. 105, a suit is not barred under sec. 109. 25 C. L. J. 556 : 21 C W. N 1004 : 44 C. 783, 14 C. W. N. 275n.

——the settlement officer is competent to grant enhancement of rent at a reduced rent in consideration of possible errors in the original measurement 15 C. W. N 921

——a landlord whose name does not appear in the khatian may sue under this sec. 18 C. W. N. 268, 17 C W. N. 348 . 17 C. L J. 431.

——enhancibility of rent cannot be questioned 18 C. W N. 949

——the questions as to status and area may be decided under this sec. 21 C. L J. 305, 1924 Pat. 18.

[illegible]

rent. 32 C W. N. 999

——issue as to status may be decided in the absence of under-raiyat 21 C W N 427

——in a case under s. 105 the court can decide points referred to in s 105A without formal issue. 51 I. C 969 (c)

——fair and equitable rent on excess land may be settled under this sec. 18 C. W N. 165.

——this sec applies both to the cases where rent has been fixed by agreement between parties and where no such rent has been fixed 16 C. L J 328 · 17 C W N 774

——whether land is liable to pay rent is to be decided under this sec. 19 C W. N. 44n.

——upon the application under this sec for enhancement of rent the revenue officer has no jurisdiction to correct the entry in the Record of Rights 1928 Cal 399 . 108 I. C 255

——a claim for enhancement on the ground of rise of prices in staple food crops under s 30 (b) is to be determined under this sec. and the parties should not be referred to separate suit in civil court. 29 C W N 253

——in a proceeding for settling fair and equitable rent it is not enough to find that there has been an increase in the prices of staple food crops but it is also necessary to find that the rent settled by the court is fair and equitable in consideration of all circumstances 32 C W N 999 115 I C 575 1929 Cal 47

——the landlord is entitled to costs of a proceeding under s. 105 14 C. L. J. 146

——suit for alteration of rent within 3 months after final publication will not be dismissed, 19 C W. N 1141.

——presumption under s. 50 applies 13 C W. N. 1149: 10 C L J. 343: 37 C. 30 F. B., 12 C W N. 904, 16 C L. J. 328 17 C. W. N. 774.

——in a proceeding under s 105 the landlord produced a

S. 105. Settlement of rent—*contd.*

kabulyat executed by the tenant *after the inception of the tennacy* showing that the rent was liable to be enhanced but there was nothing to show that the rent had ever been in fact enhanced, held that the presumption under s. 50 cl. (2) was not sufficiently rebutted. 51 I. C. 904, 52 I C. 702.

——the rate of rent is not concluded against the landlord by reason of his having made an application under s 105 if there was a valid agreement between the landlord and the tenant to the effect that the tenant would pay the sum which was made up of rent proper and abwabs as consolidated jama. 1928 Cal 399 108 I C 255

——where there is nothing to show how the tenancy was erected in a suit for settlement of fair rent the landlord is to base his claim upon some measurement on the basis of which the rent was assumed or adjusted. 55 C. 680 : 1928 Cal 553 ; 111 I C. 107

——where a kabuliyat is materially altered it is not admissible in evidence. 50 C L. J. 173

——distinction between *'objection'* under sec 105 and *'dispute* under sec. 106 shown. 22 C. 477, 23 C 257, 24 C. 462 : 1 C W N. 294 F. B., 28 C. 471.

——the fair rent settled cannot have retrospective effect on liability for rent incurred in respect of a period prior to the decision under s. 105. 26 C. W. N. 758, 9 I C. 1016 : 1926 Cal. 173

——when rent is fixed under this sec. tenant can take help of civil court for declaration that it is, *Lakhraj*. 19 C W. N 636, (this case was before the introduction of s. 105 A)

——where in a proceeding under s. 105 the issue as to whether the land was *lakhraj* was raised but for want of evidence the land was assessed to rent, a suit in the civil court for a declaration that the land was *lakhraj* was barred. 24 C. W. N. 223.

——the civil court can assess rent. 18 C. W. N 466.

——suit against 105 proceeding does not lie. 16 C L. J. 67

——when the question of area forms a subject of determination before the Settlement Officer it cannot be raised again in the civil court. 75 I. C. 670

——when the status of a tenant has been determined in a proceeding under s 105, a civil suit is not maintainable for its alteration in view of s 109. 37 I. C. 641 , 1 Pat. L. J 479, 27 C L J 210 : 44 I. C. 562

——under s. 187 B. T. Act an *Am-mukhtear* duly empowered can represent a landlord for the purpose of the application. 52 C. 139 : 86 I C. 1035 : 1925 Cal 637.

——*malguzars* are agents of the proprietors and can maintain suits under s. 105 80 I. C. 987.

——a tenant who has obtained a *bonafide* settlement for reclamation of waste land from a co-sharer landlord has the right to apply for settlement of rent against another co-sharer landlord who has got a portion of the lands by partition. 19 C. W. N. 407.

——the word "land" as used in s 105 may include a share of a co-sharer landlord and may therefore include the share of a tenant

S. 105. Settlement of rent—*contd.*

in a holding. When a tenant executes a kabuliyat in respect of such share a suit for enhancement can be filed by the co-sharer landlord. 48 C. L J. 590: 1919 Cal. 156 115 I. C. 269

——but a suit to assess rent is consistent with and arises out of the general law and s 188 is no bar to such a suit by a co-sharer. 22 C. W. N. 685.

——when the application purported to have been signed by all the landlords, subsequent repudiation and retiring from the case by some co-sharer will not attract the provision of s 188 so as to defeat application if other co-sharer landlords choose to proceed with it. 1923 Pat. 273, 52 C 139 86 I. C. 1035 1925 Cal 637.

——the withdrawal of some of the plffs does not disentitle the remaining co-sharer landlords to proceed with the suit, s 188 simply requires that all the landlords must join in making the application and not in continuing the proceeding 52 C 139 86 I C 1035 1925 Cal 637

——a Revenue Officer cannot permit some of the plffs to withdraw without the consent of the other co-plffs 52 C 139. 86 I. C. 1035; 1925 Cal 637.

——where in a proceeding under s. 105 against joint tenants some of them died but the fact of death was not brought to the notice of the court and the case was *contested on other grounds* unsuccessfully, in a suit for rent at the enhanced rate, the decree under s. 105 was held to be binding against the parties to the proceedings 28 C. W N 188 n

——where an application for settlement of rent was made only against one of the joint tenants and it was ultimately dismissed on the ground that such an application must be brought against all the *tenants, the landlord's remedy under this sec was exhausted and* he must resume his remedies in the civil court, if any 46 C. L. J. 555 1928 Cal 146 106 I C 836

——where the landlord applied under s 105 B. T. Act and the tenant applied under s 106 and disposal of application under s 105

s 106 by consent of parties, notwithstanding the decision decision under s 106 which 925 Cal 465: 82 I C. 953.

——after an application is properly made under s 105 its subsequent progress is regulated by the rules of procedure provided by the C. P C, the matter then passes from the control of the B T. Act to the domain of the C P C The subsequent withdrawal, from the proceedings, of one of the landlords does not render them invalid unless they are so rendered by virtue of the C P C. 52 C 139: 1925 Cal 637 86 I. C. 1035

——when the application is made under s 105 it is not necessary for the landlord or the tenant to name any person, mention of holding is sufficient. Subsequently the provisions of C P. C. applies to the proceedings 43 C. L J 91: 1926 Cal 1037: 97 I. C. 142, 46 C. L J 555. 1928 Cal 146 106 I. C. 836, 55 C. 1216.

S. 105. Settlement of rent—*contd.*

——proceeding under ss. 105 and 106 in the nature or continuation of proceedings in connection with the preparation of record of right, consequently the plff. need not name any person and when any persons are impleaded as defts., the plff. can implead real parties. 53 C. 1216.

——the court cannot refuse to implead a named person merely because the application is made two months after the final publication. But if the original application is in respect of a named person he cannot after the expiry of the two months' period apply to implead some other person in his place. 46 C. L. J. 555 · 1928 Cal 146 · 106 I. C 836.

——an *exparte* decree in a previous proceeding under s. 105 defining the extent of the holding is conclusive between the parties 55 C 464 : 32 C. W N. 472 : 1928 Cal 479.

——where a *Kabuliyat* mentions the area for which the rent is fixed, in an application for increase of rent on the ground of excess in area unless the tenant pleads that there was inaccuracy ... t to be taken as correct ... cepted as scientifically ... the landlord But still ... challenged, *prima facie* ... 1926 Cal 616 they ought to be accepted as correct. 91 I. C 763 : 1926 Cal 616

——in settling a fair rent under s. 105 though cl. (4) says that the Revenue Officer shall have regard to the rules laid down in the Act for the guidance of the Civil Courts in increasing or decreasing ... Revenue Officer and a Court ... ns and conditions embodied ... ts which regulate the rights ... N. 835 : 16 C. L. J 385

——where in a proceeding for additional rent for additional area a document said to be a memorandum of measurement was put in which had no date and there was nothing to show under what circumstances it was prepared, held that it should not be admitted in evidence 92 I C. 601.

——a stamp of eight annas only is to be paid for each tenancy on an application under this s. 28 C. W. N. 116 : 50 C. 903.

——when lands are held at fixed rate under a deed of grant an application for settlement of a fair and equitable rent will not lie. 27 C. W. N 328.

——when a *maurasi mukarari* patta is granted a perpetual grant on a fixed rent is implied. A provision in the patta that excess lands as found on measurement should be assessed at the rates fixed in the lease does not alter the nature of the tenancy 38 C. L J. 372.

... an auction sale must be taken ... holding the rent of which ... oppel on the part of the ... I C. 556

S. 105. Settlement of rent—*contd.*

——where during the pendency of a proceeding under s. 105 a tenure was sold in auction at the instance of the landlord, the purchaser was bound by the result of the proceeding although he was not a party to it and although in the sale proclamation the previous rent was stated 46 I. C. 136

——it is doubtful whether proceedings under this sec. are suits. *Defect in signature and verification do not make the application* invalid, nor the absence of the names of one of the proprietors. Where all the landlords filed an application but some withdrew, it should be decided as regards those who wanted to proceed with it 1923 Pat 273.

——under s 105 (6) when the parties agree amongst themselves by compromise or otherwise as to the amount of the fair rent the Revenue Officer is to satisfy himself that the amount agreed upon is fair and equitable, and it is only if he is so satisfied that he can record the amount as fair and equitable, otherwise he is to settle fair and equitable rent as provided in sub-secs. (4) and (5), 40 C L. J 34 : 82 I C. 396 · 1924 Cal 907.

——the decision of the Revenue Officer operates as a decree of a civil court in a suit between the parties as to the question of relationship and rental. 40 C L. J. 34 , 82 I. C 396 : 1924 Cal. 907, 26 C W. N. 758.

——when fair and equitable rent has been settled under s. 105, no suit lies for back rent at that rate for back period 52 C 910.

——where in accordance with a compromise in proceeding under this sec. the rate of rent has been fixed and in subsequent suit for recovery of rent a lesser rate is decreed according to the entry in the record of rights, the decision in that suit does not operate as *res judicata* having regard to s. 109, 1923 P 101.

——s 22 of the L Act is applicable to a petition under s. 105. 25 C. W. N 38

——the introduction of sec. 105A has not altered the scope of s. 109, which should be construed as before the introduction of that sub-sec. 72 I C. 781.

——in order to apply s 109 as a bar to a civil suit, it is essential to establish that the subject-matter of the civil suit has already formed the subject of an application under s 105 72 C 781

——where the proceedings under s 105 are barred on the [illegible] the [illegible] the [illegible] . 105.

——where the incidents of a tenancy to which the B T. Act applies has been determined in a proceeding under s 105 and 195 A. [illegible] appeal to [illegible]

[illegible] apply

S. 105 Settlement of rent—*contd.*

... 105 operates as civil

——where the existing rent was not determined in a suit under s 105 and all that was decided was only what the rate of enhancement should be, the decision will not operate as bar to the investigation of the question as to what was the rate of rent at the date of khatian. 114 I C. 407.

——the decision of the Special Judge settling a fair and equitable rent under this sec. is not open to second appeal but his decision as to the maintainability of a proceeding under s. 105 is open to second appeal. 1923 P. 86.

——in proceedings under s. 105 an appeal lies when the question to be decided involves not merely deciding what rent is payable but deciding the question of the principle to be allowed in arriving at the rent payable. Sec. 105 applies not only where no rent has been fixed but also when the rent has been fixed by agreement. 29 C W. N. 353 . 1925 Cal. 656 : 85 I. C. 693.

——where in a proceeding under this sec. the landlord abandons his claim for enhancement of rent and obtains a decree for additional rent for additional area, the Special Judge on appeal cannot grant a decree for enhancement. 67 I C 1001 (c).

——the period within which an appeal is to be preferred is thirty days from the date of the decree under Sch. III Art 4 and in as much as the schedule is an essential part of the decision, whether it be a decree or not, the period of 30 days is to be counted from that date. 22 C W. N. 20n., 44 I C 152.

——the Appellate Court is competent to allow a deduction on the measurement on the ground that the measurement was not a scientific one 46 I C. 544.

——the H. C. cannot go into the question whether the rent settled in a proceeding under s 105 is fair and equitable or not if the Lower Court had jurisdiction 53 I. C 411.

Res judicata and withdrawal

——application made but withdrawn is to be treated as never made. 28 C. L J. 254, 40 C 428

——a Revenue Officer can allow the suit to be withdrawn with liberty to bring a fresh suit in his own court and the effect of this order is as if the suit was never instituted 25 C W. N 1022 35 C L. J 19

——a Revenue Court cannot permit one of the plffs to withdraw without the consent of the other co-plffs 52 C 139 : 86 I C. 1035 : 1925 Cal 637.

——the decision of the Revenue Officer operates as a decree of a Civil Court in a suit between the parties and it has the force and effect of a final decree deciding relationship and rental 40 C L J 34 · 82 I. C. 396 : 1924 Cal. 907.

S. 105. Settlement of rent—*contd*

where in a previous suit under s 105 the question as to the maintainability of a suit on the ground of jurisdiction was raised and adjudicated upon and it was not appealed against, it is not open to the parties to bring a suit subsequently in the civil court for declatory decree that the decree of the Revenue Court was without jurisdiction 30 C W. N. 974 : 1926 Cal 1180 97 I C 702

——settlement of rent amounts to a decree. 11 C W N. 153

——where the plff after getting rent fixed in a 105 proceeding sued for the same and the deft denied that there was any proceeding under s. 105 and said if there was any in secret, it was not binding on him and there was no issue as to the validity of the proceeding under s. 105 nor fraud was set up, held that the court *could not go into the question whether there was a valid service of notice in the proceeding under s. 195* and that the deft's remedy was to set aside the order settling the rent by appropriate proceedings 92 I C 714 1926 Cal 582.

S. 105A DECISION OF QUESTIONS ARISING IN SETTLEMENT OF RENT.

——the issues mentioned in s 105A can be tried in a proceeding for settlement of rent under s 105. 18 C W N 268

——in a case under s 105 the Court can decide points referred to in s. 105 A without formal issue. 51 I C. 969 (c)

——the introduction of s 105A has not altered the scope of s 109 which should be construed as before the introduction of that sub-sec 72 I C. 781

——a decision in a proceeding under s 105A as to the relationship of landlord and tenant operates as *res judicata* in a suit for ejectment. 3 Pat L. J 379 46 I. C 125, (30 C 339, 29 C. 707, 19 C. L J 457) *discussed*

——a decision in a proceeding under s 105 is *res judicata* and cannot be reagitated even in defence 1927 Pat. 32 10 Pat L. T 91.

——a decision in a proceeding under s 105A that certain persons are tenure holders does not bar a suit by those persons against certain other persons who were not parties to the proceedings under [illegible] ground that they are

[illegible] provisions of s. 105A jurisdiction to decide whether an occupant of the land stands in the relation of a tenant towards the applicant. 52 I. C 406, 18 C. W N 268

——where an [illegible] 105 and 105A for [illegible] tion that [illegible] and that [illegible] of righs [illegible] of Rs. 20 [illegible] C W. N.

S. 106. INSTITUTION OF SUIT BEFORE A REVENUE OFFICER, SCOPE OF THE SEC.

Scope of the sec.

——Settlement Officer is confined to question of possession and cannot determine anything as to title. 18 C. W. N. 938 : 19 C. L. J 197, 14 C. W. N. 884 . 12 C. L. J. 107, *contra* 35 C. 101, 38 C. L. J 322 . 12 C. W. N. 1032 a dispute as to an entry in the Record of Rights can be decided under this sec. 18 C. L J. 187, 19 C W. N. 911.

——a person out of possession cannot apply under this sec 19 C. W. N. 911, 15 C. W. N 974, 17 C. W. N. 75.

——in a suit under s. 106 a prayer for possession cannot be included 49 C. L. J. 285 : 33 C. W. N. 623 : 1929 Cal 385

——the scope of a suit on proceeding under s 106 to alter an entry must be limited to the question of possession 1929 Pat 590 : 117 I. C. 644.

——a suit under s. 106 is in essence a suit for a declaratory decree in which no consequential relief is asked for 15 C W. N 110.

——a prayer for declaration of title and for recovery of possession are matters entirely foreign to the jurisdiction of the Revenue Officer under s. 106. his work being confined to a decision of the point whether the record of rights is correct or not. 24 C. L J. 79. *contra*, 14 C. W. N. 812

——where the plff claimed title on an allegation of adverse possession for st[illegible] not fall within the scope of sec. 106 and ar[illegible] me was in no way barred by s[illegible] e Civil Court.

——s. 106 d[illegible] J 197 18 C 19 C. W. N. 636, [illegible] 12 : 8 C L J W. N. 938 (18 C. 322), *diss. from*, 1[illegible]

——s. 106 is not the only remedy for the correction of an entry and civil suit for that purpose is maintainable. 25 C W. N. 13

——but where a prior suit under s. 106 for the correction of an entry has failed no civil suit on the same matter lies 49 C L J 285 : 33 C W. N 623 : 1929 Cal. 385.

——plaintiff is to prove not only incorrectness but how and in what respect it should be amended. 25 C L. J. 53 : 21 C. W. N 492.

——when case under this sec. is transferred to civil court the matter is not confined like Revenue Court. 17 C L. J 416, 11 C L J. 158, 12 C. L. J 638.

——where a Settlement Officer has no jurisdiction to entertain a suit under s 106, he cannot transfer the case to a civil court for trial 4 Pat. L T. 68 : 1 Pat L R. 157 : 73 I C 5 : 1923 P. 213

——when a case under s. 106 is transferred to the civil court, the appeal lies to the Sub-Judge and not to the Special Judge. 27 C L. J 281.

——the Civil Court also cannot give possession like the Revenue Court. 17 C. W. N. 750, 15 C. W. N. 974.

——decision of the disputes as to whether a particular parcel is in exclusive possession of any one of the parties or in joint posses-

S. 106. Scope of the sec.—*contd.*

sion, involves the determination of a question not of title but of possession. 35 C. L J. 195

——decision under s. 106, B T Act is not a bar to a suit for declaration of title and recovery of possession 24 C L J 90.

——it is absolutely necessary to correct an entry bringing a civil suit or a su[illegible] 19 C W. N. 35. 1 P. L. W. 434 : 2 P. L [illegible] 1 P. L J 563 : 38 I. C 37, 11 C. [illegible]

——co-sharer [illegible] nder this sec 10 C L. J. 458

——when a landlord brings a suit for ejectment on the ground that the deft. is not a tenanant but a trespasser, decision in a previous proceeding by the landlord under s 106 will operate as *res judicata.* 50 C 79 1923 Cal 433, 3 Pat. L J. 379 *fol*, 16 C C L J. 67 *Ref.*

[illegible] ghts under s. 106 as regards settlement of rent so as to [illegible] emplates settlement of rent

——in deciding disputes between rival proprietors under this sec. the Revenue Officer is confined to the question of possession only 45 I. C. 781, 73 I C. 5 1 Pat 157, 63 I C 602, 12 C W. N 8, but as regards the other parties claiming, the Court is not confined to the question of possession. 19 C W. N 911, 41 I C 698, *contra* the remedy of a proprietor against his rival proprietor for correcting an entry lies in a suit under s 106. 35 C. 1013 : 12 C W. N. 1032 : 8 C L J 322.

——a civil suit lies to correct an entry in the Record of Rights and it is not barred by the fact that a proceeding under s 106 was [illegible] fresh proceed- [illegible] N 636 [illegible] Record [illegible] liberty [illegible] under s. 106 a suit

evidence upon which the record was prepared and the correctness of the entry is denied by the plff, the court must come to a finding whether that evidence is sufficient to justify the entry. 62 I. C. 417.

——where there are two consecutive finally published records to the same effect it is competent to the aggrieved party to ask for a declaration against the second Record of Rights. 3 Pat L. J 361

Court-fees.

——a separate suit ought to be instituted with respect to each class of tenants and a separate court-fee of Rs. 10 should be paid for each suit. 22 L. W. 57.

S. 106. Court-fees—*contd.*

——a suit instituted under s. 106 although transferred to the ordinary Civil Court is a suit for a declaratory decree within the [illegible] and is not

[illegible] asurement

[illegible] as to the

Resjudicata and withdrawal.

——before the amending Act of 1898 order under sec. 109 was not *res-judicata*. 20 C. W. N. 275 ; subsequently it was held *res-judicata*. 20 C W. N. 491.

——proceeding under this sec. does not bar a Civil Court to try a suit for title and for possession 24 C. L. J. 79

——a decision of the Revenue court under s 106 does not operate as res-judicata so as to bar a suit in the civil court 54 C 114 : 44 C L J. 467 : 1927 Cal. 216 : 100 I. C. 293, 12 C. W. N *Rel on* (15 C. W N. 974, 10 C. L J 197, 19 C. W. N. 911) *Ref.*

——*ex-parte* order is binding but not *res judicata* 5 C. W. N. 312 n.

——a decision under s. 106 as regards the question of relationship of landlord and tenant operates as *res-judicata*. 71 I C 307

——a suit under s. 106 withdrawn with permission to bring fresh suit is to be considered as one never instituted and s 109 is [illegible] 35 C. L. J. 19 ; 25 C. W. N 1022

[illegible] under s. 106 is no bar to the [illegible] 48 C. 339, 25 C W. N 13 · 61 [illegible], 35 C. 1013 *Diss. from* 14 C W. N 854, 891 *Ref.*

——where a suit under this sec. was withdrawn with liberty to bring fresh suit a subsequent suit in the civil court was not barred by s. 109. But where an application or suit has been dismissed whether upon merits or for non-prosecution it comes within the words "has been the subject" of s. 109 and it stands as a bar 25 C. W N 1022 : 63 I. C. 954. *But the proviso to s. 109 has set the point at rest.*

——where a suit under s. 106 is dismissed for default the order of dismissal is not a decision under s. 107. 18 C. W. N. 604

S 107. PROCEDURE.

——"force of a decree" does not mean that it will always be *res-judicata*. 7 C. W. N. 33 p 54 : 30 C. 339 (appeal to Privy Council 17 C W. N. 389 P. C.), 29 C. 252.

[illegible] ement Officer *had the effect of a* [illegible] fore amendment and *is evidence* [illegible] ught by the landlord even though [illegible] 11 C. W N. 1028.

——to have the force of a decree there must be adjudication on the merits. 18 C. W. N. 604, 18 C. W. N. 128.

S. 107 **Procedure**—*contd.*

ssed for default the order *above case.*
s laid down in C. P C for dings under ss 105 and 106; fault does not operate as res judicata as it does not amount to an adjudication on merits. 53 C. 475 : 1926 Cal. 980 : 95 I C 87.

——the decision in a proceeding for settlement of fair rent is a decision of the Revenue Officer within this sec in a suit in the Civil Court for declaration of *nishkor Lakheraj* 24 C. W N. 223

——the decision is final unless appealed against. 38 C 278.

——where there is no contest the case does not fall under s 107. 9 C W N. 610 : 1 C L J 134 32 C. 336.

S 108. REVISION

——under s 108 on the application of a person affected, the Revenue Officer may revise his decision under secs 106 and 107 12 C. W. N 1032.

——this sec does not warrant the Settlement Officer in revising the entries as to *mal* lands in the Record of Rights 35 C 176 · 12 C. W. N 122 7 C. L J 103

——the power under s 108 is not restricted to revision of the decision or order on the merits. 22 C L J 57.

——every court has inherent power to take steps for the accuracy of the records. 19 C L J. 251

——*bonafide* mistake cannot be corrected under s 108, without notice to the tenant concerned 28 C W N 4 n.

——every court has inherent power to take steps for the preservation of the accuracy of its records 19 C L. J 251

——the terms of the sec. 108 are very comprehensive. A specially empowered Revenue Officer is invested under this sec. with the power of review of his own order or to revise the orders made by another Officer. So he can revise consent-decree made *ex-parte* under sec 106 18 C. L J. 125, 18 C L J 187

——it is sufficient if the application for revision was made within the period of 12 months even if the order in revision was not passed until more than 12 months had expired from the date of the order. 30 C. W N. 638 95 I. C. 971 1926 Cal 849

S 109. BAR TO JURISDICTION OF CIVIL COURT.

——s 109 is no bar to suit in the Civil Court for assessment of rent 18 C W N 466

——a suit to impugn the result of proceeding under sec 105 is not maintainable [illegible] but it may be impugned by [illegible] W. N. 223 *Dist* general rules of *res judicata* [illegible] C. L. J. 104.

——the sec. is not bar to a declaration that proceedings under s. 105 are vitiated by fraud. Where the matter is not subject of

S. 109. Bar to jurisdiction of Civil Court—*contd.*

investigation under ss. 105 or 105A, s. 109 is not a bar to a suit. 25 C L J. 556 : 21 C. W. N. 1004 : 44 C. 783.

——the introduction of s 105 A. had made no change in the law in this respect. 14 C. W. N. 897 : 12 C L. J. 195, 19 C W N. 636, 637.

——s. 109 is bar only in respect of matters which are legally the subject matter of the investigation under Chap. X. 24 C L. J 79

——a suit in the Civil Court is not barred unless the Civil Court has for its subject a matter which has already formed a subject of an application under s. 105. 46 C. L. J. 46 : 1927 Cal. 711 : 104 I. C. 349

——where a previous suit under s. 105 by the plaintiff as cosharer landlord for enhancement of rent was withdrawn on the ob- [illegible] subsequently the [illegible] rought [illegible] d by s. [illegible] ot the [illegible] same 56 C. 584

——parties cannot approbate and reprobate. 56 C 584, 39 C L. J. 40.

——it is not competent to a Civil Court under s. 109 to enquire into the status of a tenant which was the subject of an inquiry before a Revenue Officer. 27 C L J. 210.

——the defence taken in suit for rent that there should be an abatement of rent as there has been a decrease in area cannot be considered as an application or a suit within the meaning of s. 109 and the plea is not prohibited. 1926 Cal. 513 : 91 I. C 738.

——this sec. is a bar to the entertainment of an application or suit but is no bar to the defence to an action. 53 C. 47, 1926 Cal. 980

——the doctrine of constructive *res judicata* enunciated in s 11 C. P. C, cannot be applied in construing s 109 read with s. 105, 1923 *P.* 174.

——in a suit for abatement of rent the Settlement Officer's determination of the area actually held cannot be re-agitated in the Civil Court since that has once been determined under s. 105, 75 I C 670.

——this section is no bar to a defence. 26 C W. N 758 49 C. 857, 24 C W N. 223 *Dist.*

——where the mortgagor in possession through tenant made an agreement with the tenant and converted the Bhawli rent into Nagdi rent at a considerably low rate, the mortgagee who subsequently purchased the property in execution of his mortgage decree was not bound by the said agreement under s 109. 1 P. L J 563, 17 C L. J. 384. *Ref.* 1921 Pat. 165 : 1 Pat. L. T. 392 : 56 I C 805.

——in a suit for abatement of rent, the Settlement Officer's determination of the area actually held cannot be reagitated in the Civil Court since the same has once been determined under s 105 : 5 Pat. L. T. 98 : 75 I. C 670 : 1924 Pat. 511.

S. 109 Bar to jurisdiction of Civil Court—*contd.*

——where certain holdings were recorded in the Record of Rights as liable to assessment of rent and the landlord applied under s. 105 to have the fair and equitable rent settled while the tenant did not ... the tenants and that ... hem, held ... were not ... N 826 : 95

I. C. 334 : 1926 Cal. 822

S. 109A APPEALS FROM DECISION OF REVENUE OFFICERS.

——s 109 A is no bar to an appeal from an order of a Special Judge refusing to set aside an abatement of an appeal 37 C. L. J. 139 · 1923 Cal. 431 · 74 I C 925, 45 C 638

——an appeal does not lie from an order of remand passed by a Special Judge under the B T. Act 7 C W. N 440, 37 C L. J. 314 : 72 I. C. 1013

... ion of a ... ttlement ... C. 380. ... ettlement ... questions ... a second

——settling a rent must be, distinguished from settling a dispute relating to rent When no rent is fixed in the record of rights or where rent fixed in the record of rights is accepted as ... manded the decision settles ... letermines what the actual ... and second appeal lies 32

——the words "a decision settling rent' in s 109-A, Act VIII of 1885 (B. C) do not mean and include any decision upon the question ... They mean only a decision ... and equitable rent in ... not include a decision ... vords 'settling a rent," ... might be their ordinary

——the expression "settling a rent" includes enhancement and therefore s 109-A bars a second appeal when rent is enhanced 20 C. W. N 48 n

——the words "not being a decision settling a rent" in s. 109 (3) refer not only to a decision by which existing rents are varied, but

S. 109A. Appeals from decision of revenue officers—*contd*

also a decision by which existing rents are maintained as fair and equitable. The words "settle a fair and equitable rent" in s 105 (1) do not exclude a case in which the existing rent is not varied Therefore, the decision of the special judge, on appeal from the decision of the Settlement Officer, disallowing enhancement of rent is a decision settling a rent within the meaning of sec 109 (3) and consequently no second appeal lies to the H. C., from the decision 33 C 837 4 C L J. 138, (16 C. 596, 17 C. 326, 25 C. 146) *Ref*

——when in a proceeding under s. 105 the Special Judge holds that there was no excess land and therefore no rent to be settled, a second appeal lies to the H C. 37 C. 30 : 13 C. W. N. 1149 · 10 C L J 343 F. B, 5 C L J 538 *Ref.*, 14 C. L. J. 110 43 C. 603 : 20 C W. N. 428 23 C. L. J. 281 F. B.

——this sec limits the power of the H. C., to the hearing of second appeals and not appeals from order under s 558 or s 560 C. P C. 36 C 510.

——an appeal lies from an order refusing to rehear an appeal dismissed for default, even though such appeal has been preferred under s 109-A sub-sec. (2). 45 C. 638 28 C. L J. 155, 7 C W N. 440 *Dist*

——no second appeal lies from the decision of the Settlement Officer settling rent. 35 C 176, 33 C. 837 · 4 C. L. J 138, 33 C. 832

——this sec is no bar to an appeal in a case of a settlement of rent, in which a question of jurisdiction is definitely raised. 19 C W N 35.

——where in a proceeding under s. 105 the Settlement Officer held that the rent was not enhancible by virtue of sec. 50 and on appeal the Settlement Officer held that the rent was enhancible, a second appeal lay. 18 C W. N. 949

——where a Special Judge acted illegally in settling the rent his decision was not open to second appeal. 38 I C. 32 (Pat)

——in an appeal arising out of a proceeding under s 105, a Special Judge is entitled to allow a deduction on the measurement on the ground that the measurement was not a scientific one 46 I C 544

——when the question raised relates to the competency of a court to settle rent and not to settling the rent itself a second appeal lies. 89 I. C. 190

——where in a proceeding under s. 105 question arose as to whether the rent was liable to enhancement, a second appeal lies under s 109-A. 62 I. C. 677.

——clause (3) of s. 109-A makes the provisions of Chapter XLII of the C. P C 1882 applicable to an appeal to the H C, from the decision of Special Judge. 46 C. 189 : 23 C W N. 345.

——where a suit under sec. 106 is transferred to a civil court and decided by a Munsiff the appeal does not lie to the Special Judge and the competency of the civil court is to be ascertained under the C P. C. and the Subordinate Judge is competent to hear the appeal 27 C. L. J. 281.

S. 109A. Appeals from decision of revenue officers—*contd.*

——the period of limitation for second appeal is ninty days from the date of the decision in a case under s. 105 and 105-A and not from the date on which a memorandum is added to the decision taking the amount of costs incurred in the case. 5 Pat. L. J. 472.

——the Schedule prepared is a decree and in calculating the period of limitation for preferring an appeal time should be taken as running from the date of the Schedule 22 C W. N. 20n : 44 I. C. 152

——the act authorised by the B T. Act in the making of an [illegible] 'horise a new act, [illegible] by sec 108 B. T. [illegible] C. 139 . 86 I. C.

S. 109B. POWER OF REVENUE OFFICER TO GIVE EFFECT TO COMPROMISE

——under s 105 (6) when the parties agree amongst themselves by compromise or otherwise as to the amount of the fair rent the Revenue Officer is to satisfy himself that the amount agreed upon is [illegible] it he can record [illegible] to settle a fair [illegible] 40 C L J. 34

——the inquiry under sub-sec. (1) of sec. 109-B is obviously contemplated in a case where the agreement or compromise has been made for the purpose of settling a dispute. 19 C W N 321

——s 109 does not apply to a case where the contract between the parties was made several years before the settlement proceedings, 19 C. W. N. 321

S. 109C. POWER OF REVENUE OFFICER TO SETTLE RENTS ON AGREEMENT

——sec 109 (c) must be strictly complied with The Settlement Officer must be fully satisfied at the fairness and legality of the terms of compromise and must write out the order in unambiguous language. 37 C L. J 118 : 1923 C. 435 : 70 I C 895

——where on a compromise in a proceeding under s. 109-C the tenant agreed to pay *nagdi* rent in lieu of produce rent, and the rent settled was much low in consideration of the heavy *nazorana*, the mortgagee of the landlord who subsequently purchased the landlord's interest was not bound by the rent settled. 1921 Pat. 165.

S. 111. STAY OF PROCEEDINGS IN CIVIL COURT DURING THE PREPARATION OF RECORDS OF RIGHTS

——the expression "shall not entertain" includes the case not only not already instituted but cases where suits have already been instituted but not tried, 51 C. 230 : 28 C W. N. 631 81 I. C. 993 ; 40 C. L. J. 177 : 1924 Cal 704.

——s. 111 B. T. Act means that after an order has been made under s. 101, the Civil Court shall not try any suit, if such suit has

S. 111. Stay of proceedings in Civil Court during the preparation of records of rights—*contd.*

already been instituted, until three months after the final publication, 51 C. 230 . 40 C L. J. 177 : 28 C. W. N. 631, 17 C. W. N. 408 : 17 C. L J. 289, 19 C W N. 1141 *fol.*

——a suit for alteration of rent instituted within three months of the final publication of the Record of Rights should not be dismissed altogether but should be stayed until the expiry of the period 19 C W N. 1141

——the expression "suit for alteration of rent" in this sec includes not merely a suit of the nature described in s 52, but also a suit for enhancement of rent under s. 30 21 C L. J 489

——where in a suit for possession on the allegation that the deft was a trespasser the deft. set up a tenancy and pleaded that the suit was not maintainable as settlement proceedings were in progress in respect of the village in which the land was situated, held that the suit was not one for the alteration of the rent or the determination of the status of any tenant within this sec and was consequently not barred. 3 C. L. J. 63n, similar case 32 C W. N 132

——under secs 111 and 111 B, if the plaint be not rejected before registration it cannot be rejected afterwards 21 C W. N. 209. 17 C W. N 408 . 17 C L J. 238, 17 C. L. J. 634, 19 C. W N. 1141, 21 C L J. 489, 29 C. L. J. 17, 34 C 20 : 4 C. L. J. 421 : 11 C W N 39 F B

——the expression "entertain a suit or application" means the consideration of a suit or application and equally applies to a suit instituted before the declaration for the preparation of the Record of Rights is made as much as to suits instituted after. 88 I. C. 670 1925 Cal 1211.

S 111A. LIMITATION OF JURISDICTION OF CIVIL COURT IN MATTERS RELATING TO RECORD OF RIGHTS.

——the first part of sec. 111 A. prohibits suits which seek to take undue advantage of mere technical defects in the procedure leading up to or involved in the settlement proceedings. 3 C. L J 133

——sec 111 A applies only where settlement proceeding is undertaken at the instance of Govt. 25 C. L J. 556 : 21 C. W. N. 1004, 35 I C. 695, and when requirements of s. 101 (2) (i) are fulfilled. 17 C W. N. 1151 : 40 C 123, 45 C. 465, 15 C W. N 836.

——a suit for declaration that an entry contains a new statement may be instituted within 6 years of the date when the cause of action arises 11 C. W. N. 48.

——under ss 111 and 111B, if the plaint be not rejected before registration it cannot be rejected afterwards. 21 C. W N 209. 17 C W N 408 : 17 C. L. J. 238, 17 C. L J 634, 19 C. W. N 1141, 21 C L J 489, 29 C L. J. 17.

——it was competent to a court to reject a plaint under s 54 (b) C P C 1882 after the plaint had been admitted and only registered. 34 C 20 11 C W N. 38 · 4 C. L J. 421

S. 111A. Limitation of jurisdiction of civil court in matters relating to Record of Right—*contd.*

——where the record, if allowed to stand would restrict the absolute ownership of the plff and disentitle him from excluding the deft from some act of possession, the plaintiff had to complain against the entry in the record of rights and to bring declaratory *suit as provided by this sec* 28 C. W N 516 80 I C. 805 : 1924 Cal 667.

——a suit for a declaration that the plff. was an occupancy rayat is within the proviso to s. 111 A and not under s. 104 H. 19 C. W. N. 1017.

——apart from the B. T. Act the person aggrieved by an entry and who has failed to avail himself of the means given him to orrect the wrong entry under that Act cannot be denied of his ight to bring an ordinary civil suit, but it will result in a declaration only and will not have the force to compel the revenue authorities o alter the finally published record 31 C W. N 499 : 1927 Cal. 58 : 102 I. C. 113.

Limitation.

——in a suit to set aside an entry made by Revenue officer, Art. 14 of the L. Act (1 year) does not apply. 11 C. W N 48, 0 C 20.

——Art 120 of the L. Act (6 years) applies 28 C 676, 23 C W. N. 883, 47 I. C. 820.

——mere entry *does* not give rise to any cause of action 23 C. L. J. 561

——in a suit for declaration of status against entry under s. 111B, no fixed time is prescribed 19 C. W N 1017, 15 C W N. 896.

——in a suit for declaration that the entry in the Record of Rights, that a person is a tenure holder is incorrect and he should be declared a rayat; Art 120 of the L. Act (6 years.) will apply and not s. 104 H. 1929 P C 286 and 15 C. W. N 896, *Approved.*

——in a suit for declaration of status against entry 6 years *(Art. 120) limitation is to be computed from the date of final* publication and not from the date when the certificate was signed. 41 C. L. J 31

——if there is a regular challenge to the plff's right to his knowledge, 6 years' rule of limitation applies but inspite of the challenge if the plff retains possession he may bring his suit at any time within 6 years of any new challenge affecting him 2 Pat. L. J. 493.

——before instituting a proceeding for enhancement of rent it is not [illegible]

[illegible]

1 Pat. L. J. 73.

Limitation—contd.

——entry does not create or extinguish right. 1917 Pat. 2 P. L. J. 124, 11 C. W. N. 48

——limitation applicable to a suit coming both under 104 H 111 A. 47 I. C. 820

——but suits coming both under s 104H sub-sec. (3) cls. and (g) and the more general s. 111A which must be read with s Sp R Act would be barred under s 104H sub-sec. (2) if brou after the expiration of 6 months from the date of final publicati 13 C W. N. 107n

——where there are two consecutive finally published reco of rights prejudicial to the pliff. it is competent to bring a suit declaration against the second record only and time runs from t publication of that record. 1918 Pat 225 : 3 Pat. L. J. 361.

——although a previous claim may be barred by limitation und s 104H a suit under s 111A may be maintained. 65 I. C. 669

——in a suit for a declaration that the tenant had a stat different from what was recorded limitation does not run from th date of the decision of the dispute and a suit brought within 6 yea from the date of final publication was held to be within tim 68 I. C 489.

——before instituting a suit for enhancement it is not necessa to sue for a declaration that an entry in the Record of Rights th a raiyat entered as a fixed raiyat is wrong. 72 I. C. 781.

Court-fees

——in a suit for declaration (1) that the pliff was in possessio as an occupancy raiyat and (2) that his status recorded as a tenur holder was a nullity, the first prayer was held to come under s. 11 A. but the second prayer was held to be for consequential relief an as such *ad valorem* court-fee was to be paid 44 C 352 : 21 C. W. N 834.

S 111B STAY OF SUITS IN WHICH CERTAIN ISSUES ARISE

——s 111 B does not take away the jurisdiction of the Civil Court. 29 C. L J 17 : 21 C. W. N 209.

——though a suit cannot be instituted within 3 months the jurisdiction of the Civil Court is not wholly taken away when no suit has been instituted in respect of the same matter in the Revenue Court. Such suit may be instituted on the expiry of that period and there is no provision in the Act for the dismissal of a suit within the said period. *above case.*

——where a suit involved issues mentioned in cls (b) and (c) within three months from the date of final publication it need not be dismissed but may be treated, subject always to any question arising under s. 109, as though the suit was instituted on the day following the expiration of such period. 35 I. C. 76

——in a suit under s. 111-B the right to sue accrues from the date of the final publication of the record of rights but the pliff may

S. 111B Stay of suits in which certain issues arise—*contd*

get an extention of period of limitation by three months because sub-sec. (4) states that limitation is suspended for that period from the date of the certificate. 56 C. 407.

S. 113. PERIOD FOR WHICH RENT AS SETTLED IS TO REMAIN UNALTERED.

——*this sec., is not controlled by s. 103 B. i.e. mere entry of* an existing rent in the Record of Rights 21 C W. N 546: 34 I. C. 32

——where a suit was brought for recovery of rent for excess land in excess of the rent settled under s. 104 to 104 F, s 113 was no bar but s 104 J was a bar to maintainability of the suit. 17 C W. N. 153

——where a fair and equitable rent has been settled under s. 105 proceeding for enhancement of rent before the expiration of 15 years except on the ground mentioned in s 113 is barred, 72 I. C. 78, such suit is not maintainable even on the ground of prevailing rate 45 C 930

——where under the stipulation waste land becoming culturable were to be assessed at the settlement rate of rent the increase in the rental would accrue automatically on any of the waste land becoming culturable, and s 113 would not be a bar 21 C W N 534 · 5 C L. J 128.

——the rent of a tenure settled under this chapter is not to be reduced on account of reduction of area 1926 Cal 1240 97 I C 470

S. 114. EXPENSES OF PROCEEDINGS

——expenses of the proceedings under chap. X of the Act is under s 114 (1) assessment not upon the land but upon certain persons in respect of the land But sub-sec (2) of s 114, whether it be taken to have wide or narrow operation, does not make the expenses as assessment on the land 33 C L J 349: 62 I C 925

——where the order of the Local Govt under s 101 (2) (a) is *intra vires* and legal and binding the order for apportionment of costs under s. 114 is also binding on the parties 40 C. 123. 17 C W N 115.

S. 115. PRESUMPTION UNDER S 50 WHEN DOES NOT APPLY

——by proof of uniform payment of rent for 20 years before the record of rights the tenant is entitled to the presumption of s. 50 cl (2). 12 C W. N. 904, 24 C L J 363, 1 Pat L J 67

——this sec is no bar to a tenant to claim the presumption in a case under s 105 or s 106 37 C 30 13 C W N 1149 10 C L J. 343 F. B

——but when the period falls short of 20 years before the record of rights, the presumption does not apply. 30 C L J 9 23 C W N. 1041, 25 C W N. 48 n, 45 C 930, 51 I C 552, 54 I. C 672

——where a tenure-holder was recorded as to have *kaimi* interest and not *mokrari*, no suit having been brought and the entry not having been corrected in a suit under s. 106, s. 50 does not apply 51 C. 454.

S. 115. Presumption under s 50 when does not apply—contd

——after the record becomes final the tenant cannot claim presumption under s 50, 26 C. W. N 945, 947, 45 C 930, 51 I C 552, 64 I C 445, *fol*. 26 C 617, 12 C. W N. 904 *Dissented from*. 37 C 30 13 C W N 1149 10 C. L. J 343 F. B. *Ref*. 25 C. W. N. 47n, 54 I C 672, 71 I C 15 (Pat), 1923 Pat. 324, 1925 Pat. 181, 86 I C 753

——the expression "thereafter" signifies after the particulars have been finally recorded after recourse to all the provisions in Chap X, 49 C. 919 26 C W N 947 · 36 C L. J. 291 ; 70 I. C. 537, 27 C 30 F B *fol* (45 C 930, 51 I C. 552) *Approved*, (26 C 617, 12 C W N 904) *Diss* 80 I, C 926 (Pat).

——the word "thereafter" refers to a period subsequent to a publication of the Record of Rights. 6 Pat. L T. 221 · 80 I. C. 926 : 1925 Pat 181

——this sec does not come into operation until all proceedings under Chap X have been exhausted 27 C W. N. 740

——the presumption arising under s. 50 ceases to apply by reason of s 115 only when the particulars required by the order of the Local Govt. directing the survey and Record of Rights to be prepared, have been in fact recorded It would not be right to presume that the entry in the R of R meant to record anything more than what was actually recorded 1924 Pat. 1.

——where the particulars under s 102 were not recorded s 115 is no bar to the application of s 50 1924 Pat 1, 80 I C 926 (Pat)

——presumption under s. 50 arises if entries in the Record of Rights do not comply with s 102 and s 115 does not apply. 29 C W N 209 40 C L. J 248 : 84 I C 989 . 1925 Cal 208 F. B.

——s 115 does not exclude evidence of uniform payment of rent for statutory period under s. 50 in support of an entry of fixity of rent 27 C. W N 936 : 76 I. C 4 I: 1923 Cal. 365, 37 C. 30 · 13 C W N 1139 (F. B), 26 C 617, 45 C 930 ; 22 I. C 604, *Dist*.

——under s 115 a tenant cannot rely upon the presumption under s 50 (2), except in a suit under s. 106 2 Pat L. T 642.

S 115 B. (CORRECTION OF MISTAKES IN RECORD OF RIGHTS)

——*bona fide* mistakes may be corrected under s 109 A. 16 A. L J 329 17 C, W N 625

——an appeal against an order of the Settlement Officer purporting to act under s 108 A lies to the Special Judge and a second appeal to the H C. if the Special Judge purports to act under s 109 A 19 C L J, 251

Ss 116 to 120, KHAMAR LANDS

——tenant under a lease of *Khamar* land is neither an occupancy raiyat nor a non-occupancy raiyat 20 C, W N 1097

——in case of private lands held under a lease for a term of years, s 116 does not allow tenants in possession under a lessee either the status of occupancy or non-occupancy raiyats They are liable to be ejected on the expiration of the term of the lessor's lease 88 I, C 874 1925 Pat 771

Ss. 116 to 20 Khamar lands—*contd.*

——apart from a registered lease for a term of years or from year to year no occupancy or non-occupancy rights arise in zirat lands 4 Pat. 89 : 6 Pat L T. 240 : 84 I. C 305, but it has been subsequently held by the F B. of that court that there is no absolute bar to the accrual of occupancy right in zerat land unless there is a lease for term of years or a lease from year to year the only circumstance contemplated by s 116 of a bar to the acquisition of such right. 1929 Pat 460 · 10 Pat L T. 569 118 I. C. 316 F B.

——unless the lands are private lands the tenant will acquire occupancy right therein. 15 C W. N. 345 · 38 C 432 P. C.

——where it is not shown that the land was cultivated by the proprietor himself or recognised by village usage as proprietor's private land, the presumption is that the land is not proprietor's private land though it is rebuttable 7 Pat 187 114 I. C. 469 1929 Pat 41.

——if a question arises as to whether land which is claimed to be zirati is in fact zirati land, an assertion of title on the part of the landlord and communicated to the tenant before 2 3 1883 will be conclusive evidence in his favour Assertion after the date though not conclusive may be considered as evidence in favour of the landlord 2 Pat. 414 : 4 Pat L. T 135 : 1923 Pat 5 : 1 Pat L. R. 111 . 1923 P 276 71 I C. 902

——if a question arises as to the character of the land purchased by the landlord from the tenant there must be an inquiry as to the original character of the land *above case*

——if a landlord confers occupancy right on a tenant in *zirati* land that does convert it into raiyati land for all times to come, *above case*

——an occupancy right is inherent in the status of raiyat and is not the landlord's grant The acquisition of occupancy right by grant was, up to the passing of the B T Act, foreign to the law of Bengal There is nothing in s 20 or s 21 or any other sec. which provides that a right of occupancy can be acquired either by grant or by contract *above case*.

——there is nothing in s 120 which tells the Civil Court definitely and clearly that they are to exclude from their consideration that which is relevant evidence under the Evi Act *above case*

——the landlord is entitled to rely upon any evidence that may be produced to show the assertion of any title on his part and communicated to the tenant whether before the 2nd day of March, 1883 or after that date *above case*

——the contents of the lease cannot change a non-occupancy holding into *kamat* lands. 12 C W. N 436 (438)

——*kamat* lands are the proprietor s private lands over which the acquisition of occupany right is restricted by s. 116 89 I C 913.

——when at the inception it was held under a lease for a term of years or for year to year the execution of a kabulyat for a term during the continuance of the tenancy would not bar the acquisition

Ss 116 to 120. Khamar lands—*contd*

of occupancy right 1 C. L. J. 456, 13 C. W. N. 661, 26 C. 646: 3 C W N 326.

——the provisions of Ch. V. and VI of the B. T. Act do not apply only to those tenancies of the proprietor's private lands which are held under a lease for term of years or for year to year 34 C. 57. 11 C W N 225 5 C L. J. 181.

——a tenant of a proprietor's private land under a lease for a term of years does not acquire the status of a non-occupancy raiyat under Chap VI and the period of limitation for a suit to eject him is twelve years, under Art. 139 of the L. Act, and not six months under Art 1 (a) Sch. III of the B. T. Act. 35 C. L. J. 506

——the term "bakasht" has the same meaning as "khudkusht" which is the same as "sir" or "zeriat". 31 C W. N. 341 · 97 I C. 217 · 5 Pat. 735 : 1926 P C 60 : 53 I. A. 176 **P. C.**, 7 Pat 275 : 1928 Pat. 316 · 109 I C 461 9 Pat. L T. 589.

——admission of *Khodkhast* in kabulyat is no evidence of *zirat* 13 C W N 661, 276n, 17 C W. N. 466, 7 C W. N 490, 1 C L J 406 *contra* 13 C. W. N. 135 : 9 C L. J. 150, 1 C. L J. 456, but the ruling reported in 13 C. W. N. 135 has been approved by the Privy Council where it has been held that the admission in the kabulyat as to the character of the land is relevant and admissible in evidence and the question of its probative force is a question of fact and it is immaterial whether the admission is made subsequent to the 2nd March 1883 or prior. 95 I. C. 1025, 43 C L J. 86 : 5 Pat 634: 1926 P. C 79. 31 C W. N. 74: 7 Pat L T. 553 **P. C.**

——in order to determine whether the disputed lands are *zirat* lands of the malik or the *kasht* lands of the tenants the admission of tenants is admissible against them. 7 Pat 187 · 114 I C 469: 1929 Pat 41.

——recitals in deed executed subsequently to the 1st March 1883 are admissible in evidence under s. 120 (2) (a); they are to be taken into consideration by the court in coming to the conclusion whether lands are proprietor's private lands. 1928 Pat 267, 9 Pat L. T 696 7 Pat. 212.

——a tenant of *kamat* land does not acquire the right of occupancy by holding it even after the expiry of the lease 12 C. W N 436, 35 C 181

——on resumption chowkidari chakran lands become *mal zirat* lands. 1 C. L. J 303 : 9 C. W. N 571.

Onus

——onus to prove zirat is on the landlord. 13 C. W. N 661, but when it is proved, onus shifts on the tenant to prove title to retain possession. 13 C. W N. 664, 9 C. W. N 144; 8 C. L J 170, 19 C W. N 149, 11 C L J. 476.

——when the landlord cannot give evidence of possession as required by s 120 (1) (c) he can produce evidence to show that the land was treated by him as zirat prior to 2nd March 1883. 17 C W N. 168 n.

Ss. 121-142. (Distraint) (Repealed).

Ss. 144. JURISDICTION IN PROCEEDINGS UNDER THIS ACT.

——a suit for rent may be instituted in court where the tenant resides but the sale of the holding or tenure must be held in the court where the property is situate. 27 C. W. N. 542, *this ruling has no force after the amendment*

S. 147A. COMPROMISE OF RENT SUITS.

——scope of this sec. 28 C W N 984. 84 I C 730. 1925 Cal 199.

——objection in execution proceeding by a tenant as to non-compliance with sec 147 A. in a compromise rent decree is not maintainable. 24 C W. N. 1070 60 I C. 204, 17 C W N 496 *Dist*

——compromise decree in contravention of sec 147 A is without jurisdiction. 17 C. W N. 486. 18 I C 809, 33 I. C 445 (Pat), 4 P. L. W. 247 44 I C 638 and is a nullity 72 I C 40, 17 C W. 496 *Ref contra*. 1 Pat L. R 43 69 I C 616, and 30 C. W N. 40; 97 I C. 770 1926 Cal 1101 *below*

——consent decree past between a landlord and tenant in contravention of s 147 (a) is not a nullity and it cannot be set aside in a separate suit or questioned in collateral proceedings 1 Pat L R 3. 69 I C 616, 30 C W N 940. 97 I C. 770. 1926 Cal 1101, 45 L. J 24.

——a compromise decree passed in a rent suit is not a nullity merely because the provisions of s 147 A cl (3) are not complied with. 1929 Pat 287 8 Pat 372 10 Pat L T 189, 72 I C 40 *not fol*, 1929 Pat 568 10 Pat L T. 717 118 I C 723 F B. (1926 Cal 1101, 1929 Pat 287) *Rel on.* (1924 Pat 204) not *fol*

——a decree under s 147 A though in sense is a consent decree it has not all the elements of a consent decree. So the rule that a consent decree can be set aside on any ground that would invalidate an agreement does not apply to a decree under s 147 A, 118 I. C. 723: 1929 Pat 568: 10 Pat L T 717 F B

——the fact that the rate of rent recorded in the compromise was also recorded in the partition proceedings does make no difference. 72 I C 40

——where the original rate is known or proved as by an entry in the record of rights, the parties cannot effect an enhancement under the cloak of a compromise 72 I. C 40

——there is no substantial difference between this sec and Or. 3 r. 3 C P. C, 4 P L. J 667 53 I C 20

SS. 148 AND 148A. PROCEDURE IN RENT SUITS.

——suit for rent against the tenant with an alternative claim for money had and received is maintainable under s. 148 and the decision is binding 27 C W N 716: 50 C 807. 1923 Cal. 699: 77 I. C. 10, 48 C 726 *Dist*

——the procedure under s 148 is not special but summary one but there is no rigid rule that a question of title may not be determined if it arises. If a claim which is not for rent is included in a

Ss. 148 and 148A. Procedure in rent suits—*contd.*

suit under this sec the court has jurisdiction to deal with the claim 27 C W. N. 716 : 50 C. 807 : 1923 Cal. 699.

——the mere fact that something was claimed that was not proper would *not* make the decree any less a rent decree 26 C. W N. 639 · 35 C L J. 30.

[illegible] as to identity

[illegible] would it is

[illegible] the [illegible]nable

to find out the dues *to* oth[illegible] his share only. Substantia[illegible] cient, *it* must be strictly [illegible] 512, 34 C. L J. 462 *Dist.*

——the plaint in this case as drafted was in compliance with s 148 A 28 C W. N. 757 : 1925 Cal 82 · 85 I C. 214, 103 I. C 837.

——a suit for plff's. share alone but with prayer that under [illegible] to all the co-sharers [illegible] 512 : 84 I. C

[illegible] be either to [illegible] be unable to ascertain whether or not the whole rent is due. 90 I C. 925(c), 1927 Cal. 945, 1928 Cal. 347 : 108 I. C. 41, 9 Pat. L. T. 809 . 114 I. C. 193 : I. D. 1929 Pat 113.

——a co-sharer land-lord has a right to claim the whole rent on behalf of the entire body of landlords. s. 148 A being only an enabling sec 35 C. L. J 30 : 26 C. W. N. 639, 35 C. 331 12 C. W. N 249 P. C *Ref.*

——a purchaser in execution of decree for share of rent obtained by a co-sharer landlord is not a necessary party in a subsequent suit for entire rent by the other co-sharer making the first co-sharer party. *26 C. W. N. 639* : 35 C L. J. 30, 9 C. W N. 131

——a co-sharer landlord is *not required* to bring on the record a purchaser of an interest in the holding whom *he has not* [illegible] a decree obtained in a [illegible] enants under [illegible] s *by sale* in [illegible] 96 I C. 689. [illegible] future rents [illegible] subsequently [illegible] ad not been obtained by the landlords when the [illegible] assigned S. 148 does not assist the assignee. 51 C. 703 : 28 C W. N. 626 : 39 C. L. J. 373 : 80 I C. 881 : 1924 Cal. 661.

Ss. 148 and 148A Procedure in rent suits—*contd*

——an assignee of rent decree cannot execute it even as a money decree. 41 I C 542 (C)

——a suit under s. 148 A should be to recover the whole arrears due and not the entire rent payable for the holding 34 C L J 462, 18 C W N. 1016, 27 C L J 101 *Dist*

——the terms of s. 148A should be strictly complied with to give the auction purchaser a title to annul incumbrance 103 I C. 827 (C)

——to facilitate the recovery of arrears of rent to a co-sharer who is in dispute with the tenants or with his co-sharer, the legislature has enacted sec. 148 A What the sec. requires have been laid down in the ruling 1923 P 41 · 4 Pat L T 39.

——in a suit by the *malikanadars* of 10 as and odd share of certain village against the remaining *malikanadars* and the proprietors for the recovery of arrears of their share the plaintiffs were entitled to a decree giving them a charge on the land and the suit was governed by the 12 years' rule of limitation 6 Pat. L. J 34 . 2 Pat. L. T 174 61 I C 130

——in a suit under s. 148 A, the tenants must be the tenants of all the co-sharer landlords, 24 C W N 152 (note), 5 P L. W. 232 : 48 I C 359

——*proforma* defts. who are also some of the tenants of the holding can execute rent decree obtained by their co-sharer. 24 C. W. N 465, 44 I C 445 (C)

——where there has been accretion of lands in the bed of a contiguous river the tenants are entitled to the accreted lands as an increment of their tenure, but a suit for rent confined to the lands originally leased cannot be dismissed 29 C W N 505 . 87 I. C. 442 1925 Cal. 758

——all the tenants must be made parties, otherwise it will not be a decree within s 148 A 98 I C 830 1925 Pat 783

——if the tenant deft do not allege that any co-sharer landlord has been left out from the suit or that they had paid rent to the co sharer in excess of the share alleged by the plffs to belong to such co sharer, it is not open to the tenant to question the share of rent payable to the plffs 6 Pat L T. 780 1925 Pat 564, 86 I. C 559

——rent suit by co sharer landlord for the period which was the subject of a previous suit which he did not contest is barred by *resjudicata* 48 I C. 536 (C)

——when suits were framed as rent suits under provisions of sec 148A, the decrees obtained are rent decrees Though order for attachment and sale of the holding are not issued simultaneously under s 163 the sale cannot be said to be not a rent sale if there is nothing to show that the decree holder did not apply for simultaneous issue of the attachment and sale of the holding. 1928 Pat 318 : 7 Pat 260 . 107 I. C. 821.

Rent suit and rent decree.

——*Held*, by a majority of the Full Bench (*C. C. Ghose and Mukherjee, J. J., dessenting*), that a suit for rent is maintainable against some of the heirs or successors-in-interest of a deceased tenant without bringing all the heirs or successors-in-interest on the record. 53 C. 197 F. B.

——landlord can claim back-rent for additional area. 29 C. 217.

——a tenant whose defence that the landlord was entitled to land of a lesser area was disallowed in a previous suit, cannot raise the same question again. 34 C. 1020 : 11 C. W. N. 1100, 6 C L. J. 715

——where a certain rate of rent was fixed in a decision in a suit for previous years, though that rate of rent is not *res judicata* in a suit between the same parties for rent for subsequent years, it can be treated as evidence in the subsequent suit. 43 C. L. J. 135

——a suit by usufructuary mortgagee for rent is a rent suit, 18 C. W N 1016, 24 C W. N. 229 p. 242 F. B., 23 A. 338, 341, 27 A. 313.

——rent suit against tenant with alternative claim against co-sharer is *prima facie* a rent suit and not a S. C. C suit. 18 C. W. N, 180 n

——when interest of the landlord ceases before decree, it is not a rent suit 18 C. W. N. 747 : 41 C. 926 P. C., 33 C 556 : 10 C. W. N. 547 F. B. . . . . decree brought about . . . e sale 1923 Cal 324, . . . ef.

. . . roved by the tenant the mere fact that the pltf. cannot establish the identity of the holding is no reason for depriving him of the rent. 59 I C. 312

——rent to be paid to third person is also rent 4 C. W. N. 3: 29 C. 67 F. B, 2 C. W. N. 455 *Appr*. But when after adjustment of rent some money was left with the tenant to be paid to superior landlord a suit to recover that money is not rent suit. 19 C. W. N. 174.

——a suit by one of two joint co-sharers for his share of the rent is not maintainable against the tenants without their consent 30 C. W. N. 413.

——a landlord assignee of a rent decree obtaind by ticcadar can execute it as rent decree. 17 C. W. N. 276 F. B., 1 C. W. N. 694, *Overruled*.

——assignee of rent decree only cannot execute it as money decree. 1 C L. J. 500, 14 C. W. N. 752, 20 C. L. J. 200, 400, 462 . . . of rent is landlord. 7 C. L. J. 435 . . . ltf. and third persons . . . when necessary for . . . rd and tenant is not

——in a rent suit when the tenants set up *jus tertiac* the court ought not to make such third party a party to the suit and convert

Rent suit and rent decree *-contd*

the rent suit into a complicated title suit But when the pltf's. right to sue is denied it must be decided. 41 C. L J 341 : 87 I. C 930 : 1925 Cal. 743.

——the mere fact of the lessee being bound to pay some amount as Govt revenue, does not entitle the lessor to sue for account, the lessee is to be sued for rent 27 C 663

——in case of single rent suit against same deft for three separate tenancies, it will be rent decree and limitation for each tenancy is separate. 22 C. W. N. 192. But if the suit be for one entire sum it will not be rent decree 14 C W N 335, 11 C L. J 56, 16 C. W. N 395.

——the questions of the respective interests of tenants in a holding cannot be determined in a suit for arrears of rent and must be left open. 61 I C 335 (C).

——a landlord cannot break up a tenancy by declaring that he has no longer any interest in a portion of it' 33 C. L J. 513

——if there is no separate collection, suit by co-sharer must be for whole or for apportionment 16 C W N. 774

——when co-sharer landlord purchases subordinate right, other sharer can sue for rent like 16 as landlord. 10 C L J 517

——co-sharer landlord recognising the purchase of non-transferable occupancy holding, other sharer suing for entire rent, consenting co-sharer may join in that—purchaser's remedy is in damage against him 1918 Pat 269

——landlord is bound to recognise the purchaser of a putni If the landlord does not make the purchaser a party in a suit for arrears and gets a decree in the name of the old tenant and puts the putni to sale he cannot afterwards sue the purchaser for rent of subsequent period 10 C L J 538 3 I C. 346, 5 C L J 95 ; 11 C. W N. 284, 5 C L. J 148 · 34 C 257, 6 C. L J 601, 13 C. W N 1197.

——the transfer in execution of money decree cannot be treated on the same footing as a voluntary sale 26 C W N 173

——when a holding has been sold in execution of rent decree it cannot be again sold in execution of another rent decree 2 Pat. 720 ; 4 Pat L T 640

——where a raiyati holding is sold but in the sale papers there was no indication as to the rate of interest due, the auction purchaser is not liable to pay the rate of interest stipulated in the kabulyat, but only a reasonable rate 90 I. C 570.

——a decree against a landlord is admissible against tenant who claims under him 7 C L J 381, 25 C 522 R.

——where there is rent from grant, the relationship exists, 17 C. 721, so also in case of maintenance grant 38 C 278 .

Representation *(under the old law)*

[illegible] for the share of rent of a [illegible] tenant does not pass the [illegible] W N. 736 ; 9 C. L. J. 476, [illegible] *Ref.* 13 C. W. N. 270 F.

Representation—*contd*,

——execution sale under a money decree against a registere tenant passes his right title and interest only. 13 C W. N. 270.

——it is not obligatory on tenants who are not tenure-holder to get their names registered in the landlord's *sheristha* ; so the sal of a jote in execution of decree for rent obtained against the un ... recorded tenant

s allowed

them the

, a decree

obtained by the landlord against registered tenant is evidence against him But such a decree cannot be called *inter partes* 2 C W N. 172

——the whole body of tenants of raiyati holding may elect to treat one of their number as their representative in their dealings with landlord. The fact that only one tenant registered his name is merely an item in the evidence on the question whether he is or is not representative tenant *qua* the landlord 13 C. W. N. 1110.

——when recorded tenant represents a holding, the whole holding passes by sale. 37 C 75.

——where one tenant represents the co-tenants a decree against him affects the interest of all 26 C. W. N. 138 : 63 I. C. 706, 26 C. 677, 27 C. 545, 10 C. 996, 10 W. R 304 *Discussed.*

... the ownership of the whole

ciple is laid down

, C. 677, 4 C. L J.

——where a kabulyat is executed by one of several joint tenants and the other tenants acquiesce in the representation of the holding, a rent decree against the registered tenant binds all, unless there is fraud or collusion 7 C W. N. 170, 1 C. L. J. 500 *fol* But where the others do not acquiesce they are not bound. 6 C. W. N 111.

——as the law requires tenure holders to register their names in the landlord's office, unregistered co-owners by omitting to have ... registered tenant represen-

sents the holding or not is a

——in case of tenure holder his successors are bound to notify their succession and landlord is not bound to see who the heirs are. 3 C W. N. 371 but in case of occupancy raiyat landlord is to see who the heirs are, otherwise the interest of those who are not made parties will not pass by the sale 27 C 545, 4 C. W N. 608

... of transfer of

at fixed rates,

... of occupancy

rights 24 C 642.

——'right title and interest of the debtors' should be understood according to the procedure adopted in execution. 29 C. 113.

Representation—*contd*

——a suit by *se-putnidar* to compel a *dur-putnidar* to register his name in his sherista is maintainable, but a suit for declaration of status is not maintainable. 3 C W N. 19, so also in case of transferable occupancy holding 24 C. 642

Res judicata.

——where both quantity of land and amount of rent payable, were directly and substantially in issue in former suit, the decision would operate as *res-judicata* in a subsequent title suit. 43 C. L. J. 135, 17 C. W. N. 76, 17 C. L. J. 71 (11 C. W. N. 1100, 10 C W. N. 820, 26 C 428 F. B, 21 C. 236, 20 C. 505, 19 C. 656, 1 C. L. J. 348), *Revd.*

——a finding arrived at in a rent suit is not *res-judicata* in subsequent suit for rent if the latter suit could not have been tried by the court which decided the earlier suit, But it is a valuable piece of evidence. 91 I. C 1026 (c).

——where in a suit for rent the landlord obtains a decree against the tenant and the latter pays the amount due under the decree the question of title is *res-judicata* in a subsequent suit for ejectment. 87 I C 672

——questions of area of a holding if decided in previous rent suit, is *res-judicata*. 34 C. 1020. 11 C. W. N 1100 · 6 C. L. J. 715, even if the subsequent entry in the record of rights differs. 74 I. C 961

——an *ex-parte* rent decree though not executed, is evidence as to the amount of rent 3 C. 383 1 C. L R 385, but it is not conconclusive evidence as to rental 16 C 300 F. B., 7 C. 23: 8 C. L. R. 257, 11 C L R. 483, 23 W. R. 149

——an *ex-parte* rent decree operates as *res judicata* as to the relationship of landlord and tenant. 17 C. W. N 627, 18 C W N. 33, 20 C W N. 48, 43 I. C. 170, 15 C W. N. 335, 40 I. C. 659 (C), 16 I C. 590 (C), 10 I. C 363 (C)

——an *ex-parte* rent decree, if executed, is some evidence of rate of rent. 2 C. W. N. 172.

——an *ex-parte* decision in rent suit may operate as *res-judicata.* 82 I. C 990 : 1925 Mad. 378, 16 C. 300 F. B *not fol*

——previous rent decree is not *res-judicata* as to the amount of rent but it is presumptive under sec. 51 B T. Act, 6 C W. N. 539, 5 C L J 92, 23 C W. N 136 n. 47 I. C. 173 (C), but where there has been no change it is *res judicata*, 21 C. W. N. 96n. whether it is *res-judicata* or not depends on circumstances of the case 1 C. L. J. 248, 2 I C 11.

——a rent decree is *res judicata* only to the effect that for the years for which the suit was brought the rent was the amount then found. 1923 Cal. 282.

——where the issue in the rent suit determines the rent for a full term of the lease it operates as *res judicata*, otherwise not 77 I. C. 334.

——the *decision* as regards the rent for one year prejudices question as to rent for following years. 82. I. C. 990 : 1925 Mad. 378,

Estoppel to question of transferability—*contd.*

——mere mutation of name and acceptance of rent does not operate as estoppel to create any title 40 C. L. J. 468 P. C

——mortgage taken by landlord of an occupancy *holding does* not operate as estoppel to deny transferability but assignment of mortgagee's interest does. 17 C. W. N. 70.

——purchaser of portion of the occupancy holding taking settlement from landlord cannot plead non-transferability against mortgagee 15 C L. J 269 : 39 C 513 : 16 C. W. N. 475

——question of transferability does not arise amongst rival claimants. 13 C W. N 630, 11 C. W N. 76, 6 C. W. N 624, 2 C. W N 279 n, 175, 11 C. W. N. 767, 14 C. W. N. 71, 15 C. W. N 703, *contra*. 26 C 84.

Estoppel between landlord and tenant.

——tenant cannot deny title of his lessor without first surrendering possession. 24 C L. J. 103, 20 C. W. N. 1335, 28 M. 526, 34 B. 329

— [illegible] of the land *before* denial of lan[illegible] him in.

— [illegible]

7 C [illegible]

——ss. 115 and 116 of the Evi. Act are not *exhaustive* 20 C W. N. 1145, 3 C. L. J. 629, 20 C. 296, 5 C. 669, 24 C. L J. *103*, 5 C. 662, 10 C W N. 747.

——a covenant by the tenant not to transfer the land without the consent of the landlord is an incident which binds the transferee of the lessee. 37 C. L J 538.

——lessee cannot question the status described in the *kabulyat* when the kabulyat is found to be void. 24 C. L. J 541 : 20 C W N 1140. But admission of tenant of khamar right *of landlord* in a kabulyat is nothing, 17 C. W. N. 466, 7 C. W. N 400, *13 C. W. N* 661, 13 C. W. N. 913 : 9 C. L J. 15, 1 C. L. J. 508

——a landlord who does not recognize the purchaser *of a putni* cannot sue him for rent of subsequent period *10 C. L. J.* 539 3 I. C 346, 5 C. L. J 95 : 11 C. W. N. 284: 34 C. 257, *6 C L. J* 601, 13 C. W. N 1197.

——a lessee is estopped from denying lessor's *title even if he* was not put into possession by lessor, in the absence *of proof* of his ignorance of lessors title or that his execution was *procured by fraud*, misrepresentation or coercion 40 M 561.

——grantor is estopped to show that the *recitals in the document* as to his status, are incorrect and he had no *authority to create the* lease. 13 C. L J. 649, 656.

——a lessor granting a permanent *lease cannot repudiate his* own status 22 C W N. 179, 20 C W. N. *1340, he is estopped from* denying the recitals in the *lease as to his status.* 13 C. L. J 649, 656, 48 C 783 : 32 C L. J. 296 : 25 C. W. *N. 4 F. B*, 32 C. L J *296* But see 23 C W N. 435, 437.

Estoppel between landlord and tenant—*contd.*

——a lessee taking under-tenure lease from tenure-holder who is subsequently found to be occupancy raiyat, cannot deny landlord's title under the lease. 24 C. L J. 411

——if a grantor of a lease professes to have a higher status he is estopped to deny the recital in the deed 43 C. 783, 44 C. 771 *Ref.*

——a decree-holder landlord is estopped from denying the title of the tenant described in the sale-proclamation, as against the auction purchaser 17 C. W N. 248n.

——when landlord puts the raiyati holding to auction-sale he cannot eject purchaser saying that tenancy was under-raiyati. 17 C. L. J. 652

——Bengal Tenancy Act is not complete Code even in respect of the law of landlord and tenant, much less as regards contract and equity. 24 C. L J 542, 35 C 34: 11 C. W. N 983. 6 C L J. 273. *F*

——when landlord puts the raiyati holding to auction sale he cannot eject purchaser saying that tenancy was under-raiyati 17 C L. J 652

——granting of permanent lease to under-raiyat, notice under s. 49 (b) served, under-raiyat cannot rely on subsisting tenancy, 23 C W. N. 435 (17 C W N. 59, 468, 18 C. W N 140) *F.* 13 C. L J 549, *Dis* 23 C. W. N 487.

See other cases under "Evidence Act ss 115—117"

Estoppel to question will.

——an heir at law of an occupancy raiyat can question the testamentary disposition of his predecessor 18 C. W N. 1290, 12 C. W. N 1086 · 8 C L. J. 261. *Dist*

S. 149. PROCEDURE IF RENT DUE TO THIRD PERSON.

——a suit is not maintainable by a tenant to have it determined which of two defts, both of whom claimed rent from him, is his landlord 2 C W. N. 61, 37 C 552: 14 C. W N 784 11 C L. J 577, 18 C W. N 116, 15 C L J 653, 20 C L J 148

——but a tenant is not debarred from bringing a suit against two sets of defts. who had both obtained rent decree against him, in order to compel them to interplead one another. 5 C. L J. 34 n

——no question of apportionment arises under this sec. 15 C. L. J. 501 16 C. W N 558, 21 C L J 485.

——this sec contemplates a suit culminating not in a decree

——a decision as a question of title by a court in a suit under s. 149 (3) does not operate as *res judicata* on the question of title between the parties in a subsequent suit, 1927 Cal. 431: 100 I. C. 427.

S. 150. PAYMENT INTO COURT OF MONEY ADMITTED TO BE DUE TO LANDLORD.

——the sec. is highly penal and cannot be put in force against a deft. unless he has intentionally admitted money to be due and has not paid it. 20 C 595.

——in order to ascertain whether any rent is admitted to be due the whole of the written statement must be taken into consid... 20 C 595.

... to those cases where ... the burden of proof ... ich the burden of ... is in question. 35 ... 131, contra. Irres- ... the deft admits ... of rent he must

... f rent is in issue

——where the deft. pleads that the amount claimed is excessive the plea will not be heard until he deposits in Court the admitted amount. 4 Pat 304 : 6 Pat. L. T. 757 : 86 I. C. 841 . 1925 Pat 483, 32 C. W. N. 1082 : 1928 Cal 874.

S. 153. APPEALS.

——no appeal lies from the ... in a suit for rent below a ... ally empowered under cl (b), ... 032.

... l power disposes of a rent ... against his decision 85

... ot come under this sec. 14 ... W. N 80 n contra 2 C.

——this sec. does not apply to a suit for assessment of rent. 10 C. L. J. 629.

——but it cannot be said that because there is a prayer for enhancement of rent the suit should be considered as one for assessment of rent 44 C. L. J. 296 : 1926 Cal. 1182 : 96 I C. 570, 10 C. L. J. 629 Dist.

——the amount may be reduced by withdrawal of portion of claim. 12 C W N 449 . 35 C 547

... estion of ... 91 I. C.

amo... 896, ...

——decree at the ... not come under this sec. 11 C. L. J. 392.

... y the tenant" signifies the ... to the landlord who had

——"amount of rent annually payable by tenant" in cl (a) includes the case of rent payable by a tenant to one co-sharer

S. 153 **Appeals**—*contd.*

landlord having separate collection. 17 C. 489 F. B, and it signifies the amount annually payable by the tenant to the landlord who has instituted suit for the recovery of rent. 26 C W. N 96

——"suit" includes execution proceedings. 4 C. W. N. 269 : 27 C. 484, 28 C. 116.

'andlord. 12
C, 13 C.

there was no co-sharer in existence no appeal lay. The mere allegation of tenants as to the existence of co-sharer does not give him the right of appeal. 30 C. W N 850 44 C L J 414 1926 Cal 1113. 97 I C. 1033. *contra.* (by single Judge) 1026 Cal 1929 : 97 I C 138.

——an appeal lies from the decision in a suit for the assessment of fair rent and for the recovery of the same 52 C. 689. 90 I C. 71 : 1925 Cal. 936

——when the defence is that the defendants are the direct tenants of superior *maliks* who are made parties, appeal under the sec. lies, 24 C W N 52 n

——when the defence sets up title in himself no second appeal lay. 25 C W. N. 55 n

——when the question of landlord and tenant is decided, no appeal lies 12 C W N 448 35 C 547, 20 C. W. N 967, 47 I C. 922 (c), 47 I C 105 (c)

——appeal lies when share of rent is disputed. 8 C. W N 193, 51 I C. 397 (c)

——where conflicting title is not decided the sec does not apply. 24 C. L J 235 20 C W. N. 967, 50 I. C 276 (c).

——there is no rigid rule that in a rent suit question of title may not be determined The procedure under s 148 is not a special jurisdiction but a summary procedure 50 C. 807 27 C. W. N 716 · 77 I. C. 10.

——this sec does not apply where the tenant sets up title of *proforma* deft 55 I C 92 (c)

——when appeal lies against order passed in execution or miscellaneous proceedings of non-appealable decree. 32 C 957 9 C. W. N 721 F. B, 28 C 116 *overruled.* 24 C L. J. 331 37 I C 425

——in the case of rent decree for an amount not exceeding Rs. 50, no appeal lies against an order in execution passed by judge having special power, 88 I. C 667 1925 Cal 1064

——an order setting aside a sale in execution of a rent decree is not *appealable.* 30 C. W N 586 : 95 I C 659 1926 *Cal* 790

——an order passed in execution must itself decide in order to be appealable a question relating to title to land or to some interest in land as between parties having conflicting claims. The words both decree and

Rs. 50, some of
the allegation of

S. 153. Appeals—*contd.*

transfer in favour of other defts. the suit involves a questio *title* having conflicting claims within s. 153. 1929 Cal 645, 31 C. W 140 *Ref.*

——an additional District Judge may dispose of an applic *under sec. 153*, transferred to him by the District Judge. 27 C. N. 315 1923 Cal. 469 : 72 I. C. 794, 5 C W. N. 48 n

——this sec is a bar to second appeal in suits for rent w the decree is passed by the District Judge, Additional District J or Subordinate Judge when the amount does not exceed Rs. unless a question of a special character has been decided. 37 C J. 521 ; *1923* Cal 573 : 74 I C. 547, that is unless the questio title or some interest in land is involved 1927 Pat. 300 : 102 I 603

——a decision on a question whether the *jama* was part larger jama is not a decision on the amount of rent annually able and therefore the case does not come within the exception the sec. and consequently no appeal lies 31 C W. N 436 : 102 I 357 : 1927 Cal. 959.

——where the dispute was whether the annual rent was Rs Rs. 5 a second appeal lay 39 C. L. J. 334 : 1924 Cal 838 . 81 I C

——where the value is below Rs. 100 no second appeal lies w no question as to the amount of rent was either raised or decid 82 I. C. 829 : 1925 Cal 395.

——this sec. bars the entertainment of any application to aside an *ex-parte* decree or for review of judgment, unless contains a statement of injuries and the admitted rent is deposit 62 I C 80.

——question as to the amount payable in money in default payment of rent in kind is "question of the amount of rent annua payable by a tenant", within the meaning of this sec 62 I. C. 639

——no appeal lies against the decision as to the relationsh of landlord and tenant, of a munsiff specially authorised in a re suit valued at less than Rs. 50, 20 C W. N. 96 : 61 I. C 194

——the word "rent" in the exception to s. 153 does not inclu interest. 63 I. C. 529.

——amount claimed includes interest also. 3 C W N *Contra* 11 C. W N. 110.

——but the Full Bench has held that the amount claimed be read so as to include interest at a high contractual rate such 75 p c A claim for statutory interest or damages is an ordinary ... taken into consideration in whether the amount claime 48 C. L. J 327 ; 1928 Cal. 777

S. 153A. DEPOSIT ON APPLICATION TO SET ASIDE *EX-PARTE* DECREE.

——applicant must state the injury 15 C. L. J. 52 : 11 I C. 123, 41 I. C 80 (c)

——deposit not necessary when deft sets up larger holding 19 C. W. N. 970 : 29 I C 476

——the intention of the Legislative is that the court should regulate the amount of deposit and in all cases it should record its reasons for the order it passes requiring or excusing deposit 47 C. L J. 66 · 1927 Cal 821 10 I. C. 853, 19 C. W N. 970, *Dist.* 1921 Pat. 281 *Diss. from*

——when an aplication is made to set aside an *exparte* rent decree and the tenant denies that any rent is due the court is not justified in admitting the application without recording in writing that it is satisfied that a deposit is not necessary 62 I. C 444

——in an application for setting aside an *exparte* decree the court can order a deposit of the decretal amount only when the tenant admits that the rent claimed is due When the tenants do not appear and plead ignorance of the suit, there can be no admission of any rent due 2 Pat L T 372, 15 C L J 52, 1 Pat L T. 323, 30 C. 447, 20 C 595, 19 C. W N 516 *Ref* But see 1927 Cal 821 : 103 I C 853

——where it is said that s 153 A does not say that it is only in a case where there has been an admission of any amount due that such deposit has to be made, or that the deposit must be in respect of the admitted amount only and not of any amount in excess thereof

——even in case of denial of liability the court must record reasons for not depositing the amount. 25 C W. N. 47 (note)

——where *exparte* decree for rent was passed due to no fault of the deft. and it was set aside on the application of the deft without any previous deposit, held on appeal that although there was a good deal of force in the objection taken by the appellant that the court had no power, still in as much as there had been an [illegible] decree and the admitted amount [illegible] order of the lower court should [illegible] 7 Pat. L T. 441 1926P. H

——the question whether the proceedings in publishing or conducting the sale were regular or not would fall within the explanation, whether the irregularity was due to frand or negligence or to any other reason 1928 Cal 859 115 I C 522, (16 C L. J. 542, 18 C. W. N 1266) *Dist* 22 C L. J 244 *Diss from*, 32 C. W N. 57 *fol*

S. 155. EJECTMENT.

——when a suit under this sec fails for want of notice other reliefs cannot be granted 22 C 77

——the tenancy continues in operation till the failure of the tenant to comply with the decree under s. 155 24 C L J. 523

——court can entertain application for enlargement of time after the expiry of the period prescribed in the decree and even after the

S. 155. Ejectment—*contd.*

decree-holder has applied *for execution* 24 C. L. J. 523 : 44 C 954. 21 C. W. N. 276, 16 C L. J. 520.

——*in measuring* damages for breach of covenant such a su will be allowed as will place the *landlord* in the same position as the covenant has not been broken. Where the landlord has no suffered substantial damages nominal damages should be allowed 24 *I. C. 538*

——when the *suit is for ejectment* even on the allegation of forfeiture on breach of covenant unless the notice prescribed by the ...ssed. 47 C L J. 21 : 1928

...tipulation prohibiting the ... *in case* of transfer and the tenant transferred his rights but continued ... landlord's right of re-entry in possession as the *lessee of the* transferee and the landlord instituted a suit under *s. 155 (1) (b)* without giving any notice, held that the suit was maintainable as the deft. ceased to be a tenant after he incurred the forfeiture. 1928 Cal. 113 : 105 I C. 786.

——*notice must specify compensation*. 19 *C. L. J.* 40, 27 C W. N. 144, 22 C. 77. *Notice after remedying* the breach is nothing. 23 C. W. N. 569

——a notice not requiring the tenant to remedy the *misuse* ... only asking for compensation to ... 23 Cal. 149

... includes some lands not within ... or because the quantity *is not*

——no notice is required to eject a service-tenure-holder who refuses to render service. 2 C. L. J. 403

——"capable of remedy" means *physically possible to remedy*. 10 C. L. J. 592.

——compensation should be determined according *to loss* 23 C. L J 332

——this sec. applies to *waste lands* 13 C. L. J. 300.

——*the provision of s. 178 does not exclude* the operation of s. 155, 13 C. L. J. 300

... decree under this sec. cannot direct payment of compen... C. W. N. 658 : 63 I C 235

... the payment of *compensation* ... 595. ... not a proper *decree* 10 C L

——compensation must be demanded in the notice *either* in addition to *or as an alternative* to a demand on the *tenant to* remedy the misuse or breach. 29 C. L. J. 436 : 51 I. C. 383, 23 C. W. N. 569, 34 I C. 537 (c), 34 I. C. 497 (c)

——*notice is* not vitiated merely because *compensation is* demanded in the alternative. 30 C. 663

——a suit under this sec. must include all the *lands of the* holding. 2 C. L. J. 369.

155. Ejectment—*contd.*

——co-sharer landlord can sue under this sec. 19 C. 541.

——cause of action runs from knowledge. 9 C. W. N 246 n.

——there is waiver by receipt of rent. 9 C. 843, 14 C. 33.

——the tenant is entitled to effect any improvement in his lding. 2 Pat. L J. 634.

——suit by co-sharer landlord for injunction against tenant is t barred by *ss 155 of the B T. Act. 16 C L. J. 126, 9 C.* . N 246 n.

mitation.

——under cl. (a) i e where the raiyat uses the land in a manner ich renders it unfit for the purposes of tenancy, Art 32 L. Act years) applies 24 C 160: 1 C W N 223, 26 C 564 · 3 C. W. N. F. B So also where there is kabuliyat but no stipulation of ialty by way of ejectment 20 C. W. N 661

——but in case of breaking a condition on breach of which the iant is under the contract liable to ejectment Art. 1, Sche. III, year) of the B. T Act applies.

158. APPLICATION TO DETERMINE INCIDENTS OF TENANCY.

——application under this sec. cannot be made by tenant against sharer landlord even holding under separate lease 18 C W. N. 3, nor does the sec. apply when tenancy is not admitted. C. 249 p 252

——under this sec the court is to determine what the existing [illegible] 6 C W N. 562, 21 C. 807.

[illegible] under this sec whether the [illegible] does exist between the parties

——one application may contain several tenancies held by the ne tenant 24 C 197: 1 C W N 236, but not held by different iants. 11 C. 602

——an application under s 158 is not a suit and its dismissal for fault under Or. 9 r 8 C P C. does not bar a subsequent claim for determination of the annual rent payable 2 Pat 193 4 Pat L. 705 · 74 I C 464: 1923 Cal 381.

——the court cannot determine transferability 3 C. W N. 15.

——but s. 158 includes cases of ascertainment of fair and itable rent 18 C W. N. 466 20 I. C 910.

——s 158 (d) entitles the court to determine the rent payable the tenant and this is not restricted to cases where the rate of it has already been *ascertained 88 I. C 959: 1925 Pat. 517:* 5 P. H. C C 153

——the Revenue Officer will be competent to ascertain the itractual rent on local enquiry but if there is no such rent he l be equally competent to determine a fair and equitable rent on basis of the implied proviso which the status will give rise to. I. C. 133: 1928 Cal 43.

S. 153. Application to determine incidents of tenancy

——s. 153 (1) (d) refers onl
rent and not to cases where th
is asked to fix it 4 Pat. 604:

——there is nothing to prevent the landlord from ... may fi

made
ce appe

decree and such an order shall be regarded as a decree
Sch. III (4) and time should run from the date of the order.
L J. 106: 30 C. W. N. 479: 1926 Cal. 688: 95 I. C 245

—— presumption under s 50 cannot be availed of under
55 I C 709 (c)

S. 158B Passing of tenure or holding sold in executi decree or certificate. (*Repealed*)

Ss 159-167 INCUMBRANCE, ANNULMENT OF.

——to acquire right under s 159 the purchase must
execution of rent decree. 10 C. L. J. 324, but such sale
pre-arranged condition to defraud the under tenure-holder is
avail 20 C L J 11: 19 C. W. N. 270. 1923 Cal. 324, 12 C.
336 P. C.

——s 159 is for the benefit of the landlord in order to ex
the sale and that does not affect in any way the interest
judgment debtor or the purchaser. So the incumbrancer cannot
any benefit on the ground that the sale was not under the B T
1926 Cal 1062 · 95 I C. 853.

——these secs apply to the sale of non-occupancy holdings
37 C 709. 14 C W N. 814, but does not apply to under-ra
interest 16 C W N 831: 16 C. L. J. 539

——Ss. 161 and 167 apply to all holdings whether transfe
or non-transferable 97 I. C. 309: 1927 Pat. 53: 8 Pat L T
6 Pat 235

——the sale of a share of a tenure separated with the con
of landlords and tenants comes within these secs 4 C W
80n. but when the sale is of portion of a tenure the purc
cannot annul incumbrance. 11 C. W. N 359.

As regards incumbrance. See "Incumbrance".

——incumbrance within the sec. must be some interest cre
by the tenant and not his under-tenant. 25 C W N. 106
I C. 469.

——the word incumbrance includes statutory title and inte
acquired by a trespasser by adverse possession of a part of
... and such incumbrance can
provided in s
5 C L J. 292
ubsequently acqu
12 years as ag
C 259, (13 C

... protected under s. 160 ...

Ss. 159-167. Incumbrance, annulment of—*contd.*

N. 1025, 42 C. 145, 27 C L J. 293, 27 C L J 284). *Discussed*. Similar case. 32 C. W N. 587 . 1928 Cal. 880

——the interest of a person who was originally an occupancy raiyat and subsequently acquires the right to hold at a fixed rate is a "protected interest 54 C. 681 1927 Cal 846 ; 104 I C. 744, 49 C. 280 *Rel. on.* 13 C. W N. 1025 *Dis approved*

——when the deft claimed the lands Lakheraj, the purchaser of the putni taluk at rent sale was to prove that the *Lakheraj* holding commenced after the creation of the *putni* 48 I. A 499, 26 C. W. N. 465. **P C.**, 14 M. I A 152 *fol*

—— 24 C. 746.

—— . an incumbrance i

—— on of money decree may repurchase it in execution of rent decree and may annul a mortgage 12 C. W N 114

——suit for ejectment after purchase in execution of rent sale is maintainable where the plaintiff came to know from the written statement first that there is incumbrance which is to be cancelled. There may be conditional order 24 C W N 637, 650

——where a landlord recognises a person as the purchaser and tenant of a portion of a certain occupancy holding and permits him to pay rent in respect of such portion he gets an occupancy right in the portion of the holding and it is a protected interest within s. 160 1925 Pat. 556 86 I C. 575

——a mortgage of a putni is an interest which is protected under s 160 (g). 90 I. C 955 . 1926 Cal 356.

——the word "purchaser" includes assignees of certified purchaser at an execution sale 55 C. 1070 32 C W N. 759 108 I. C. 585 1928 Cal 448.

——although the original suit for rent can be brought against a holder in respect of all the separate holdings or tenures, there is nothing in the C. P. C or B. T Act to prevent the consequent decrees and orders from being so moulded as to enable their provi-

P. C. 171 **P. C.**

——a landlord purchaser at a rent sale is, like any other purchaser, bound to follow the provision of sec 167, 35 C. L J 1.

——the mere rent sale of a holding does not in itself without further steps being taken by the purchaser, annul any incumbrance which is existing on the holding. 75 I C. 841.

——mortgage is an incumbrance which the purchaser at rent sale must annul within one year or lose all right to annul the incumbrance. 97 I. C. 309, 1920 P. H. C. C. 19 *fol*, 1922 Pat. 355 *Dist.*

Ss. 159-167. Incumbrance, annulment of—*contd*

—where the plff a settlement holder from the landlord wh[illegible] rent decree sues th[illegible] holding previously i[illegible] plff. who seeks the [illegible] e was not aware of the incumbrance within time specified for the service of notice 33 C W. N. 1079 1928 Cal. 892.

—but the onus is upon the person who questions the validity of the notice to establish that the notice under s 167 was not legally served. 1928 Pat. 318 : 7 Pat 260 : 107 I. C. 821, and it has [illegible] purchased [illegible] cree is not [illegible] e landlord [illegible] e although 1928 Pat 234 . 9 Pat L T. 241 : 7 Pat. 155, and also by the *Cal. H C.* and the *P C.*, that a prior purchaser in execution of mortgage-decree cannot maintain that the subsequent purchaser in execution of rent decree is bound to annul his incumbrance which he has none after the purchase 25 C. W. N. 424, 40 C 89 *P. C. Fol 38 C.* 923 *Ref.* but before the sale under the mortgage-decree takes place the Len subsists and it must be annulled although rent is the first charge 24 C. W. N. 961 : 59 I. C. 868. (13 C. W. N. 412) *not fol.* and *also in* 1929 Cal 392 : 113 I. C. 904 I. D. 1929 *Cal 126.*

—where a mortgagee purchased the holding in execution of his mortgage decree and subsequently it was sold in execution of rent decree and the purchaser at rent sale sued the mortgagee for possession, held that the mortgage having been merged in the decree the mortgagee purchaser had become the owner and could not resist the purchaser at rent sale. *90 I. C. 946* · 1926 Cal. 165

—the purchaser of a portion of a non-transferable occupancy [illegible] the meaning of Ss 161 and [illegible] the landlord after surrender [illegible] , T. 581, 1 Pat. L R. 402.

[illegible]

—mortgage of part of occupancy holding ; sale *for arrears of* rent 69 I. C. 841.

—a benamdar auction-purchaser is the *proper person to annul* an incumbrance. 21 C. L. J. 65 : 34 I. C. 215.

—but a real owner for whom the benamdar merely holds the property in trust is not precluded from giving notice under s 167. 55 C. 1070 : 32 C. W. N. 759 : 1928 Cal. 448 : 108 I C. 585

—one of several auction-purchasers cannot annul an incumbrance. 1 C. W. N. 314

—it is an abuse of statutory provision for sale of tenures in execution of rent decrees to bring about designedly a sale under such circumstances so that the right of under-tenure-holders might

Ss 159-167. Incumbrance, annulment of—*contd.*

be destroyed, an unencumberd title conveyed to the purchaser, and the maximum of benefit conferred on the defaulter. In such a case the transaction is private sale 1923 Cal. 324, 10 M. I. A. 540 · 12 C. L J. 336, P C., 18 W. R 240 *Ref.*, 20 C L. J 11 19 C. W. N. 270.

——when wrong form is used for proclamation through oversight in order to find out the auction purchaser's right obtained under the sale the true meaning of the decree as well as the proceedings leading up to the sale should be looked into. 1926 Cal. 1062 · 95 I. C. 853.

[illegible] has been [illegible] -purchaser [illegible] ct, if the [illegible] ale or the [illegible] : 78 I. C

——the mere sale of property in execution of rent decree does not in itself without further steps being taken by the purchaser, annul an existing incumbrance 5 Pat. L T. 407 75 I. C. 841 : 3 Pat 126 : 1924 Pat 440

——annulment of higher interest annuls the subordinate interest. 17 C W. N 1064

——an under-raiyati interest created in contravention of s. 85 need not be annulled 17 C W N 860, 18 C. L. J. 252, 19 C. W. N. 412, 1077.

——the Collector being a ministerial officer, cannot allow amendment of the name of wrong person 28 C 180.

——the purchaser is entitled to the standing crops also 11. C. L. J. 87.

——the purchaser may sue for rent even after the service of notice. 17 C. W N 627

— [illegible] under B. T. Act.

— [illegible] the application [illegible]

——absence of due service of notice on a person who in the suit disclaimed all interest therein cannot prejudice the plaintiff 32 C. 710.

——"date of sale" means the date on which the sale is confirmed and not the date of sale. 1929 Pat 236 10 Pat. L T 396, 18 C. L. J. 170 . 18 C W N 349, 22 C W N 86, 7 C W. N 552 *contra*, it is the date on which the sale actually takes place. 17 C W. N. 440 : 16 C L J. 131.

——knowledge of possession of third person is "notice of incumbrance' 17 C W N 440, 16 C. L J. 131.

——notice is essential for the annulment of incumbrance. 1924 Cal 396

——a very strict construction must be put upon the provision of s 167. The Civil Court must be satisfied that the notices were in

Ss. 159-167. Incumbrance, annulment of—contd.

fact served on the incumbrancer The entries in the order sheet are *not prima facie evidence* against the incumbrancer that the notice was served. 1928 Pat. 459 : 9 Pat L. T. 484 : 7 Pat 733 : 115 I C. *196.*

——service of notice has the effect of annulling an incumbrance 25 C 551. 2 C. W. N. 138 n. but the incumbrancer may apply to set aside the sale. 10 C. W. N 976.

——*a notice* is not bad *though it* does not specify *the particulars of* the land or the rent payable 5 C. W. N. 272.

——a joint notice to several tenants is not bad 5 C W. N 272, but *it must* be served on the whole body of incumbrancers, 18 C. W N 259 21 I C 928, P. C., 32 C. 710, 14 C. W. N. 138 (note).

——*service* according to the service of summons is good 18 C. W N. 259 P. C

——where the notices are not served in accordance with Or. 5 Pr. [illegible] complied with and 218. [illegible] ating due for

——entries in the order-sheet are not *prima facie* evidence of service *of notice.* 7 C. L J. 262. 15 C. W. N 88 n., Service must be *proved* by evidence 7 C. L. J. 262, 29 C. 813.

——*under* s. *167* once the Collector has issued the notice the incumbrance *must* be deemed to have been annulled. *But this* does not mean that the validity of the decree and the consequent annulment of the incumbrance cannot afterwards be called *in question.* 2 Pat. L. R. 19 · 78 I C. 476 : 1924 Pat. 515

——purchaser and incumbrancer being the same person no notice is required. 4 C. W. N. 736 : 28 C. 12, 8 C. W. N. 332 *contra.* 4 C. W. N. 268.

S 169 RULES FOR DISPOSAL OF SALE PROCEEDS.

——a suit by the unrecorded purchaser of a share of tenure after the date of the rent decree against the original tenant, *for the recovery of the sale proceeds,* is maintainable. 7 C W. N. 552

——under this sec. the landlord is entitled to recover *rent up to the date of sale merely* and not up to confirmation of sale. 26 C. W *N.* 511, 18 C. W. N. 136, *contra* below.

——the words "date of sale,' in cl (c) mean the date when the [illegible] W. N. 552 [illegible] W N 1116 L. J. 722 es interest.

contra. 12 C. W. N. 144n, and rent [illegible] 26 C W. N. 511

——the cost of an application under s 169 (c) is not *recoverable* out of the sale proceeds, 2 Pat. L J. 723.

——a landlord after he had sold the tenure in *execution of a* decree for arrears of rent could not sue the auction-purchasers of

S. 169. Rules for disposal of sale proceeds—*contd.*

the tenure for rent which had fallen in arrears between the date of his decree and the date of their purchase under that decree. The provision of the law evidently shows that the Legislature intended that the charge in respect of any rent falling due between the date of suit and the date of sale, in satisfaction of the decree passed therein, shall be transferred from the tenure to its sale proceeds, and that the tenure shall pass to the purchaser at a sale for arrears of rent free of all liability created by the default of the previous holder. 21 C 169.

——but rent is to be regarded not as accruing from day to day but as falling due only at stated times according to the contract of tenancy, or the general law under s 53 B. T Act, 21 C. 383.

——a landlord has a right under sub-sec (1) cl (c) to have the rent due to him between the institution of the suit and *the date of the sale*, paid out of the balance, before any sum can go to the Jt. Dr. or to his mortgagee who stands in the shoes of the Jt. Dr 34 C 724 : 6 C. L. J 26

——a landlord is entitled to [illegible]
him in discharge of arrears of rer
of rent suit to the *confirmation of s*
application for such payment, a sui
be time barred. 16 C W N 582 · 21 C L. J 535.

——but in view of the alteration of law by s 65 C P. C the liability of surplus sale-proceeds under s 169 B T Act is limited to arrears accrued due up to the *date of the sale* and cannot be extended to arrears due up to the *date of confirmation of sale* 18 C. W N. 136.

——an application under cl (c) may be made even after the expiry of two months from the date when the sale is confirmed 2 Pat L J 722

——under sub sec (2) a tenant is entitled to dispute the right of the D. Hr to receive any accoount of rent under sub-sec (1) cl. (c) on the ground of payment or satisfaction in any other way 19 C. W N. 582 21 C L J 535.

S. 170 APPLICATION OF R R 58 TO 63 OF OR 21 OF THE C. P C. AND DEPOSIT BEFORE SALE

Applicability.

——s. 170 applies only when the whole tenure or holding is attached in execution of a decree for its own arrears and it does not apply when a portion of a tenure or holding is attached in execution of a decree for the arrears of the whole tenure or holding. 54 C. 1064 1928 Cal 94 107 I. C. 357.

Cl. (1) Claim.

——no claim can be preferred. 5 C. W. N. 474 : 28 C. 382 F. B, 10 C W. N 547 33 C 566. 3 C. L J. 470 F. B., 4 C. W. N. 732, *overruled*, 4 C. W. N. 734 *apprd*

——the provisions of s. 170 are imperative and they lay down that the provisions of claim cases shall not apply to an attachment

Applicability—*contd.*

in execution of rent decree. 3 Pat L. R. 341 : 1926 Pat 213 : 3 Pat. L R. 339 ; 1926 Pat 210. This is upon the principle that a landlord is not bound to go beyond his own record and any person not recorded as tenant must seek his remedy elsewhere. 3 Pat. L. R. 339 , 1926 Pat 210, 1929 Pat. 195 : 10 Pat. L. T. 118.

——but claim may be perferred when two or more holdings are attached in execution of decree for rent thereof. 13 C W. N. 650, 19 C. L. J 525 and also when the decree is of co-sharer landlords 36 C 765, 34 C. 298 : 11 C. W. N. 497, 11 C. W N 676, 26 C. 937 but not so when other co-sharers are made parties defendants 3 C. W. N. 386

——the court is to inquire whether the decree is under the B T. Act, 12 C. L J 549, 27 C. W. N. 817

——the executing court can go into the question whether the decree was a decree under the B. T. Act, so as to bring into play the operation of sec 170 and to prevent a claim being preferred to the property attached 27 C. W. N. 817 ; 1923 Cal. 715.

Cl. (2) Certifying satisfaction.

——no enquiry is necessary to be made as to whether the application by the decree-holder certifying satisfaction of the decree is *bonafide* or not. The only thing to be seen is that the application is made before the tenure or holding is knocked down to the auction purchaser, 4 Pat. L. T. 495 ; 1923 P. 572 . 75 I C. 676

Cl. (3) Deposit, right and procedure.

The language of this clause has been materially changed allowing deposit by any person whose interests are affected by the sale.

——a transferee of a whole or a part of a non-transferable [illegible] landlord cannot make deposit [illegible] he has not got an interest in the [illegible] C. W. N. 845 · 39 C. L. J. 429 : [illegible] C. L. J. 554 : 96 I C. 363 : 1926 Cal. 957 : 54 C. 15 F. B.

[illegible] occupancy holding has no [illegible] sec. 170 cl (3), 28 [illegible] C W. N. 421 · 15 C. [illegible] L. J. 261, 7 C L. J. [illegible] 170n, 27 C W N.

——when the landlord accepts the rent from stranger on protest the latter does not acquire any tenancy right. 44 C. L. J. 127:

[illegible] the deposit made by a trans- [illegible] f the transfer. 1923 Cal 730 :

[illegible] (3) of s. 170 is the person against [illegible] and does not include a trans- [illegible] ed there is comprehensive and [illegible] C. L. J. 548 : 17 C. W. N. 163.

Cl. (3) Deposit, right and procedure—*contd.*

——a previous purchaser of tenure is not entitled to deposit as his interest is not voidable by the sale. 10 C. W N 438, nor the purchaser of a holding who has been recognised. 17 C W. N. 163.

——but a previous purchaser claiming to be tenant for a period of 12 years to the knowledge of the landlord is entitled to make deposit 16 C L J 548 : 17 C W N 163.

——an under-raiyat whom the superior landlord does not recognise may deposit. 19 C. W. N. 1127 . 32 I. C 503

——a person who claims the tenancy by adverse possession may deposit 16 C. L. J. 548 : 17 C W N. 163

——execution of decree against Hindu widow, reversioner's right to deposit. 70 I. C 127.

——reversioner cannot deposit 3 P L J. 145 : P L W 84 : 3 I C. 23

——the lower court has to see if third person has the right to eposit, the order is not appealable 17 C. W N 62 15 C. L J 388

——on an application under s 170 notice must be given to the ecree-holder and the judgment-debtor and the court must decide hether the applicant has or has not *locus standi* to deposit 4 Pat. T 247 , 1923 P. 353 · 73 I. C 12

——notice must be served on interested persons. 18 C W N. 12, 15 C W N 685, 13 C L J. 535

——in case of deposit under s 170 notice to the D Hr. must e given 18 C. L J. 142

S. 171. THE AMOUNT PAID INTO COURT IS A MORTGAGE-DEBT.

——s 171 applies mainly to rent decree 32 C. 972

——where on an application under s 171 the court permits the pplicant to pay the money directly to the decree-holder, the prosions of the sec are complied with 4 Pat L T 134 : 71 I. C 473 : 922 Pat 347

——a depositor under sec. 171 becomes a statutory mortgagee nd that mortgage is redeemable by subsequent mortgagee. 18 C. V N. 207n.

——depositor may apply to the executing court for possession gainst the Jt Dr 6 C. L J 592, 10 C. L J. 473 . 18 C W. N. 75 but not against a stranger, 12 C. W. N 55 6 C L. J 595

——a mortgage created by sec 171 is not an incumbrance and not liable to be avoided by the purchaser of a tenure at rent sale C W. N. 519 : 21 C. 537.

——mortgagee making payments has an additional lien. 31 C. 75, 3 C 794

——money paid by the mortgagee under s 171 does not become part of his mortgage and is not recoverable as such. 21 C. L. J 29 : 29 I. C 929.

——second mortgagee cannot get credit of the amount paid nder s 171 in a suit by the first mortgagee. 11 C. W. N. 403.

S. 171. The amount paid into court is a mortgage debt—*contd*

——where the mortgage is not genuine the alleged mortgagee depositing the money is not entitled to get the money although the tenant was benefitted thereby. 21 C. W. N. 394 : 25 C. L J 325

——where the court decides a controversy between the usufructuary mortgagee and a simple mortgagee as to their respective rights to make the deposit under this sec. the order is appealable 29 C L J 416, 52 I C 980.

——an order passed on an application of a person not a party to the suit is not appealable. 17 C W. N. 602

S. 172. INFERIOR TENANT PAYING INTO COURT MAY DEDUCT FROM RENT.

——a *seputnidar* depositing the amount of rent decreed against the *durputnidar* is entitled to set off the amount against the claim of rent made in a suit by the mortgagee-auction-purchaser of the interest of the *durputnidar*. 33 C. L J. 494 : 63 I. C. 1004

——when a landlord did not question the right of purchaser of tenure to deposit the amount and withdrew it, he was estopped to question the right of the depositor subsequently, 6 C. L J 601. see also. 12 C L. J 609.

S 173. BIDDING AT SALE.

——where the judgment-debtor is the purchaser at auction sale the sale is not void but voidable. 5 Pat. L. T. 13 : 74 I. C 769 : 1924 [illegible] judgment-debtor cannot get the [illegible] conviction under s 185 I. P. C., 21 [illegible] is within discretion of the court which ordered execution to determine whether the sale should stand or not and in the absence of prejudice the H. C. will not interfere in revision 80 I. C 708 . 1925 Cal. 293.

——a registered transferee can apply to set aside sale on the ground that the auction purchaser is the benamdar of the judgment debtor 9 C. W. N. 134

——when the purchaser is found to be benamdar for the judgment-debtor the sale is only voidable and not void 21 C 554

——the decree holder and all the judgment-debtors are necessary parties to a proceeding under this sec. 3 C. W. N 14 n

——an attaching creditor has *locus standi* to apply to set aside a sale under this sec 3 C. W N. 14 n

[illegible] should be made within three [illegible] y accrues 24 C 707 [illegible] 24 C. 707 . 1 C. W. N. [illegible] 51 C 1014 : 554, 86 I. C 209 *contra* Art 166 L. Act, applies (30 days) 28 C. W. N 154 n.

——an application under this sec. is cognizable under s 47 C. P. C , so the operation of Art 166 L. Act, is attracted 51 C. 1014 : 82 I C 322

——no appeal lies from order setting aside a sale under this sec. 21 Cal. 825, 87 I. C. 744 : 1926 Cal. 213.

S. 173. Bidding at sale—*contd*

y the auction-purchaser he decree holder or co- 3 C. W N. 14 n. 3 C.

W. N. 104.

—when the ... bенamdar for the judgment

purchaser
irty to the
C W. N.

98.

——an order setting aside a sale under s. 173 is not appealable. 46 I C. 748 (c), 19 C. L J. 81.

S. 174. (APPLICATION TO SET ASIDE SALE).

This act has been materially changed making its provisions similar to Rr 89 to 91 of Or. 21 of C P C.

——the period of 30 days for depositing the decretal amount cannot be extended on the ground of fraud 17 C. W N 216 n : 18 C. W. N 31.

——deposit under this sec is not bad for falling short of the required amount owing to the miscalculation of the officer of the court 11 C. W. N 116, 26 C 449 F. B. 4 Pat. L T. 643 71 I C. 925, 1924 Pat 25b, *Dist* 18 C. 255 *Ref.* 25 C 216 *Fol*

——the deposit need not be made separately in favour of D Hr. and auction purchaser So where the amounts were deposited separately, one being in excess and other slightly deficient, but the total amount deposited was correct the sale should be set aside. 88 I C 988 : 7 Pat. L T. 11 · 1926 Pat. 55.

——court cannot extend the time of dposit, so where the deposit fell short and balance was paid after the prescribed period under court's order, the deposit was bad 16 C W N. 736 ; 15 C L J. 89 (14 C W N 882 13 C L J. 432 filing of deficit court-fee after time) *Diss* (13 C L. J. 535 : 15 C W. N. 685, 18 C 481, 13 C L J. 467, 10 C. L J, 880), *Ref.* 17 C W. N 85

——the time fixed by the court ending on a holiday, deposit on the re-opening day is good 10 C. W N. 535 3 C L. J 339.

——the period of 30 days runs from the time when the sale becomes final. 35 A 65

——an application under sec. 174 can be made by the J Dr. alone and if a person professes to act on his behalf his authority to do so must be duly established 16 C. L. J 546

——when the decree is satisfied out of court instead of actual deposit in court an application by the Jt Dr falls under this sec. 1926 Cal 1236 : 97 I C. 306

——Jt Dr depositing money on the assertion that the tenure had ...

that
lose

S. 174. (Application to set aside sale)—*contd.*

right of suit analogous to the right given to purchasers under the C. P. C., 43 C. L. J. 279 : 94 I C. 292 : 1926 Cal 738

——five per cent of purchase money is to be deposited even ... 23 M.

to set aside the sale after depositing 5 p. c. for the purchaser ... both the Jt. Dr and D Hr. file a petition stating that the decree has been satisfied the sale must be set aside under this sec. The order of the court on such petition is appealable and if the auction purchaser was a party to the suit s. 47 C. P. C. also applies 4 Pat 718 : 1925 Pat 525 · 6 Pat. L T. 795

——where the decree is modified in appeal the sum decreed there is to be deposited. 3 C W. N 231.

——the provision of Or. 21 r. 92 C. P. C. requiring notice to be served upon the auction purchaser does not apply to proceedings to set aside sale under s 174. 6 Pat L. J. 16 · 2 Pat. L T. 66 : 61 I. C. 126 . 1 C. W N 114 *Ref.*

——s 174 bars an application being made on the ground that the Jt Dr has no saleable interest and that the auction-purchaser would lose his money. 43 C. L. J. 279 1926 Cal. 738 · 94 I C. 292

——the provisions of this sec apply to the sale of a holding for arrears of rent under the Bengal Rent Recovery Act of property in Orissa 75 I C 278 : 25 C W N. 1009 : 38 C. L J. 229 : 40 M L J 546 1921 M W N 399 · 2 Pat L. T. 453 : 61 I C. 1 P. C. 11 I C. 239 . 14 C. L J 168 16 C. W. N. 511 *approved*

——no suit lies to set aside an order passed under s 174. 62 I C 743 : 18 C 481 *Fol*

——an order under this sec. is not appealable. 1926 Cal. 1236 : 97 I C. 306

S 178 (RESTRICTIONS ON EXCLUSION OF ACT BY AGREEMENT).

Sub sec. 1 cls. (e) to (i) have been newly added in recognition of the new provisions made in the Act.

——the sec has been enacted to safe guard the interests of the ... certain contracts between ... 'ed to a raiyat by ... ttled raiyat from ... s 178. 85 I.C.

——a contract of re-entry before the ... it was enforcible. 33 C. 136 · 10 C. W. N 533

——a contract in a lease restricting alienation by the tenant and reserving a right of re entry by the landlord in case of breach of the covenant is not opposed to this sec. 94 I C. 338

——a landlord is entitled only to the interest secured to him by s 67. 17 C. W. N. 120 : 18 C. L J. 175.

S. 178 (Restrictions on exclusion of act by agreement) —*contd.*

——it is open to the Zemindars and tenure-holders to contract themselves out of the provision of s 41 Bengal Cess Act. 8 C L. J. 525 : 12 C. W N. 154. 4 C. 576, 11 C L J. 140, 3 C. L J 337, 3 C L J. 391 · 33 C 683, 13 C L. J. 212.

——covenant entered into in 1851 in a putni lease reserving rights of re-entry in the future in favour of the landlord is valid and is enforcible against under-tenants of the putnidar 44 C. L. J. 220 ; 1927 Cal 41 : 98 I. C 46

——admission in kabulyat that the land is *khudkhast* is not binding on the tenant 13 C. W. N 661, 13 C. W. N. 276n, but it is admissible in evidence and the question of its probative force is a question of fact. 1926 P C 79 31 C W. N. 74 ; 44 C. L. J. 86 . 7 Pat. L. T 553 95 I C 1025 P C

——a raiyat cannot make testamentary disposition of non-transferable occupancy holding. 18 C. W. N 1210, 1294, 42 C. 251 . 21 C. L. J. 187, 22 C. W N. 474 43 I C 779, 12 C. W. N. 1086 . 8 C. L J 261 *Diss.*

——B. T. Act is not a complete Code even in respect of the law of landlord and tenant, much less with respect to law of contract. 20 C. W. N 1340.

——where a kabulyat is found to be void, lessee is estopped from questioning the status described in kabulyat 24 C. L. J 541 : 20 C. W N. 1340, 20 C W. N 1335 *Fol*

——no contract can take away the right of acquisition of occupancy right 15 I C 575 (c).

——this sec only bars a contract against the accrual of occupancy right The provision of the sec is not contravened by the ex[illegible]

so [illegible]

ex [illegible]

——*the stipulation in a compromise for the ejectment on default* of payment of premiums was held to be of no avail as it was in contravention of the provision of s 178 sub-sec. (1) cl (c) 28 C W. N. 984 . 84 I. C 730 : 1925 Cal 199

——this sec. does not affect the validity of a contract creating a tenancy on new terms entered into between the landlord and raiyat [illegible]

(Pat)

——an agreement by an occupancy raiyat not to claim compensation [illegible] own is legal and enforcible

[illegible] status of raiyat at a fixed [illegible] a new term. S. 178 could.

S. 178. (Restrictions on exclusion of act by agreemen —contd.

——a lessee retaining possession cannot even after the term ha expired, deny the lessor's title at the time of the lease 20 (W. N. 1135.

——breach of condition, measure of damages, landlord will b placed in *status quo*. 19 C. W. N. 1197, 24 I. C 538

——a compromise rent decree without stating the former rent i. a nullity 17 C. W. N. 496. 6 C. L. J. 320.

——sub-sec (1) cl. (a) of this sec. in controlled by s 194. 19 C. W N. 1197, 20 C L. J. 551.

——the provision of s. 178 does not include the operation of s 155. 13 C L. J. 300.

——kabulyat stipulating to avoid s 29 of the *B. T. Act* is void. 18 C W N. 739.

——a lessee retaining possession cannot even after the term has expired, deny the lessor's title at the time of the lease *20 C. W N. 1135*

——breach of condition, measure of damages, landlord will be placed in *status quo* 19 C. W. N. 1197, 24 I. C. 538.

——s. 29 does not apply when the jama is consolidated by new contract 32 C. L. J. 134.

——kabulyat stipulating to avoid s. 29 of the B. T Act is void. 8 C. W N 739.

——a contract enhancing rent within 15 years from the last enhancement is not valid and binding, and a suit may be brought for enhancement under s 37. 1918 Pat 162.

——a stipulation in a lease entered into before the passing of the Act, entitling the landlord to assessment of rent at the prevailing rate is valid. 1926 Cal. 1177 ; 96 I. C. 565 ; 32 C. W. N 295

For other cases *See B. T. Act. S. 29.*

S 179 PERMANENT MUKARARI LEASES

——this sec. controls sec. 67. 5 C. W. N. 438, F. B. 2 C W N. 543, 21 C. W. N. 108, 12 C. W. N. 175, (26 C. 130 : 3 C W. N 35) *overruled. It has got legislative recognition by the amendment The rulings as regards abwab also are no longer law, abwab being made illegal by the amendment.*

——where by a contract between the parties, a permanent ... and the terms can be

... durpatnidar is valid

——a grant for an indefinite terms enures at least for the lifetime of the grantee A condition against transfer is often enjoined in a lease merely as a foundation for a claim to *nazar (premium)* in case a transfer is made, and if it is not void, it does not (where there is no clause of re entry) render a transfer of the lease inoperative. 25 C. W. N. 857, 17 C. 826, 36 C. 745 *Ref.*

S 179. Permanent Mukarari Leases—*contd*

——where the tenure was not within "a permanently settled area" the settlement by the Govt with the deft. was not a permanent settlement as defined in s 2 (12) of the B T Act and so it was not exempted from the operation of s 52 (1) (b) of the said Act. 25 C. W. N 361. P. C

As to the meaning of terms conveying permanent right, see "*Meaning of terms*"

S. 180 UTBUNDI CHUR AND DEARAH LANDS

——*chur* is land which is formed by fluvial action 29 C W N. 290 : 80 I C. 702 1925 Cal. 249

——occupancy right can be acquired in *chur* or *dearah* lands by accretion to the original holding 21 C 233, 15 W R 87, 149, 16 W R 95, 8 B L R, 73, (24 W. R 404) *not fol*

——lease of *chur* land for a term of years creates non-occupancy right 42 I C 546, 20 C. W N 14, 1097.

——this sec is not controlled by s 20 33 C 444 4 C L J 63

——the tenants holding a *chur* land are liable, until acquisition of occupancy right, to pay rent agreed upon irrespective of s 43 The introductory words of sub-sec (1) of 180 govern the whole of the remaining sub-sec 14 C W N 470 37 C 419, 11 C L J 364, 32 C. 463

——agreement by tenant, with landlord in contravention of latter's covenant with the Govt not to recover enhanced rent is enforcible *above case*

——right of occupancy cannot be acquired unless particular land is held for 12 continuous years. 17 C 392, the presumption of s 20 cl (7) does not apply to *dearah* lands 33 C 444 4 C. L J 63

——in order to avoid liability for rent for future years an *utbundi* tenant is not bound to give any notice of abandonment to the landlord, when he ceases to hold the land, 11 C W N. 581 : 5 C. L J. 398

——a raiyat who holds *dearah* land, cannot, until he has acquired occupancy right in his holding by twelve years' continuous possession, demand a reduction of rent under s. 52 (1) (b) of the B T. Act 18 C W N 598

——the additions of s 180 (A) and (B) under the Amending Act X of 1928 [illegible] ious arrangement or custom [illegible] s between the landlords and [illegible] or 180B, which taken away [illegible] utbandi raiyat who has acquired a right of occ[illegible] yat acquiring a right of occupancy [illegible] e provisions of s 180 has the [illegible] quitable rent, irrespective of ss. [illegible] 1929 Cal 614

S. 181 SERVICE TENURE.

——the term "service tenure" in s. 181 really means service tenancy and does not mean tenure in contradistinction to a holding

S 181. Service tenure—*contd.*

and the *description* of the service tenure holder as a 'malik' does not give *rise to* any inference of his right of tenure. 1928 Pat 603 : 109 I. C. 287 : 7 Pat. 566

——where the service tenure-holder refuses to perform the services *he is liable* to be ejected however long he might have held the land. 4 C. 67.

——tenant holding a service tenure cannot acquire a right of occupancy 4 C. 67.

——service tenure may be resumed when services are no longer *required or* the tenant refuses to perform the services 22 C 938, 22 C L. J. 403, 22 B. 422. But when the grant is for services of public nature Zamindar cannot at his option put an end to it. 10 C W. N. 161 . 3 C L. J 1 P. C.

——s. 155. B. T. Act does not apply and is liable to be ejected *without* notice. *1 C. L. J.* 16 n. 2 C L. J. 403, 3 C. L J. 274 : 33 C 339.

——service tenure-holder can be ejected otherwise than in *execution of* decree. 25 C. 131.

——co-sharer cannot eject partly. 31 C. 786 : 8 C. W N. 125

——right of occupancy cannot be acquired under service tenu 23 C. W. *N.* 136, 11 C W. N. 46 : 5 C. L. J. 53, so no notice to q is necessary *2 C L J 403*

——although occupancy right cannot be acquired in chakr *lands* after the passing of the B T. Act rights already acquired und *s. 6 of the Rent Recovery Act* are protected by s. 19 of the Act, *s. 181* does not govern sec. 19. 44 C. L J. 271 : 1927 Cal 46

——right of occupancy may be acquired in choukidari chakra land. *31 C. 1021.*

——resumed choukidari chakran land being transferred to th *proprietor*, old estate continues. 28 C L J 160, 25 C. L J. 44, *(34 C 109*, 13 C. L. J. 102). *Overruled.*

——when service-tenure-holder repudiates title of the *landlor* he *is liable* to be ejected without notice and the suit *comes unde* *Tr. P Act But* before suit, the landlord must do *some ac* showing *intention* to determine lease. 33 C. 339 : *3 C. L. J.* 27 2 C. L. J. 403 *Ref.*

——*a tenant* entering into possession as *service-tenure* holder cannot by a subsequent *assertion of* higher title acquire such titl even it the landlord does *not sue to* eject him within 12 years o such assertion. *91 I. C. 451 : 1926 Cal 645.*

——a service tenure-holder cannot claim adverse possessio simply because he does not render service. 1921 M. W. N. 373 *62 I. C* 771, 1 Pat. 292.

See other cases under "Choukidari Chakran lands."

S. 182. . HOMESTEAD.

... are not applicable to *the case* o ... of the B T. *Act do not apply* ... by raiyat. 43 C. *L. J* 332 : 1926

S. 182. Homestead—*contd.*

——a tenant is protected by this sec. from eviction in case of culturable lands which are really part of his homestead and appurtenant thereto. 92 I C 843. 1926 Cal. 580

——when homestead lands are held under *raiyats*, the law regulating ejectment from the homestead lands is the same as the provisions regulating the raiyati lands, 91 I. C. 183

which
held
182
553 :

1925 Pat 612.

——occupancy right cannot be acquired in land used for building purposes 16 C 952.

——but it can be acquired in land used by cultivator for his own habitation and forming part of his entire agricultural holding, 22 W R. 591, 14 W R 402.

——where the main feature of the land is *bastu* mere cultivation of a portion or use of a portion for horticultural purposes will not convert it to agricultural land 40 C 402

——raiyat having right of occupancy in agricultural land in the village acquires the right of occupancy in the homestead land not forming part of his holding 13 C L J 255 14 C L J 176

——the provision of sec. 182 B T. Act is applicable whether the homest
different la
16 C. W N
W. N 550
N. 416, 13 (

——where the homestead land was under a separate jama formed by mutual consent of landlord and tenant s. 182 B T Act was not applicable 23 C W N 16n

——to bring it under the B T Act the land must be actually [illegible] and it is not sufficient
ts use as homestead. 22'

the character of land is
tead, and it must be established that the land is used by the raiyat as his homestead. 72 I C. 640.

——a sublease of homestead portion only is governed by sec. 182 B T. Act 16 C. W N 618. 15 C L. J (72, 21 C L. J. 275 : 19 C. W N. 914, 8 C W N. 454, 15 C L J. 2n

——when homestead lands are held under persons who are themselves raiyats, the ejectment from the homestead land is regulated by the provisions which regulate the raiyati lands. 91 I. C. 183.

——it cannot be said that because a settled raiyat takes settlement of a plot of land adjacent to his homestead though for purposes not agricultural the tenancy of the new plot will be governed by

S. 182. Homestead—contd

this sec. 37 C. L J 524, 1923 Cal. 667: 74 I. C. 552 22 C L. J. 219: 20 C. W. N. 550. *this case as held below has got legislative recognition by the amendment of the sec.*

——where the tenant (1) was a settled raiyat (2) had lands [illegible] hired labourers, whom [illegible] (3) had his granery and [illegible] circumstances it was [illegible] that the disputed land was governed by either this sec or by any other [illegible] *above case* [illegible] *settled raiyat for keeping* [illegible] sec A homestead land is [illegible] yat keeps agricultural cattle [illegible]

——*the* rights derived from a contract have been abrogated [illegible] with regard [illegible] as to the pr[illegible] although un[illegible] from the ope[illegible] *96 I. C. 541.*

S. 183. CUSTOM AND USAGE.

Custom (*General*)

——custom, if a question of law or fact. 25 C. L. J. 613.

——custom must be ancient, reasonable and certain *23 C. L. J.* 148, 42 C 455 · 20 C L. J. 183, 9 C 698, 26 C. 55 P C, 2 A 49

——must be proved by unambiguous evidence. 17 W. R 553 P. C

——evidence of custom must be precise and conclusive. 20 W. R 154.

——the question whether a given state of facts establishes a binding custom or usage, is a *question of law*, but the *question* whether such a state of facts has been proved by *evidence is a* question of fact. 25 C. L. J. 613, 29 M 24 *Diss. cases* on the *subject* reviewed.

——whether a custom is reasonable or valid is a *question of* law 19 C. W. N. 1188, 10 C. 138.

——a customary right owes its origin generally *to common* consent, and when fully developed may be treated as incorporated into contract by implication. 11 C L. J. 209

——statements of persons who were in a position to know the existence of a custom or usage in their locality, are admissible under sec. 48 Evi. Act, 26 C. 184.

Usage (*General*).

——may be of recent origin or existing from a *long time* it is the habit which is ordinarily and regularly practised by the inhabitants *of a place* 23 *C.* 427; 3 *C.* W. *N.* 21, 26 C. 151

——usage of transferability should be proved either in the landlord's estate or in the neighbourhood which can give rise to the presumption of its existence on such estates 23 C. 179

Usage (*General*)—*contd.*

——there is a great difference between a custom and usage and the latter may be established in much less period of time than custom, 3 C W. N 21

——a transfer of occupancy holding can be justified by a local usage which has fructuated into maturity, but not by a usage which is still growing up 6 C W N 861

As to custom and usage of cutting down trees see, "s 23 B. T Act."

Ss. 184-185. LIMITATION.

Applicability,

——the test of applicability of the provisions regarding limitation is whether the suit was between landlord and tenant to whom the provisions of the Act apply 102 I C. 768 1927 Pat 313 8 Pat L T 673.

it does not relate
essly provided 17
B. (17 C W N.

——B T. Act is not a complete Code 6 C L J 272 11 C W N 983

——parties cannot contract to alter the law of limitation, In instalment-rent decree time runs from the date of decree 17 C. W. N. 518 But see 39 M 129.

——in computing the period of limitation injunction period is to be excluded 18 C W N 539, 14 C 385, 21 C 381, 14 C L J 610, 27 A. 334, 16 B 123 (6 C W N 735) *Dist.*

——s 19 of the L Act is applicable to rent-decree 34 C L J. 194, 10 C. L J 517, 3 C L J 347, 9 C W. N 1025, 9 C 255 **P. C.** (23c 192, 4 C L J 533) *Dist*

——where the plea of limitation was taken and an issue framed but it was pressed in the trial court the point might be pressed in appeal 3 Pat L R 132 89 I C 340 1925 Pat 549

——s 184 B. T Act provides the period of limitation but s 14 Limitation Act does not provide the period of limitation but the means of computation, so s 184 B T Act does not exclude s. 14 L. Act 33 C. W N 227 1929 Cal 325

Sch. III Art 1, Ejectment suit

——ejectment of non-occupancy raiyat,—6 months from the expiration of the term of the lease 18 C. L J 597

——a sub-lessee of a non-occupancy tenant is not a non-occupancy tenant but is merely a tenant of the non occupancy tenant A suit by the landlord to eject him is governed by the general law of limitation as there is no relationship of landlord and tenant 62 I C 292 (c)

——the tenant of a proprietor's private land under a lease for terms is not a non-occupancy raiyat and the period of limitation *for ejecting him is 12 years. 35 C. L. J. 506, 1 Pat. 340.*

Sch. III Art 1. Ejectment suit—*contd.*

——tenant of a *kamat* land for term becomes a trespasser after the lapse of the term and so special limitation applicable to non-occupancy raiyat does not apply as he is not a non occupancy raiyat. 26 C. W N. 833. P. C.

——in a suit for ejectment of tenant and damages for excavation Art 32 of the L. Act is applicable. 25 C. W. N. 930.

Sch III Art. 2. Suit to recover arrears of rent.

——registered lease, suit for rent, limitation—when of agricultural land, 3 years, when of non-agricultural land, 6 years. 23 C L J. 111.

——a suit for arrears ... than three years after the date is not barr ... brought for that period. 3 ...

——a suit by assignee ... 2 (b) but falls under Art 110 L. Act. ... 444 (e).

——the limitation prescribed in sch. III Art (2) (a) (6 months) only applies to case where the deposit has been made under s 61 of the Act and if no deposit has been made within the meaning of that sec the limitation period does not apply. 90 I. C. 871 : 1925 P. H C C 293

Sch. III Art. 3, suit to recover possession of land as a raiyat or under-raiyat..

—— ... dispossession by the ... figure of speech ... onsidered ... 1917 ...

——in order that there should be dispossession under this Art there should first be possession 48 C. L. J. 554 : 115 I. C. 355 ; 1929 Cal 157

——Art. 3 applies only to cases of actual dispossession by the landlord and not to constructive dispossession 90 I. C 793 : 1926 Cal 350

——the doctrine of constructive possession should not be extended. 62 I. C. 690, 1926 Cal. 350 : 90 I. C. 793.

——in determining the application of the special law of limitation the purpose and sense of the Act, which governs the relation of landlord and tenant only must not be left out of sight. The tenant should not be deprived of the rights that he otherwise ... between whom and himself there ... ntended to deal ... t. 62 I C. 690. ... by the land- ... original tenant ... relationship of ... on applies but ... end the special

Sch. III Art. 3, suit to recover possession of land as a raiyat or under-raiyat—*contd.*

limitation does not apply 24 C. W. N. 282 31 C L J 199 As to the latter point there is divergence of opinion 2 C. W. N. 175, 6 C. W N. 333, 5 C L. J 650, 17 C W. N 817, 27 C. L. J 528, 13 C. W N 108. 9 C. L. J. 131, 21 C W. N. 976, 21 I. C. 860, 2 P. L. J. 567, 62 I. C. 704.

——in a suit by occupancy raiyat for recovery of possession against auction purchaser at sale caused by landlord, limitation is 12 years. 17 C W N 1049 18 C L J 86, 21 C. W N 373, 1928 Pat. 218: 9 Pat L T 735 109 I C 519 *contra*, limitation is 2 years 13 C. W. N 108 9 C. L J 131 when landlord is auction purchaser it is 2 years 21 C. W. N 976, 978 but see the dissentient judgments of J. Cuming and J. Page in 1927 Cal. 109 98 I. C 140

——dispossession caused by the act of delivery of possession by court is not dispossession by the landlord within this Art. 97 I. C. 629

——a suit by tenant against landlord who dispossessed him claiming title under an auction-purchase in execution of a rent decree against third person is governed by 2 years rule. 28 C W. N 482.

——when in execution of a rent decree obtained *exparte* against some minors the landlord purchased the holding and obtained possession and the minors sued after two years to restore possession [illegible] roperly represented 450: 31 C. W N.

[illegible] ght when the purchaser is recognised by some landlords but dispossessed by others from the whole holding the suit by the purchaser for possession is not barred by Art 3 as the dispossession was not by landlord no relationship of landlord and tenant existing between the plff. and the deft. 39 C. L J. 581

——when occupancy raiyat is dispossessed by person inducted on the holding by landlord, at his instigation and in collusion with him, special limitation applies and landlord is a necessary party. 25 C. W N 168, 27 C W N. 86

——plea of special limitation may be raised by person claiming under the landlord even if the landlord is not made party. 1925 Cal 461.

——special limitation applies not only in a suit against the [illegible] him. In [illegible] een made

[illegible] from the landlord and it was not found that he was authorised by the landlord to oust the plaintiff (the decree being that the plaintiff has no title and was never in possession) special limitation would not apply To apply the law dispossession must be by the landlords personally or by an agent acting within the scope of his authority. 25 C. W. N, 102, 4 C. W. N 326, 24 C. 40, 9 C. W N. 54, 4 C. W. N.

Sch. III Art. 3, suit to recover possession of land as a raiyat or under-raiyat—*contd.*

665, 13 C. W. N. 108, 21 C. W. N. 976 373, 27 C. W. N 86—these are cases where the special limitation was applied), 29 C 610· 6 C. W. N. 702 F B. 10 C. L. J. 89, 17 C. W. N. 1149 : 18 C. L J 86, 41 C. 52 : 18 C W N. 353 : 18 C. L. J. 86, 28 C. L J. 216, 32 C. L. J. 9, 27 C W. N. 259, these are the cases where it was not applied

——where the landlord had no hand in the ouster and the deft was recognised as tenant after he had entered into possession ... 91 I C 493 ; 1926 Cal 751

... suit by a tenant for ... he has been ousted ... alleged purchase by ... of the landlord 93

I C. 031 (b).

... been by a ... of a

——Art 3 does not apply in a suit between two tenants unless dispossession can be attributed to the agency of the *landlord.* 36 C. L J. 140, 27 C. W. N. 259 : 70 I. C. 602, 23 C. W. N. 102 *Ref*

——Art. 3 applies when the dispossession is by the *naib* of the landlord 34 C. L. J. 462.

——Art 3 does not apply where there is no *relationship of* landlord and tenant between the parties 1923 *Cal.* 327.

... third person under ... bring the ... ndlord had

... ssession of ... suits for ... nt relating

——where the landlord takes possession of the land as usufructuary mortgagee from the tenant and continues in possession after the termination of his rights under the mortgage his possession is adverse and it is not a dispossession within Art 3 *B T. Act* 59 I. C 442

——the title of the certified purchaser who is in the eye of law a tenant is destroyed by 3 years, possession of *landlord* 24 C W. N 1024

——where the plff. had purchased a portion of the tenant's holding in execution of a money decree and had never obtained delivery of posession Art. 3 of Schr III does not *apply.* 5 Pat L. T 616 : 1924 Pat. 780.

——to find out whether a person is a raiyat or not within the meaning of Sch III, Art 3 the test is not the use *of the* land the tenant has made but the purpose for which the land had been leased out 3 Pat. 540 ; 82 I C 79 : 1924 Pat. 557.

Sch. III Art. 6. Execution of decree.

——co-sharers decree of rent is rent decree and limitation for execution is 3 years. 10 C. L. J 463, 17 C. W. N, 518, 18 C. L J. 81, 1 C W. N. 751, 1271, 22 C. W. N. 28 n *contra.* is a money decree and limitation is 12 years. 16 C. W. N 1006.

——limitation of rent-decree runs from the date of amendment. 18 C. W. N 266, 17 A 39, 22 C. W. N 540.

——a rent decree cannot be made payable by instalment. 11 C. W N 857: 1927 Pat. 313. 102 I C. 768 · 8 Pat L T. 673

——application of Art. 6 to execution of rent decree 1923 Pat. 5 · 1 Pat 779

——rent decree is equivalent to possession. 18 C W. N. 940

——a suit for declaration of title and for possession wherein the plff. denied the relationship of landlord and tenant between him and the deft. does not fall under Art 6. 91 I C, 478 1926 Cal 545.

——an execution petition can be treated as a continuation ...us application must ... part of the decree- ...o applications are ... 771

Setting aside sale under s 173 B T Act.

——an application under s. 173 B T. Act is cognizable under s 47 C. P. C and Art 166 of the present L Act governs such an application. 28 C. W N 144 n

S. 186A. DAMAGES FOR DENIAL OF LANDLORD'S TITLE.

——before awarding damages the court should find as to whether there was reasonable or probable cause and should record its grounds for coming to that conclusion, the appellate court should also consider in coming to that conclusion 15 C L J. 114

S. 187. AGENTS & REPRESENTATIVES OF LANDLORDS.

——the agent neet not be authorised in writing to act on behalf of all the landlords 24 C. 169

——a power of attorney executed by a Notary Public being produced, no affidavit of identification of the person is necessary. 9 C W. N. 986

——when two joint agents are appointed for collection of rent and a kabulyat is executed in favour of the landlord, upon the death of one, the contract of agency does not terminate against the surviving agent. 17 C L J 201

——a minor can eject a lessee as trespasser who was inducted into the land by his certificated guardian acting conjointly with his co-sharer, without the authority of the court 15 C 40

——a right to take accounts and to recover such sums as may be found due is not assignable, being barred by s 6 cl (e) of the T. P Act. 51 C. 972

S. 188. JOINT LANDLORDS TO ACT JOINTLY.

The proviso added to the sec. has widened the power of the co-sharer who is now empowered to do many acts under the Act making his other co-sharers party-defts. which he could not do under the previous Act.

——this sec. does not prohibit joint landlords to be separate. 27 C. 479 : 4 C W N 494.

——co-sharers can sue for the whole rent making other sharers parties-dfts 25 C. 331 : 12 C. W. N. 249 : 7 C L J. 139 P. C. 7 C. L. J. 425

——this sec applies only to cases of landlords and has no C. 504,

verb-

ally or in writing. 24 C. 169.

——suit for arrears of rent is not under the B. T. Act 38 C. 270 P. C. 27 C W. N. 372 : 36 C. L. J. 234

——s. 188 does not apply to a suit for arrears of rent It is to be determined with reference to the general principle of legal procedure. 36 C. L. J. 234, 35 C. 331 : 7 C. L. J. 139 P. C Ref

——co-sharers having separate collections may sue jointly. 2 ... N. 787 . 3 C. L J. 627,

... or assessment of rent. It ... but they should be made ... : 1925 Pat. 553.

——co-sharer can sue for use and occupation of land outside holding 13 C. W. N. 635.

——co-sharer can sue for filling up tank or for damages 16 C L. J. 127.

——when one co-sharer landlord purchases sub-ordinate right the other sharers can sue for arrears of rent as sole landlords 19 C. L J 517.

——taking kabuliyat for one's own undivided share does not make him separate ...

... member of a Mitakshara joint ... co-sharers either as plffs. or ... 72 I. C 722. So also a suit ... is the only person recorded ... 461 ... of 1822 const. ... the word 'agent' in this sec. includes also a plurality of agents. ... I. C. 937 : 1925 Cal. 245.

S. 189. POWER TO MAKE RULES.

——the ... directed to be made under ... be Survey ... notice to ... 719 : 1924

... C. 213 : 84 I. C. 488.

Ss. 191-192. PROVISION AS TO TEMPORARILY SETTLED DISTRICTS

——s. 191 has no application to an estate which, though not permanently settled in 1793, subsequently settled in the year 1811. 4 C. W. N. 513.

——agreement by tenant with landlords in contravention of the latter's covenant with the Govt in taking settlement of *khasmahal* lands not to enhance the rent is enforcible on the principle of waiver. 14 C W N. 470 . 37 C. 449 ; 11 C. L. J. 364, 32 C. 463

——where in a temporarily settled estate the Government has prohibited sublettting lands at a higher rate a contract to sublet at a higher rent cannot be enforced 33 C. W. N 362 : 49 C. L J 65 : 1928 Cal 763, (32 C. 463 and 37 C 449) *Dist*

——where the tenure was not situated within " a permanently settled area " the settlement by the Govt. with the deft. was not a permanent settlement and so was not exempted from the operation of sec. 52 (1) (b). 25 C. W. N. 361 P. C.

——rent in *khasmahal* can be enhanced 23 C W. N 945; 54 I. C. 850.

——re-settlement by the Govt keeps alive the contractual obligations of subordinate holders as amongst themselves. 18 C. W. N. 907 ; 19 C L J. 308 ; 23 I C. 16.

——s. 192 does not empower a Revenue officer to fix a rent so as to affect the contracts entered into before the passing of the B T. Act 35 C. L. J. 140.

——the temporary settlement holder is not by virtue of the terms of ss 191 and 192 precluded from exercising the ordinary powers of a landlord under ss 7 and 30 of this Act 30 C L J 140.

——there can be a permanent tenure in the Sunderbans 21 C. L J 315.

S. 193. RIGHTS OF PASTURAGE &c.

——a suit for rent of a share of a tank does not come under this sec. 11 C. L J 63n 14 C. W N 159n.

——Sch III of Art 2 cl (b) of the B T. Act is applicable to a suit for the recovery of rent of a *jalkar*, but the money so reserved is not rent within the B. T. Act, and interest at the rate of 12½ p. c. under s 67 is not allowable on the arrears of such money. 19 C. W. N. 514.

——according to the stipulation in the lease claim for rent in respect of the *jalkar* was governed by s. 193 and a special rule of limitation could be invoked. 50 C. L J. 19 : 1929 Cal. 545.

S. 188. JOINT LANDLORDS TO ACT JOINTLY.

The proviso added to the sec. has widened the power of the co-sharer who is now empowered to do many acts under the Act making his other co-sharers party-defts. which he could not do under the previous Act

——this sec. does not prohibit joint landlords to be separate. 27 C. 479 : 4 C W N. 494

——co-sharers *can sue for the* whole rent making other sharers parties-dfts. 25 C. 331 : 12 C. W. N. *249 : 7 C. L. J. 139 P C, 7 C L. J. 425*

——this sec. applies only to cases of [illegible] has no [illegible] C. 504,

[illegible]

——suit for arrears of rent is not under the B. T. Act. 38 C. 270 P. C. 27 C. W. N. 372 : 36 C. L. J. 234.

[illegible] be determ[illegible] of rent It is to procedure [illegible] principle of legal [illegible] 19 P. C. Ref.

——co-sharers having separate collections may sue jointly 2 C L J 205, 35 C. 33, 7 C. L. J. 139, 10 C W. N. 787 : 3 C L. J. 617, 33 C 1010 : 10 C. W. N. 952.

——a co-sharer landlord cannot sue for assessment of rent It may be *unnecessary* to join others as plffs. but they should be made parties-*defts* 88 I. C. 687 : 6 Pat. L. T. 367 : 1925 Pat 559.

——*co-sharer* can sue for use and occupation of land outside holding 13 C. W. N. 635

——co-sharer can sue for filling up tank or for damages. 16 C L J. 127.

——when one co-sharer landlord purchases sub-ordinate right the other sharers can sue for arrears of rent as sole landlords 16 C. L J. 517.

[illegible] wn undivided share does not [illegible] member of a Mitakshara joint [illegible] co-sharers either as plffs or [illegible] So also a suit [illegible] person recorded [illegible] 461 [illegible] of 1922 consti[illegible] word "agent" [illegible] C 987 : 1925 [illegible]

S. 189. POWER TO MAKE RULES.

——the procedure for a survey though directed to be made under the provisions of this Act must be that laid down in the Survey Act and it must be conducted with all the publicity and notice to all parties concerned as laid down in that Act. 1924 Pat. 717 : 1924 H. C. C. 213 : 84 I. C. 488.

(4) Cause of action—*contd*

——an infliction of corporal punishment to pupil for enforcement of discipline is justifiable if it be moderate 45 M. 548 · 42 M. L. J. 460 : 31 M L T. 26 : 1922 Mad. 200

——when a man dies by the tort of another, his heirs have a cause of action for damages. 64 I. C 311.

——a husband cannot sue the Ry. Co for damage for the death of his wife during journey, he not being the aggrieved party 41 A 488 : 50 I C. 130 · 17 A L J. 506

——the owner of a field from which earth was washed away by heavy rains and deposited in the adjoining field has not right to dig and carry back the earth and no suit lies in that respect, nor does the fact that the neighbour lowered the level of his field gives a cause of action 19 A L J 309

——an owner of land is entitled to protect himself against water which he has not brought on the land himself, likewise his neighbours have a right to protect themselves against water which threatens to do damages to their properties. 23 Bom L R 1107 59 I. C. 391

(5) Conspiracy when actionable.

——a criminal conspiracy gives rise to a civil liablity if special damage has been suffered by the plff. There is no rule in the Evidence Act, requiring the standard of proof of a conspiracy in a suit for damages in consequence of injury resulting from conspiracy, to be the same as in a criminal case. 16 C W. N 145 : 13 I C 721

——in an action of conspiracy allegation and proof of malice is essential to the cause of action The mere fact that a stranger whether he was or was not aware of a contract, induced the promissee not to perform his contract with the promissor does not by itself, in the absence of other elements, give rise to a cause of action 39 B 682 28 I C. 408

—a person inducing a girl betrothed to another to break the engagements and marry him commits no tort as to give the aggrieved party a cause of action. The proceeding or enticement is actionable when it is the result of a conspiracy and before a conspiracy can be actionable it should be shown to be a conspiracy to do a lawful thing by unlawful means or to do an unlawful thing even by lawful means. 41 B. 137 38 I C 588

——combination may be an element of aggravation in the assessment of damages but it is not sufficient to make it a different tort. 40 C 898, 18 C W N. 185, 23 I C 25

(6) Damages.

——an action for damages against some of several joint wrongdoers is maintainable 106 I C 261 1928 Cal 138

——plff is not entitled to damages if loss could be avoided by him. 19 C W N 1311

——the owner of an adjoining field cannot sue for damages for removal of the earth by heavy rains from his field to that of the

(6) Damages—*contd.*

other although that was caused by the *digging of the field* by the latter. 19 A L J. 309

——where an owner of land, without wilfulness or negligence uses his land in the ordinary manner, though mischief thereby accrues to his neighbour, he is *not liable for damages*, but if unusually he brings upon his land water which would not naturally have come upon it, he will be liable for damages for the escape of the water into the land of his neighbour. 16 C. W. N. 875: 15 I. C 543.

——where the plff. and the deft. were owners of adjoining fisheries and owing to the obstruction of the free passage of fish to the plff's waters caused by the deft. the plff's catch was materially lessened the plff. was *entitled to damages*. 1 Bur. L J. 146: 74 I. C. 41

——a person cannot be allowed compensation for losses which he might have resonably *avoided* 33 C L J. 72.

...awarded ...172 in

...st a ...for which a ...t the land, ...to pay as ...cupation of ...trespasser ...for the purpose ...ot stand by and ...1925 Mad. 223:

...

——where the *attachment before judgment* is obtained without reasonable and probable cause and therefore maliciously, damages ...not completed as the ...527 · 30 M. L T. 289:

...only does not give rise ...923 A. 465: 20 A. L.

——the fundamental principle that the plff. cannot be permitted to follow a line of attack which the deft. has no opportunity to meet is of special importance in collision cases where the accident happens ...manner and in an extremely

...the nature of ...of the owner ...the old market ...dy by way of

...fied voter from ...a action for

(6) **Damages**—*contd.*

——in case of *bona fide* trespass a nominal damage is to be awarded 20 A. L. J. 838 . L R 3 A. 494

——where a person was given a slight push on the assumption that he was trespasser without any injury to his reputation or person he is entitled only to a nominal damage 68 I C 664 1923 Cal 306.

——when the claim for damages is exaggerated the deft. is liable for proportionate court-fee only. 45 M. L J 366.

——a landlord who seizes or detains the goods of the tenant for some unpaid rent, acts illegally and is liable for damages 63 I C 44

——in a suit for injunction without prayer for compensation the court should grant damages without referring the parties to further litigation. 61 I C. 870.

——purchaser having other goods of his own to meet demands of his own contract is no ground for disallowing damages 43 A 257

——in the case of the dismissal of a school-master or other servant without due notice one month's salary would be reasonable damages 13 Bur L T. 168 . 63 I C 982.

——in a suit for divorce on the ground of wife s adultory with the co-respondent the court can award damages against the co-respondent 45 M L J 282

——a trespasser is not entitled to compensation for improvements made by him. 28 C 141

——a trespasser cannot claim compensation in a suit for possession. 28 C 142, 12 A L J 1026 25 I C 198

——in awarding damages for physical injuries caused to plff. by the negligence of the deft the amount of compensation must be fair and reasonable, an absolute compensation is not the true measure of damages 45 I C 556 23 M. L. T. 312 . 7 L W. 415

——mesne profits are in the nature of damages which the court may mould according to the justice of the case. 27 C 951, 957. 4 O. W N 631 P. C.

——in a suit for damages for a criminal assault the plff is not [illegible] in prosecuting

915 P W. R 117,

l attachment of

Dr. 32 C L J

the date of the

——order of temporary injunction maliciously obtained gives rise to cause of action for damages 45 P. L. R. 1922 1922 Lah. 303

——on a question of *quantum* of damages it is not the practice of the H C to interfere except on a question of principle 2 Pat L T. 255 62 I C 72

——where goods were despatched by steamer from C. to P. under a bill of lading and while the steamer was at G. a fire broke out and damaged the goods partially and a sale of the goods resulted in a loss, held that the consignor was entitled to damages on the basis

(6) Damages—contd.

of the market price at G. on the date of damage and not the market price at P. at the time of discharging the cargo. 53 C 239 95 I C 1042 : 1926 Cal. 564.

——under the circumstances of the case the deft. company was held to be justified in putting an end to the managing agency of the firm of plff. and the plff. was held to be not entitled to recover damages. 30 C W. N. 440.

——the deft instituted a suit against the plff. maliciously and without reasonable and probable cause He obtained also a tem [illegible]

——in a suit for compensation under the *Carrier's Act* negli[illegible] [illegible] is not to be proved by the [illegible] *N. 970* [illegible] compensation is maintain[illegible] which has been subsequently [illegible]

——no action lies against any person for issuing execution or otherwise acting in pursuance of a *judgment or order* of a court of [illegible] L R 595 [illegible] *damages will be awarded* [illegible] *up his character* 85 I C [illegible]

(7) Defamation.

(7A) Abusive and scandalous language.
(7B) Fair comments.
(7C) Imputation regarding caste.
(7D) Journalists' comments and procedure.
(7E) Miscellaneous cases of privilege.
(7F) Statements made in plaints, written statements &c.
(7G) Vakil's or Pleader's comment if defamatory
(7H) Witness's statements if privileged.

(7A) Abusive or scandalous language.

——as a principle of equity every person is entitled to have his reputation preserved intact and words infringing *this right* give rise to the cause of action. 1929 All. 214 : 27 A. L. J. 3[illegible] 115 I. C. 458.

——where words *defamatory in themselves* and not *mere verbal* [illegible] damage, though *no special* [illegible] 34 C. 48 . 4 C L J. 3[illegible] 40, 38 M. 173 *Appr.* 4 C. [illegible], 42 M. 131.

——abusive and insulting language,—as calling the plff. a [illegible] [illegible] born or bastard) *soor (pig)* [illegible] [illegible] defamation is *not actionable.* (*Ghosh J. contra*) 25 C. 653 :

(7A) Abusive or scandalous language—*contd.*

——mere use of scandalous words imputing unchastity to a woman is not actionable by itself 28 C 452.

——writing a letter to husband alleging that the wife was a witch and by her soicery caused the death of certain person, making statements of similar description to their castemen, is actionable as slander and no proof of special damage is necessary. 4 C. L. J. 390.

——where a respectable Indian gentleman D Hr. was called a most insolvent upstart, the words were not held to be defamatory as they did not throw a reflection on the birth or reputation or general character. 9 A L J 253 13 I C 506

——no damage is recoverable for the mental distress caused by an insult 28 C 452 5 C W N. 659

——where the plff advertised in a newspaper that a picture painted by *Ravi Varma* was for sale and the deft styling himself 'Ante Humbug" expressed his doubt about the genuineness of the picture in the same papers held that the deft was not liable for damage, for defamation. 9 I C. 279 . 9 M L T 230 1911 M W. N. 226.

——defamatory language is such language as injures or tends to injure a man's reputation The test of the defamatory nature of any given language is its tendency to excite against the plff feeling of hatred, contempt, redicule, fear, dislike or dis-esteem 47 A 391 86 I. C 922 1925 All. 371

——the law applicable to the Parsis of Bombay is the common law of England and consequently a suit for damages for slander of a woman is not maintainable without proof of special damage 28 Bom L R. 391 : 1926 Bom 302

——if the words are defamatory and untrue the law implies malice and the plff is entitled to damages without any proof of express malice 1929 Lah 561 117 I C 90

——damages in an action for libel are entirely discretionary and the defamant's, conduct not from the time of publication of libel down to the moment of verdict should be considered 1929 Cal. 561 117 I. C 90

(7B) Fair comments.

——any member of the public can comment fairly on facts truly stated on the matter of public interest but the allegation of fact imputing any act of misconduct takes the libel out of the sphere of fair comment Then the allegation must be proved to be true 19 I C 98 15 Bom. L R 130.

——a journalist is not deprived of the privilege of fair comment merely because there are slight unimportant deviation from absolute accuracy not affecting the general fairness of the comment 47 I. C 449 ; 20 Bom. L R 185

——nothing is libel which is a fair comment. It must be a comment and not a statement and the comment must be based on facts in order to be pleaded in defence. 48 C. 304 : 63 I C 467 ; 25 C W. N. 150

(7B) Fair comments—*contd.*

——*a fact* may be truly stated and may yet be utterly untrue Comment to be *fair* need not take the form of an inevitable inference 47 I. C. 449 : 20 Bom L R. 185.

——*mis-statement* of facts and comment in a newspaper is not fair comment. 30 M. L. J. 294 : 1916 M. W. N. 267 : 32 I. C. 408

——to *describe* a journalist's communication as rubbish is defamatory 41 I C. 696

——any person has the privilege to defend his character against *false charges* and may retort upon his assailants but if it is not fairly made then it will be malicious and *actionable*. 32 C 318. 8 C. W N. 731.

——fair comment when privileged. 25 M. L. J 476 : 21 I C 625, 41 A 329, 12 M. L T 377 : 16 I. C. 736, 20 Bom L. R 185 · 47 I. C 419, 15 Bom. L. R. 130 : 19 I. C 98, 25 C. W. N 150.

(7C) Imputation regarding caste.

——a suit for defamation against the Panchayat of one's own caste for issuing notice suspending social relation with him for breach of c[illegible] the absence of express malice 21 [illegible] A. 561 33 M L J 103 : 2 Pat. [illegible]

——whe[illegible] [illegible]radh ceremony and afterwards [illegible] taking meals in at widow remarriage held that the deft had not slandered him 36 I C. 460 : 28 M. L. J 58 · 17 M. L T. 369.

——to call an European or Anglo Indian a "native" is not defamatory though insulting. 41 I. C. 696 (L. B.)

——where the *deft* falsely wrote that the plff instigated the [illegible] he was liable [illegible] believed the [illegible] at the matter might be investigated by the society concerned, he was protected 41 A 329 : 60 I. C. 398.

(7D) Journalists' comment and privilege.

——a newspaper is *exactly* in *the position of* an individual for defaming 1929 Cal. 309.

——it is a falacy to suppose that some kind of privilege attached to the profession of the press as distinguished from the members of the public. The freedom of the journalist is *co-extensive* with [illegible] can go to the same lengths as [illegible] unless otherwise *shielded* 41 C [illegible] 161 : 16 Bom L. R 544 · 25 M [illegible]

——whilst a jour[illegible] [illegible] on public question with care, reason and [illegible] [illegible]ived of *his privilege* merely b[illegible] [illegible]s from absolute accuracy whe[illegible] [illegible] general *fairness* of the commen[illegible] [illegible] whole [illegible] to t[illegible] Facts must be truly

(7D) Journalists' comment and privilege—*contd.*

false. Fair comment impliedly permits of a much greater latitude than the drawing of inevitable inferences. 47 I C 449 : 20 Bom. L. R 185

——mis-statement of facts and comment in the newspaper is not fair comment. All the facts upon which the imputations are based need not set out to justify the imputation of motives to a person in an article published in a newspaper. 30 M L J 294 . 32 I. C. 408 : 1916 M W. N 267

——in the case of libel against a class of persons, if the description in the libel can be shown to be applicable to one of such persons, that person may bring an action for damages for libel. 35 C 495 12 C W N 490

——a comment under the particular circumstances of the case was held not to be fair comment and was not privileged 48 C. 304 63 I C 467

——a journalist is entitled to comment on matters of public interest and no suit will lie against him unless he has exceeded the bounds of fair comment or was actuated by malice. If statements are derogatory of a person they must be stated as matter of comment and not as matter of fact in which case they require to be justified, that is, they will have to be proved to be true. 21 I. C. 625 : 25 M L J 476

——the proprietor of a newspaper is civilly liable for any libel appearing in its colums although it was made in his absence, without his knowledge and even contrary to his orders 1929 Cal. 129

(7E) Miscellaneous cases of privilege.

——defamatory words published by the Governor-General in course of Official duties are not actionable unless maliciously made 39 M. 781 31 I C 224 29 M. L J 280

——a libellous statement made by the Govt in an appellate order is absolutely privileged 37 M 55 19 I C 353 ; 24 M. L J. 429.

——a suit for damages for defamation cannot be brought against the Crown 18 C W N 106 17 C L J 75 16 I. C. 922

——an imputation of crime made in good faith by an employee against his employer made to a co-employee with a view to their making an enquiry in the matter is privileged as it was made in the interest of the communicator himself 42 M 132 24 M. L T 461 : 1919 M. W N. 113 , 35 M L. J. 673.

——[illegible]

——an action lies for malicious publication of statements which are false in fact and injurious to another unless they are fairly made in the discharge of one's public or private duty or in the conduct of his own affairs. 9 O & L. R. 302.

(7F) Statements made in plaint, written statements, affidavits and petition of complaints.

——a defamatory statement in the pleadings is not privileged and may form the foundation of a suit for damages for libel 17 C. W N. 554 : 17 C L J. 105 ; 18 I. C. 737.

——statement made by the parties to a suit in the pleadings is not privileged, and a charge of defamation is maintanable but the witness deposing is privileged. 5 C. W. N. 293, 23 C 867 f.l 14 B 97 Diss.

——litigants are not privileged to insert any matter they please into their pleadings, application or affidavits or to make any statement they like in the witness box however irrelevant or insulting they may be. 3 L. B. R. 265

——defamatory statements in pleadings are not absolutely privileged 65 I C. 204

——written statement of party containing defamatory matter is not absolutely privileged. 15 C. W. N. 995 ; 14 C. L. J. 31.

——a defamatory statement made in an affidavit is not privileged if it is irrelevant to the inquiry to which the affidavit related 8 C. W. N 292.

——defamatory word used in a complaint in a criminal court are not actionable. 40 A. 341 : 16 A L. J 360 · 45 I. C. 540, F. B

(7G) Vakils or Pleaders comment if defamatory.

——when defamatory statement is liable 40 A. 341.

——where a Vakil [illegible]

plf [illegible]

ma [illegible]

for [illegible]

api [illegible]

con [illegible]

85 13 C. W. N. 340, 18 C. W. N. 424

——when a pleader is charged with defamation in respect of [illegible] court ought [illegible] W. N. 340 [illegible] be privileged

[illegible] N. 835

——defamatory statement made by the advocate outside his duty are irrelevant and are necessarily made in bad faith and are consequently defamatory. 115 I. C. 458 : 1929 All. 214 ; 27 A. L J 33.

(7H) Witness's statements if privileged

——if a party to a judicial proceeding is sued in a civil court for damages for defamation regarding statements made therein on oath or otherwise, his liability in the absence of statutory rules must be determined on the principles of justice, equity and good conscience identical with the corresponding relevant rules of the common [illegible] L. J. 91 · 6 C

[illegible] witness or party [illegible] made in judicial

(7H) Witness's statements if privileged—*contd.*

proceeding. But it is otherwise in case of pleading 39 C 164 14 C. L J. 31, 38 C 880, 32 C 756, 1060, 32 P R. 1917 · 38 I C 978, 42 A 257, 15 C 264, 21 O. C 321 49 I C 58, 5 C W N 293

——there is an obvious difference between the case of a witness giving evidence, who is bound by law to say all that he knows though the consequence may be that his evidence will include defamatory matter and who is, therefore, admittedly privileged, and a party making statements in pleadings conveying unwarrantable and irrelevant insult to the opposite party 5 C W N. 293

:hastity to pltf's sister
of him nor did cause
is privileged unless it

——answer by witness to question on oath is privileged 43 A. 92, 54 I. C. 890 18 A L. J 112, 40 A. 271

——statements made in the course of a judicial proceeding by a party or witnss is not actionable 5 W R 134 : 10 M 87, 14 B. 97, 2 B 230, 10 A 425, 15 C. 264

——but it must be found out if such statement was relevant to the inquiry 18 I C 331 11 A L J. 193,

——in this country the question of civil liability for damages for defamations and questions of liability to criminal prosecution do not, for the purpose of adjudication, stand on the same basis. 24 C W. N 982 ; 32 C L J 94 48 C 388, F. B.

(8) Easement

For cases relating to easement, see "*Easement*"

(9) Government and Government officer.

——Govt is not liable for the negligence and carelessness of the servants and officers of Municipality and District Board 39 M 351 · 27 I C 723 1915 M W N 39

——an officer acting honestly in discharge of his duty is not liable although he acts on false report 40 C 898. 18 C W. N 185 62 I. C, 25

——neither the Secretry of State nor the Collector is responsible in tort for acts or defaults of the Collector done in official capacity. 16 I C 714 14 Bom L R. 654

10) Guardian and minor.

——where the esate of a minor has benefitted by the trespass on the part of the guardian, the state will be liable for the resulting damage to third person 5 N. L J 206 : 66 I. C 468, 28 B. 330

——the estate of a minor is not liable for damages for a tort committed by his guardian The guardian himself is liable 64 I C. 473, 31 C 839, 6 N. L R. 6 *Dist* 13 N L R. 101, *Fol*

——a minor is not responsible for a tort committed by the manager of his estate, provided the act was not done in connection with the management of the estate. 31 C. 839.

(11) Jurisdiction of court.

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re is
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a personal tort committed outside the local limits of the cour
jurisdiction, so the court ought to be guided by the rule of just
equity and good conscience. 39 M 433 : 23 I. C. 394 : 28 M. L. J. 2

(12) Malicious house-search.

——in a suit for damages for malicious house search, the p
is to establish satisfactorily that the defts or some of them we
responsible for the search which was *held in the house*. *Circum*
tancial evidence must be incapable of explanation on any oth
hypothesis 1924 Pat 817.

(13) Malicious proceedings and malicious prosecution

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easonable a
expert adv
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proceedings
he course th
ie pltf malic
also obtain
of which th
s against th
926 Cal. 757.
of moveabl
the propert
653 : 54 I. (

——the pltf in such cases can . . . value of th
property and compensation for wrongful attachment, and his righ
is impaired by subsequent occurences for which he was not res
ponsible 33 A. 306 ; 9 I. C. 317 : 8 A. L. J. 92.

——compensation for wrongful seizure is no more than damage
for tort in detinue or trespass. The pltf must prove actual possession
of the property and its deprivation. 38 A 676 : 35 I. C. 66

——malice on the part of the person making such attachment
must be proved. 54 I. C. 827.

——in an action for damages for wrongful attachment of a
. . . . due from a third person no mal . .
itself *primafacie wrongful*. 1915
ttachment before judgment does
39 M. 952 : 32 I. C. 433 ; 1916
M. W. N. 156.

(14) Market

——where illegal means in the nature of intimidation and

(15) Master and servant.

——when master is liable for the tortious act of the servant 13 C. W. N. 619, 23 C. W N. 102n, 78n, 43 B 103, 45 I C 822, 51 I C. 753 (Pat), 42 I C 52

——suit for damages caused by cattle for the negligence of the servant. 10 Bur. L T. 223 · 42 I C 52.

——when an independent contractor takes a buffalo to tend it and it gores to death the plff s buffalo, the contractor alone is liable for damages, the test is to see whether the relationship of master and servant existed between them 10 Bur L T 223 : 42 I C 52 . 9 L. B. R. 54

——where a chaffuer takes the motor car of his master to his house in disobedience of master's instructions his master is liable for the servant's acts though unauthorised, as the servant was acting in the course of his employment and was not on a frolic of his own, 94 I. C 551 . 27 Bom L R. 518 1925 Bom 360

(16) Municipal authority.

——where statutory bodies are entrusted with the performance of public duties, their liability cannot be shifted to a contractor employed by them for a particular purpose 41 M 538 44 I. C 303

——in the absence of proof of malice the members of a Municipality are not liable for any untrue statement made in a report 1923 Nag. 226 73 I. C 39

——the exemption from liability of local bodies such as Municipality for non-feasance is confined to neglect of high ways and does not extend to drainage works which they are bound to repair so as not to be a nuisance to neighbouring owners 35 B. 116 21 I C 847 15 Bom L R 1034

——when the bursting of a water pipe was beyond the control of the Municipality the latter will not be held to have been negligent in respect of the actual breaking of the pipe, but if damage results from the negligence of the servants of the committee in failing to take proper action when the damage is brought to its notice the committee will be responsible 1913 P W R 95 18 I C. 816. 1913 P R 88

——no action for damages lies against the public body unless it amounts to carelessness or negligence in the discharge of their statutory duties 42 M 331 50 I. C 809 36 M. L J. 372

(17) Negligence including contributory negligence.

——when the negligence of the plff. or deft. is the sole cause of the accident, the matter is free from doubt. But difficulty arises when the accident is caused partly by the negligence of the plff

(17) Negligence including contributory negligence—*contd*

and partly by that of the deft. which the court is to determine If the court finds itself unable to discover to what extent the negligence of the plff or the deft. contributed to bring about the accident, the deft. is entitled to succeed for *in pari delicto potior est conditio defendantis*. 52 C. 602 ; 89 I. C. 679 : 1925 Cal. 893.

——where the plff.'s case was that in consequence of the encroachment of the river Ganges the land on which the plff *Katchery* stood was threatened with delusion but owing to the obstruction of the deft. he could not erect another *Katchery* on another peice of land and remove the grain and other goods, and he sued for damages, held that the suit was not maintainable as the loss was attributable not to the deft. but to the wanton negligence of the plff. To attribute the cause of loss to the deft his action must be the "decisive" cause of such loss or the loss should be the natural and probable consequence of the trespass 18 C L J 327 21 I C 513

——owner of land is not liable for the mischief done to his neighbour without wilful and negligent uses of his land 1 C W. N. 875.

——the negligence of parents in allowing children to walk over railway lines unaccompanied by other cannot be imputed to the child as in the nature of contributory negligence. 46 M. 929 : 192 Mad 312 : 45 M. L. J 545.

——deft is not required to exercise more than ordinary caution and skill, burden of proof in such cases. 19 Bom L R. 778 : 42 I C 82, 41 I C. 382 (M).

——keeper of vicious horse is liable for compensation without proof of negligence on his part. 12 C W. N. 916.

——where the deft had stored large quantity of cotton on the ground floor of his residential house for a long time without any ventilation and unwatched and the cotton ignited with the consequence that the adjoining house was destroyed, held that the deft was liable in damages to the plff. for negligence. 48 A. 414 : 1926 All 695 . 94 I. C 425 : 24 A. L. J. 420.

——where the vendor sold goods wrongly labelled and acting upon the label damage was caused to the purchaser, the vendor's plea of contributory negligence failed as it was his duty to put on right labels 34 I. C. 373.

——in a suit for damages for negligence the burden of proving that the injury was got by an act or omission of the deft. for which he was in law responsible lies on the plff. 42 I. C. 82 : 19 Bom L R 278.

——the driving of motor car being a work of skill the driver is bound to act to the best of his skill which must be such as others of that occupation may reasonably be expected to possess Where the deft went on an excessive speed and met with an accident causing injury to the plff he was grossly and culpably negligent so as to be liable in damages 38 B 552 · 21 I. C. 705 : 15 B L. R 959.

(17) Negligence including contributory negligence—*contd*

——if the proximate cause of the injury is the negligence of the plff as well as that of the deft, the plff cannot recover anything 37 B. 575 · 19 I. C. 485 · 15 Bom. L. R 252.

——negligence is the effective cause of an injury when it has in fact caused that injury as a direct and natural consequence. When negligence has once been established liability follows for all the consequences which are in fact the *direct and natural* outcome of it, whether the injury was a consequence foreseen or not To determine liability the law will consider the proximate and not the remote cause of an injury. 47 C. 1027 · 33 C L J. 72 61 I C. 14.

——the principle of contributory negligence has no application to a case simply because the plff did not, at the earliest possible opportunity, remove the obstruction to a water course, caused by the deft. 3 Pat L W. 283.

——a criminal act is different from a reckless one 47 A 268 · 84 I C. 714.

18) Nuisance

——every owner of land is under an obligation not to allow the roots and branches of his trees to extend to the land of its owner and in case of breach of such an obligation, it is open to the court to grant a mandatory injunction for the removal of the nuisance 34 C L J. 315 66 I C 536, 28 I C 843, 19 B. 420, 31 C 944, 43 B 164 47 I C 629, 42 I C 92

——where a tree on one land falls down partly on another land the owner can require it to be removed, and on its not being done so, remove it himself. If after falling the tree strikes fresh root in the lands of both the owners they are entitled to the fruits thereof jointly 1924 Pat 416

——in an action for nuisance it is no answer to say that the deft. has done everything in his power to prevent its existence 40 B 101 ; 33 I C 192 17 Bom L R 1040

——when an individual sues for obstruction to public way he must *prove* special damage 25 C. W. N. 95 61 I. C 405, 1923 All 182 60 I C 711, *contra* Special damage need not be proved in suit for obstruction of public right of way 26 C W. N 587

——mere noise alone if produced by several persons might amount to a nuisance capable of being remedied by an injunction 51 I C 728

——the remedy for interference with ancient lights is not a suit for nuisance for which there should be sensible abridgement of the light so that occupation is rendered uncomfortable or to a sensible degree less fit for business purposes 39. C 59. 12 I. C. 60

——it is an actionable nuisance to erect an oil mill close to a dwelling house emitting foul smelling gas and water and producing unbearable noise Where the nuisance cannot be abated it can be prohibited 45 I. C. 428. 1918 M. W. N 293: 24 M. L T. 17.

(18) Nuisance—*contd.*

——if a person keeps a very large number of horses and the locality is very thickly populated it may cause discomfort, annoyance and injury to health not only of the residents of two or three houses but of such larger number of houses, in the latter case it will be public nuisance. 87 I. C. 771 : 27 Bom. L R 581, 1925 Bom. 458

——a raised road or "bund" traversed depressed ground through which a cannal flowed properly provided with a gap or "eye" for the flow and a bridge over the canal The owner of the lower land caused this gap or "eye", to be filled up, thus blocking up the course of the water in the canal at that spot which water overflowed and flooded the higher land and damaged the crops there, held that the lower owner was guilty of an actionable nuisance for which he was liable in damages to the owner of the higher land 30 C. W. N 218; 1925 P C. 236 42 C L J. 156 : 90 I. C. 198 · 3 Rang. 494 1925 M W. N. 894 P. C.

——the question whether a latrine constitutes a nuisance from the legal point of view must be judged by a general standard the maxim is *lex non fatet votis delicatorum* 92 I. C. 678

(19) Party necessary.

——if the objections of non-joinder of parties in an action of tort be not taken at the time and in the way provided by law, the deft is liable to such portion of the damages only as have been incurred by the original plff. 25 C. 285.

——a suit in which relief is claimed on the basis of a tort, may be maintained by any of the persons injured thereby, even though the tort is a damage done to land-owner by the plff *jointly with* other persons who are not parties to the suit 2 C. L. J. 496

——the rule that in actions of wrongs apart from *contract,* when several persons [illegible] sue in respect of a wrong done to their joint property by tres- [illegible] should, in general, all join as [illegible] in the action, is not inflexible. 6 C. L. J. 383.

——an appeal against wrongdoer cannot proceed without making the representatives of a deceased wrongdoer (respondent) party 62 I C. 714 (*c*)

20 Principal and Agent.

——whenever a question as to the liability of a principal for acts of his agent arises the sole test is the scope of the authority of the agent 43 C. 511 : 20 C.W. N. 268 : 23 C. L. J. 225 : 34 I C 598

——where a trustee or agent by his tortious acts make it impossible for the other party to discover the state of things, every presumption consistent with established facts ought to be made 62 I C. 83 : 2 Pat L T. 365.

——a principal is liable for the fraud of his agent acting within his authority whether the fraud is committed for the benefit of the principal or of the agent himself. 43 C. 511 : 20 C W. N 268 23 C L. J. 225 ; 34 I. C. 598.

(21) Railway Company, suit on tort against.

inlighted pit on nd was trying mages for not 4 : 75 I. C. 250. owing to the N 499 · 28 C.

——although a Railway Company does not insure the safety of persons whom it undertakes to carry, the duty which it owes to such persons is of a highly enormous nature,—injury to person and property,—negligence of Railway Company 51 C. 861 · 1925 Cal. 108.

is injured owing to the train and the immediate cause of il which the Ry. Co. pleaded me unknown person who was onus of proof that the plff's nce of the Ry Co was upon them, they discharged that onus by evidence 48 C 757 1922 P. C 195.

——to render a Railway Company liable for the omission on the part of the driver to whistle, it is necessary to prove that the driver was guilty of breach of duty or an error of judgment or that he saw the danger or failed to give warning because failure to whistle is not the omission of any statutory precaution. 48 C. L. J 45 : 1928 Cal 504 . 108 I. C 37

o was a second class passenger and caused he deft. Ry. Co, 25

mere invitation or an accident caused liable for damages for breach of general duty to exercise care. Such breach can be regarded as one either of an implied contract or of a duty imposed by the general law and in the latter case as *informa tort.* But in either case their general duty may be superseded by a specific contract which may either enlarge, diminish or exclude it. 19 C. W. N. 905 31 I. C 684 P C.

——where a gate at a level crossing is left open it is an invitation to the public to cross the line and an accident at that place points to negligence of the Ry Co. 41 C. 308 18 C W N 325 · 23 I. C. 788

(21) Railway Company, suit on tort against—*contd.*

children to walk over Ry. lines unaccompanied by others cann imputed to the child as in the nature of contributory negli 46 M. 929 : 1924 Mad. 312 : 45 M. L. J. 545.

——where a passenger in a train with his arm projected inches out of the window came in contact with the open door o of the stationary carriages of a train and fractured his ar ... -ontributory neglig

damages shoul ailway servants.

——the husband cannot sue the Ry. Co. for damages for death of his wife during journey as husband is not the aggr party 41 A. 488 50 I. C. 130 : 17 A. L J. 506.

(22) Remote damage.

——remote damage cannot be allowed 36 M. 580.

——to determine responsibility the law will consider the ximate and not the remote cause of an injury. 47 C 1027 : 61 14 · 33 C. L J. 72.

(23) Tort-feasor

——a person interfered with in his lawful enjoyment of his property is entitled to rid himself of that unlawful interference any lawful means, and to hold the wrongdoer liable for dama The wrongdoer cannot prescribe the remedy. 40 C 598 : 17 C. N. 541 · 18 I. C. 949 · 11 A. L. J. 413 : 17 C L. J. 478 : 15 Bom R 472 P C.

——suit on tort lies against several persons only when t have acted together. 41 I. C. 12 (C).

——in an action for conversion the fact that a person wa lessor or the fact that he encouraged the wrongdoers would be s cient by itself to support a finding that he was a joint tort fe 49 C. L. J. 415 · 31 Bom L. R 702 : 33 C. W. N. 155 P. C.

——the liability of a wrongdoer in tort is joint and sever 72 I. C 670

——generally the liability of joint wrongdoers in tort is and several but it is an inflexible rule which needs no relaxati ... the jointness of the act or ac ... 350 ally liable for ... em whatever the ... ntribution betwe ... sts as an exceptio ... ence of law onl

33 I. C. 140

——the liability of tortfeasor is as a rule joint and several b it is not an inflexible rule, each case is to be decided on its merit 2 P. L. T. 235 · 61 I. C. 425 : 1 Pat. L. T. 235.

(23) Tort-feasor—*contd.*

——rule against contribution as between tortfeasor does not apply in respect of costs 24 O. C 148

——wrongdoers are jointly and severally liable 15 C. W N 825 But when the *defts.* act in *good faith or in assertion of title* and there is no collusion or combination, the liabilities are several 14 C. W. N. 849 · 37 C. 559

——where there is conspiracy among the defts in illegally opposing the plff a joint decree is good 2 Pat L. T. 143 : 6 Pat L J. : 60 I C. 346

——all trespassers whether *bona fide* or *mala fide* are liable for mesne profits The *bona fide* trespassers are entitled to deduct collection charges but not the *mala fide* trespassers 34 C. L J 415 : 11 A 518 . 21 C. 142 *Ref*

——mesne profits are generally measured by the profits of the wrongdoer in actual occupation and he is the person from whom prima facie they are to be recovered, if some other person has joined them in connection with the wrongful possession he is also jointly and severally liable for the whole of the mesne profits 53 C. 992 31 C W N. 112 1927 Cal. 182 · 99 I C 428

——members of Hindu joint family possessing wrongfully not according to their respective shares, are liable to contribution of mesne profits [illegible] e shares 31 C 597 31

[illegible] session of separate plots [illegible] ofits ought to be calcula- [illegible] possession 1 Pat L. T

[illegible]

——where the defts are wrongdoers in the sense that they [illegible] they were doing an illegal or [illegible] on but if they acted under a [illegible] right of contribution *inter se.*

[illegible]

——where tort is not wilful, contribution *inter se* lies 18 C. W. N. 622.

——the doctrine that there is no contribution between joint tortfeasors cannot safely be extended to India 38 A 237 33 I C 165 : 14 A. L. J 275.

——release of one joint tort-feasors operates as a release of all. 14 C. W. N. 849 37 C 559 11 C L. J 503, 14 C L J. 354, 24 C L J 462, 6 C L. J 383 *contra.*

(24) Trespass.

——where the plff, case was that in consequence of the encroachment of the river ganges the land on which the plff's *Katchery* stood was threatened with delusion but owing to the obstruction of the deft he could not erect another *Katchery* on another piece of land and remove the grain and other goods and he sued for damage, held that the suit was not maintainable as the loss was attributable not to the deft. but to the wanton negligence

(24) Trespass—*contd.*

of the plff. To attribute the cause or loss to the deft *his action* ... should be the
L J 327.
to constitute
e forbidding
to withdraw

Before using force a trespasser must always be given an opportunity to withdraw peacefully. 1923 Cal. 306 . 68 I. C. 664.

——*when a person super-imposes a wall on footing* or foundation belonging to another he commits trespass and the proper remedy is a mandatory injunction to have the wall removed. 33 C. L. J. 26 62 I. C. 199.

——when a person interfered unlawfully with the exercise of the property of another he commits trespass and is liable *for damages* 31 C. L J. 495 . 57 I C 375 F. B, 16 C. W. N. 34

——it is a matter of grave doubt whether a man can be a trespasser on himself 36 B. 214 ; 12 I. C. 225 . 13 Bom L. R. 317

——an ordinary suit for trespass in the absence of proof of ... *for the arrest of a ship* When
he competing
course of law
ffer from the
d not to any
C 463.
act was not
s honest and
e or probable
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——an honest or inevitable mistake cannot be pleaded as a defence by one who has intentionally *interfered* with the *person* or property of another, so if a litigant executes any form of legal process which is invalid for want of jurisdiction, irregularity or any other reason and thus commits trespass, he is liable in an *action for trespass*, no malice or want of reasonable or probable cause need be proved. 14 C. L. J. 515 : 16 C. W. N. 540 · 11 I C 729
... doing of an illegal act forcibly and without
her. The illegality and
ablished before trespass
al no right is infringed.
59.

——a plff. who is out of possession should not be allowed to sue the deft., who is alleged to be in possession as a trespasser for an injunction. He ought to sue for the possession *of the land*. 18 C. W. N. 545.

——where a *darputni* in the possession of a Hindu woman as daughter and heir of a former *darputnidar* was anulled by an *auction-purchaser of the putni* by a notice under s 167 *of the B. T.* Act but she did not vacate the land, in a suit for damages against her when she died during the pendency of the suit and a

(24) Trespass—*contd.*

reversionary heir was substituted, held that her act was a personal tortious act on her part and not for the benefit of the estate and a decree for mesne profits for the period she was in wrongful [illegible] rsonal estate, if any, heirs were personally quent to that period. [illegible] C. L. J. 383 · 27 C 951 957). *Ref*

——an owner of immovea[illegible] can claim damages from any one

——in case of trespass [illegible] compensation is not the adequate

(25) Wrongful dismissal.

——a suit for damages is maintainable for the wrongful dismissal of a trustee without convening a proper meeting 41 M. 357 : 33 M. L J. 660 43 I. C 205

——in a case of the dismissal of a school master or other servant without due notice one month's salary would be reasonable damages. 13 Bom L. R. 168 63 I C 982.

TRANSFER OF PROPERTY ACT.

Applicability

——T P. Act applies only to alienation *inter vivos* and has no application to disposal of property by will. 46 M. 190 . 43 M. L. J. 486 : 31 M L T 221

——the principles of the Act apply to the Punjab, 4 Lah. 439, 91 I C 778 1928 Lah 575, 17 I C. 991 . 1913 P L R. 36, and applied to Berar before 1912 1923Nag 88 71 I. C 421

——T P Act does not contain the whole law on the subject of transfer of property. 28 C L J 77

——T P. Act shall be read as part of Contract Act and Registration Act 44 M. 55 F B . 20 C W N 195 34 C. 207 : 38 M 1158 22 C. 179 44 M 55 F. B., 20 C W N 195 34 C. 207 38 M. 1158 22 C 179 44 M 55, *contra* 41 B 550

——the principles embodied in the Act are generally applicable to moveable properties 19 C W. N. 208 20 C L. J. 183 : 42 C 455 25 M. L. T 331 : 49 I C 722.

——the analogy of a leasehold interest as defined by the Tr. P. Act is out of place in the case of putni taluks and all the provisions of this Act cannot by analogy be made applicable 52 C. 655 · 41 C. L J 527 89 I. C. 785 1925 Cal 962 . 30 C W. N. 233

——definitions of this Act are not applicable to Presy Towns Ins Act. 75 I. C 203

——this Act does not apply to easements 20 C W. N. 1158 : 34 C. 450

——the provisions of this Act are not retrospective but the principle of s. 111 (g) applies as a rule of justice, equity and good conscience to a lease transaction before this Act came into force

Applicability—*contd.*

42 *M. 589 : 23 C. W. N* 889 : 29 C. L. J. 528 : 50 I. C 631 : 21 Bom L. R 655 **P. C.**

——the fact that a portion of a holding used for residentia *purposes* is planted with fruit bearing trees does not alter the character of the holding and the case is *governed* by T. P. Act. *25 C W. N. 378* : 66 I. C. 61.

——the presumption in case of tenancies of homestead lands *originating* prior to the Act is that they are non transferable, the burden of proof being on the tenant Mere long continued possession *does* not give rise to a presumption of transferability. The exception to the presumption is where there has been an erection of *a pucca building* and when the tenant spent large sums of money. *20 C W. N* 1113. 1 Pat L. J. 253 : 36 I. C. 126.

——no writing was necessary to validate a sale before the Act. *42 C. 801* : 21 C. L J. 231 : 19 C. W. N. 250 : 28 I C. 930 · *13 A L J. 229* : *28 M. L J. 548.*

S. 2. Repeal of Acts.

——the provisions of this Act are not retrospective but the principles of s. 111 (g) apply to lease created before this Act. *42 M 589* : *23 C. W N.* 889 · 29 C. L. J. 528. 50 I C. 631 : 1919 *M W N* 27 **P. C.**

——this Act does not apply to mortgage decree before this Act came into force but under which instalments were payable after this Act came into force 43 B. 703 : 52 I. C 455

——usufructuary mortgages in the muffasil before this Act were not required to be registered. 38 A. 494. 21 C. W. N. 265. 24 C. L J. 504 : 39 I. C. 11 **P. C**

——this Act is not a consolidating Act and the right of the mortgagee to a general account of the moneys due to him under the terms of the mortgage is saved by s. 2 cl. (b). 26 I. C 184 16 M *L. T. 265.*

——in order to be entitled to the benefit of s. 2 (C) it must be shown that the rights as they exist now arose out of the legal relation constituted before the Act. 19 C. W. N. 525 : 20 C L. J. [illegible] 24 I. C. 183.

——non-transferable homesteads have not been rendered transferable by th[illegible]

——a lea[illegible] before the passing o[illegible] did es not make it [illegible] W. N 322 : 33 I. C. ..

——no writing would be required to validate a sale before the T. P Act, 42 C. 801 : 21 C. L. J. 231 : 19 C. W. N. 250 · 13 A L. J. 229 **P C**

——no attestation was necessary for the validity of a mortgage deed before this Act. 39 C. 227 : 16 C. W. N. 129 · 14 C. L J. [illegible] 11 I. C 884.

S. 3. (Definitions)

Actionable claim.

——right to arrears of rent purchased is an actionable claim. 17 C. W N. 679 · 40 C 650 17 C. L. J 438 F. B.

——arrears of rent constitute moveable property and is debt within s. 3 but not a debt secured by a mortgage of immoveable property. 4 Pat 43 83 I C. 81 : 6 Pat L T. 139 : 1925 Pat. 310, 40 C. 650 *fol*, 31 I. C. 473, 98 I. C 263 : 1926 M W N. 774 1926 Mad. 1173

——the word "debt" means an actually existing debt, that is, a sum of money which may time or the payment of which may or may not happen. 97 I. C 257.

——sale of immoveable property out of possession is not actionable claim. 13 C 297.

——the benefit of an executory contract is actionable claim. 11 C. W. N. 566

——the right to recover mesne profits or damages for breach of contract is not actionable claim and is not transferable. 36 C. 345 : 13 C. W. N 384, 2 C W N. 42, 18 C W N. 450, but when the claim merges in judgment it can be transferred before assessment 18 C W N 450, 38 C 13

——right to recover arrears of rent purchased with the owner by pleader 40 C. 1923 Mad 177 : 70 I. C. 85.

——the right to take account and to recover the sum that may be found due is not transferable, 40 C L J 78, 36 C 345, 42 I. C 390. (c)

——in India there is an imperative statutary rule that a mere 26 C W N. 285. is not a mere right to sue for L. J. 129 1922 Mad 397 : 69 I. C 301.

——shares of partners are saleable. 20 C. 693

——right to sue for damages for breach of a contract for sale or purchase of goods cannot be transferred 47 B 719, 106 P R. 1914 · 27 I C. 115, 1923 N 61

——in an ordinary Life Insurance policy the Insurance Company is a debtor in respect of the policy moneys which is a debt 13 Bom. L. R 590 : 11 I C 964

——a book debt is an actionable claim and to render a gift thereof delivery is not necessary 44 M 196 : 61 I C 461 · 10 M. L J 25.

Attest

——the amending Act of 1926 is not retrospective. The words "attest means" cannot be held to mean "attest always meant." 1927 Cal. 763 103 I. C. 662, *contra*. 105 I. C. 422 (e).

Attest—*contd.*

——the amending Act XXVII of 1926 is not retrospective so as ... force. 49 A. 25 : 24 A. L. ... of 1926 and Act X of ... W. 565 F. B ... by the explana- ... unaffected 1923 ... 1228 . 48 C. L. J

Immoveable property.

——*if there is* a building, inside which there is a machinery sheltered, *it cannot be* said that this machinery was attached to the building for the permanet beneficial enjoyment of the building itself as is contemplated in cl (C) of s. 3., 46 A. 286 ; 78 I. C. 243 : 1924 A 365.

... property for the purposes of ... 100, deed of transfer of ... W. N. 641 : 27 C. L. J ... 3 I. C. 129. ... property and s. 59 does ... 9 I. C. 478.

——*trees are* immoveable property. 63 I. C. 264 : 2 Pat. L T. 622.

——trees other than fruit trees or other forest produce are standing timber and hence moveable property. 13 Bom. L. R. 874 : 12 I. C. 375. Fruit trees are immovable property. 10 A. L. J. 516 : 17 I. C. 910

——where a mango tree was not intended to be used as timber but *for* the purpose of enjoying the fruits of it, it is an immoveable property. 5 Pat. 765 : 1927 Pat 1

——*doors* and windows of a house are not moveable property 38 M. 18 : 16 I. C. 877, 14 M. 467, 13 M. 518, 11 C. 164.

Notice of fact.

N.B *By the amendment of the definition Registration and actual possession have been said to constitute notice thus making the divergent rulings on the points obsolete.*

——a person is not bound to attend to vague rumours or to statements by mere strangers 9 M. I. A. 18 P. C.

——there may be constructive notice of a fact 33 B. 1 P. C. 22 C. 909, 18 W. R. 166 : 11 B. L. R. 46 P. C, 35 B. 342. *lis pendens* is constructive notice. 11 C. W. N. 561, P. C, 28 C. 23, 6 B. 18* F. B, 8 B L. R. 474

——the expression 'wilful abstention from inquiry and search' means want of *bona-fides*. 22 C. 185. ... 95, 20 B. 230, 6 B 163 F. B, 18 ... F. B, 16 A. 478, F. B, 1922 ... 0 : 71 I. C. 559. *contra*, mere ... 34 I. C. 115, 2 C W. N. 751.

Notice of fact—*contd*

3 C W. N 30, 7 C W. N 11, 7 C 199, 22 C. 185, 23 C 790, 27 C 358, 31.C. 737, 12 M. 424, 429, 15 M. 268, 15 M 301, 29 B 199, 68 I C. 732. 48 C 11 P. C. *these latter rulings have become obsolete by the amendment*

——whether registration of a document is sufficient to impute notice or not is to be decided on the merits of the particular case 77 I C. 862 . 1923 A. 169, 18 A. L. J 1074 *fol*

——where a mortgagee submortgages his interest the original mortgagor cannot be said to have notice of the submortgage, merely because the latter is registered 88 I C 398 . 1925 All. 557, 48 C. 1 P. C *fol*

——omission by the transferee to consult public register in spite of universal practice amounts to gross neglect amounting to notice. 6 Lab. 344 89 I C. 615 1925 Lah. 542.

——a purchaser cannot be expected to enquire into the title

——a purchaser without notice from a person who had notice is protected , on the other hand a purchaser with notice may shelter himself under the title of the persons from whom he purchased if the latter could successfully raise the defence of want of notice. 42 C. 625 : 21 C. L J. 177 · 19 C W N 37 · 27 I. C 261.

——possession is sufficient notice. 8 C 597, F. B, 10 C. 1073, 16 C 414, 21 C. 120, 11 M. 419, 14 A. 362, 27 A 366, 6 B. 168, F. B. 193 F. B., 19 B. 391, 27 B. 452, but it must be actual and not constructive. 7 C. W. N. 294, 27 C. 7, 2 C W. N. 207, 13 B. 229, and that of thief or licensee is nothing. 27 B. 43.

——if there is a tenant upon a property his open possession is ... erms of the tenancy but also of ... of all enquiry by the transferee. 1926 Cal 204, 17 C. L. J 209: 16

——notice of a lease amounts to notice of its terms. 18 C. W. N 420 : 21 I. C. 920.

——if a party has in any way obtained the full knowledge of fact it must be considered to have notice of that for all purposes. 34 C L. J. 256 · 26 C. W. N. 36

... the contents of a document. 25 W. N. 201 · 35 C. L. J 409, 42 ... om. L. R 557 P. C., 3 C. W. N. 6 : 24 C. L. J. 487 : 21 C. W. N.

——notice of a book amounts to notice of its contents, so the search of a register amounts to a knowledge of all its contents,

Attest—*contd.*

——the amending Act XXVII of 1926 is not retrospective s
9 A 25 24 A
and Act. X
F. B
the expla
dy done is unaffected. 1
407
32 C W. N 1228 : 43 C. L

Immoveable property.

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sheltered, it cannot be said that this machinery was attached to
building for the permanet beneficial enjoyment of the build
itself as is contemplated in cl (C) of s. 3, 46 A. 286 : 78 I. C 2
1924 A 365.

——a mortgage debt is immoveable property for the purpose
this Act and when the value exceeds Rs 100, deed of transfer
W. N. 641 : 27 C. L.
3 I C. 129.
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9 I C. 478.

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——the expression 'wilful abstention from inquiry and search
means want of *bona-fides*. 22 C 185.

——registration is notice. 31 C. 95, 20 B. 290, 6 B 168 F. B, 1
B. 444, 22 B. 213, 26 B 538, 13 A. 432 F. B, 16 A. 478, F. B, 1922
Lah 64, 1 Bur. L. J. 204, 1 Pat. L. R 80 : 71 I. C. 589 *contra*, mere
registration is not notice. 43 C. 1052 : 34 I. C. 115, 2 C W. N. 77

S. 6. (What properties cannot be transferred)—*contd*

——the guardian of a minor Hindu reversioner cannot bind the minor by any contractual engagement in respect thereto. 86 I C. 1016 : 1925 Mad 941, 2 Pat. L. T. 471 62 I C 933

——if a Hindu reversioner purports to relinquish his interest in favour of the widow her interest is not in any way enlarged. 24 Bom L. R. 351 : 1922 Bom. 437, 23 I C 98 1 L W. 237

——the transferor of the right of future succession is not stopped from questioning the validity of such transfer 19 C W N. 580 43 C. 28 : 28 I C 675, 46 C 566 : 28 C. W N 521 49 I C. 1 P C, and an agreement of such transfer cannot be specifically enforced 17 M L. T 419 29 I C 241

——a settlement of disputed claim to reversionary estate by two claimants by virtue of which one gives up the claim on receipt of a sum is not void 38 A 107 · 31 I. C 919.

——this sec does not bar an agreement by an heir expectant to divide property in a particular way on the happening of contingency, 33 A. 457 : 9 I C 530 8 A L J 275, *contra*, 35 M L J. 684 49 I. C. 260

——the chance of a Mahamedan heir-apparent succeeding to an estate cannot be transferred or released 9 C L J 50, 30 B 304, 31 B. 165, 11 A 456, 39 M 554, 1913 M W N 371 18 I C 15, 2 I C. 865 *contra*, can be relinquished. 33 A 457

valid in India. S. assignment The indicate that the he same category as the chance of an heir apparent of obtaining a legacy 47 I. C. 563

——right of son to get share in the mother's estate cannot be relinquished 48 C 1059 25 C W N 990 66 I. C 705

——cl (c) of this sec merely expresses the rule that there cannot be an "easement in gross" 20 C W N. 1158 34 I. C 450.

——it is only a transfer to a stranger of natural rights which carry with it the obligation to third person that could not be transferred under the sec but one can waive or release any rights in property belonging to himself 27 M L J 272 26 I C 211 : 16 M. L. J 393

——an agreement by a collateral of a childless proprietor not to contest at any future time a gift made by him is not a transfer of any right of expectancy 89 I C 212.

——right of pre-emption being a purely personal right cannot be transferred 36 B 139 12 I C 693

——the right to exercise the profession of a broker is assignable as it is not a personal right. 18 C. W. N. 1194 19 C L. J 313 : 24 I. C. 387.

——*Vritis* are as a general rule inalienable. They can only be alienated under special condition and local customs. 39 B. 26 : 28 I. C. 132.

S. 6. (What properties cannot be transferred)—*contd*

——agreement to *transfer political* pension is *void*. 50 M. 711 1927 Mad. 604 : 103 I. C. 339 : 52 M L J 632.

——when a settler reserves an allowance to himself from the 1928 Mad 1201.

ive offerings to a 43 C. 28 : 19 C.

W. N. 580 : 25 I C 670

ceremonies 16 W. R. 171 9 A. 193, 8 C L. J. 499, 24 C. 83, 13 C 19 C W. N. 208 : 42 C. 455, 24 C. 1084, 33 C. L J 141, 8 C. L. J. 15 W. R 339, 17 W R. 41 offerings 26 C. 356 ; 3 C. W. 470 : 6 C W. N. 728, 10 W R 457, 19 C W. N 580, 47-B 529 : 1923 Bom 358, 37 I. C 960 (C), L. R. 772, office of *Mutwali* I. C. 117, right of pre-emption 91, 46 M. 659 P. C, right to get C. 381 cannot be transferred

Right of annuity charged on property can be transferred. 23 C. W. *N.* 824, *10 C. W. N.* 1102, *53 I. C.* 587, 52 I. C. 953, and specified *property given* in lieu of maintenance can be transferred 29 I C. 251.

——but rights to receive *offerings* made at a temple when 50 A. 394 1925 fixed by decree M. 7 *Ref* the right under *the judgment* (here for maintenance) is assignable and the nature of the chose in action is generally *immaterial*. 38 C. 13.

——*a lease* from year to year is transferable under s. 6 and is also heritable unless there is anything to the contrary in the contract of lease 36 I. C. 1006

——a nonpermanent tenure created after the passing *of the T. P. Act* and before the passing of the B. T. Act is *transferable* *44 C. L. J. 434* · 1927 Cal. 220 : 100 I. C. 302, 7 C L. J. 553 *Dist*

——*in India* there is an imperative statutory rule that a mere 235, 70 I. C. 498. fits or damages is not C. W. N. 384 · 35 C. Pat L. T. 591 : 2 Pat.

——but the right to a decree for mesne profits is assignable 19 C W. N. 450 : 20 I C. 685, even before the amount is ascertained. 44 M 539 · 62 I. C 305 · 1921 M. W. N. 137, 1 Pat. L. J. 427 : 37 I. C. 998.

——when a property is transferred with all its intents in certain suits relating to the same, the transferee can maintain a suit to recover mesne profits. 33 C. W. N. 614.

S. 6 (What properties cannot be transferred)—*contd.*

——the word "mere" implies that the transferee acquires no interest in the object of transfer other than the right to sue. Where a person purchases a tank along with a covenant against misfeasance, the purchase was not of mere right to sue 10 Pat. L. T. 191 : 1929 Pat 245.

——the interest under a deed of usufructuary mortgage deed creating charge on the profits is transferable. 9 Pat L T. 743 : 1928 Pat. 587 : 7 Pat. 584 : 110 I. C. 526.

——a right to sue for damages for breach of contract for sale or purchase of goods cannot be transferred 47 B. 719 : 1923 Bom. 403, 10 M L. T. 496 10 I. C 320, 36 C. 345 *fol.*

——a right to contribution is not a mere right to sue in damages and can be transferred. 1922 Mad 397 1922 M W. N. 442 31 M L. T. 156

——where a land is transferred together with past-profits accrued due, the latter is a mere right to sue and not an actionable claim. 89 I C 827 (c).

——an auction purchaser at a revenue sale can maintain a suit for recovering arrears of rent due by tenants. Clause (e) of this sec. is not a bar to such suit because the plff did not purchase merely the right to recover mesne profits but the whole estate together with that right 91 I C. 474 (c)

——transfer of arrears of rent with the immoveable property is valid 1923 Mad 177 70 I C. 38, 1922 M W N 822.

——the right accruing to the landlord to sue the tenant holding over after expiry of the term is a mere right to sue and is not transferable 30 M. L J. 492 · 34 I C. 6 1916 M W. N 79.

——arrears of profits which have already accrued due are

I. C 390 (c)

——one usual test for determining the transferability or otherwise of an inchoate right is whether it can be attached in execution of a decree. The right to demand accounts or to an indefinite sum which may or may not be found due on the taking of accounts cannot be attached 40 C L J 79 : 82 I C 411.

——where a school committee transfers the whole management of the school to another committee the latter can sue for debts due on accounts to old committee. It is not a mere right to sue. 92 I. C 973 1926 Mad. 417 50 M L. J. 54 1926 M. W. N. 149

——the right to recover moneys found due on taking accounts is not a mere right to sue but an actionable claim and can be transferred. 42 I C. 390 (c).

——the income of an estate which is the subject matter of litigation held in a Bank to the credit of the successful litigant is not property within s. 6 (c) 46 M. 190 : 43 M. L. J. 456 · 1922 Mad. 457.

S. 6. (What properties cannot be transferred)—*contd*

——*Tankhas* are assignable as they are heritable allowance 24 C. W. N. 938 : 57 I. C. 858.

——a contract of service being a personal right is not assignable. 47 I. C. 902.

——this *Act does not* contain an exhaustive enumeration of what is transferable and an assignment is not invalid merely because *it is not* covered by the provisions of that Act. 33 I. C. 696 : 19 M. L. T. 329.

——*cl. (4)* of this sec. does not modify the well-established principles of *equity that* when a transaction is enterd into for unlawful or immoral purpose and that purpose has been achieved, the *court would* not interfere at the instance of a *particeps criminis* [illegible] the transaction 44 M. 329 :

[illegible] not a mere right to sue for [illegible] J. 129 : 1922 Mad 397. 69 I. C. [illegible]

——share of a partner is saleable. 20 C. 693.

——*right to* damage for breach of contract is not assignable. 13 C. W. N. 384 : 70 I. C. 498.

——right under a future possible lease that may come into existence as the result of renewal cannot be transferred. 44 M. L. J. 236 : 72 I. C. 139.

——a contract for the future sale of *future* expectations cannot be enforced 50 C. 929 ; 4 Pat. L. T. 609 : 45 M. L. J. 617 ; 21 A. *L. J.* 718 **P. C.**

——a sale of champertous nature is immoral and opposed to *public policy* and hence invalid. 1924 Mad. 146.

——right to sue for damages for breach of a contract for sale [illegible] of goods cannot be transferred 47 B. 719.

[illegible] ...ict from unlawful [illegible] void considera[illegible] ...iod. 85 I. C. 459.

S. 7. Persons competent to transfer.

——transfer by a person incapable of contracting is not wholly void and a mortgage in favour of a minor is enforcible by him. 40 M. 308. 36 I. C. 921 : 1916 M. W. N. 363 **F. B.**

——a minor mortgagee can enforce the mortgage. *When the* transfer is under the Tr. P. Act and no reciprocity is wanting it is always enforcible. Tr. P. Act. does not say that a transfer cannot be made in favour of a minor, a minor can buy property. *Where* under a contract the minor is to perform something on his part the contract is void, otherwise not. The **P. C.** ruling in 30 C. 539 : 7 *C.* W. N. 441 holds only that a mortgage by a minor *is void*. *But* 24 20 C. W. N. 120n. (33 C. 232 : 33 M. 312 : 33 A. 657) *But* 22 C. W. N. 130.

——bond securing debts contracted during minority as well as sum advanced when adult, may be fully enforced. 11 C. W. N. 133.

S. 7. Persons competent to transfer—*contd.*

——when guardian under the Indian Majority Act is once appointed the minor cannot attain majority before 21 1921 Pat 100

——a lease executed in favour of a minor is null and void and confers no title to the lessee. 1918 Pat. 241

——a debtor is not bound to pay his debts to minor without safe guarding his interest and so he is not liable for costs if the minor sues for the money. 64 I. C. 385.

——where under a contract the minor is to perform something [illegible] uiing in [illegible] minor is [illegible] C. 539, P. C. *Fol.*

——whenever transaction by a minor has been held to be void, the essential fact which rendered it void was that some agreement by the minor was an essential part of the contract 37 M. 390,

——mortgage executed in fovour of a minor is not void when the minor had nothing to perform 22 C W N 130, (39 C 232 16 C W. N. 74, P. C., 30 C 539 7 C W. N. 441 P C) *Dist* 69 I C. 543

[illegible] pudiating a contract if he [illegible] resentation that he is *sui*- [illegible] W N. 468 · 25 C 616, 2 [illegible] But in case of fraudulent [illegible] pleaded by way of defence. [illegible] against the minor can be passed. 24 C 265.

——a minor can sue on a promissory note executed in his favour. Bur L J 227

——the power to set aside sale deed executed by a minor should not be exercised by the court in favour of a unscrupulous vendee, 15 A 644 21 A L. J 596

[illegible] fit by the deceitful act of [illegible] on behalf of a minor by [illegible] the contract, it may be [illegible]. But where the contract is not for the benefit of the minor, no specific performanee should be allowed. 10 C W N. 763 26 B. 326 337 : 27 C. 276 : 29 A 213 : 11 B 551

——when there are two promissors one cannot take the plea of minority of the other in a claim against himself. 20 C W. N. 840. 24 C L. J 74 P. C, 34 M 314 *Fol*

——a sale in favour of minor is void 33 M 312, 33 C 539. P. C *Fol*

——a minor vendee being dispossessed by third person for defect in vendor's title is entitled to refund 35 A 370 11 A. L. J 512 ; 19 I. C. 610, (39 C. 232 · 50 C. 539 P. C), *Dist.*

——whenever transaction by a minor has been held to be void the essential fact which renderd it void was that some agreement by the minor was an essential part of the contract. 37 M. 390.

S. 7. Persons competent to transfer—*contd.*

husband) ... lative there
position ... her when

—— ... estopped from repudiating a contract if he has not exercised *fraud* but only misrepresentation that he is *sui juris* 20 C W N. 418 : (26 C. 381 : 3 C. W. N. 468 : 25 C. 616 ; 2 C. W N. 330). *Fol., 15 C. W N. 239 Dist.*

S. 8 Operation of transfer

——this sec. is not ... iction but a rule concerning ... 9 : 26 M. L. T. 262.

the ... title and to remove from ... sed in the mind of the transferor or the transferee *at the date* of the transfer. 1929 All. 465 : 27 A. L. J. 690 ...

... be inferred except from the ... but if the document is ambiguous ... certain rights can be inferred from circumstances. 37 I C. 870 (C).

——a deed of grant ought to be construed strictly against the *grantor.* 18 C L J 48 : 17 I. C. 494.

——where immoveable property is hypothecated the fixtures pass to the mortgagee, 22 C. W. N. 758 ; 44 I. C 211, 18 C L J 48 ; 17 I. C. 494, 19 C. W. N. 710,*contra.* 45 M. L. J 341 : *1934 Mad 187,*

... itled to sue ... and grown ... 33 C. 815 ... prior to the ... 13 L. W. 44.

... n cannot pass a ... M. L. J. 600 ... transfer of right ... W. N. 174

——where a conveyance executed by an executor having beneficial interest in the property along with other beneficiaries purported to sell "all estate, right and title" of the vendor, *held that the whole property passed to the purchaser and not merely* the interest of the executor. 42 C. 56 ; 18 C. W. N. 1313 : 20 C L. J 368 : 24 I. C. 296 : 16 Bom. L R. 796, P. C.

S. 9 Oral Transfer.

——oral surrender of a lease is valid 28 C L. J. 220 : 46 I C 160 : 28 C. 256 ; 5 C. W. N. 351 : 22 C. W. N 441 : 13 C. L J. ... *1919* Pat 88 : 47 C. 129 : 19 I. C 124 (C).

S. 10. Condition restraining alienation.

——condition restraining alienation is bad. 23 I C. 232 ... 14 C. L J. 303 : 34 I. C. 516, 43 C. 165, 1923 Oudh. 236. It is not so in case of lease. 18 C. W. N. 1138, 10 C. L. J. 40 ; 36 C 715, 31 I C

S. 10. Condition restraining alienation—*contd.*

516 (c), 1924 Lah. 729, 1923 Cal. 679 37 C. L. J. 538 but see 26 C. W. N. 874 : 64 I. C. 1001 (c).

—a stipulation in a darpatni lease restraining the creation of subordinate rights by the darpatnidar does not contravene s 10 of the Act. 45 C. 940 27 C L. J. 511 : 46 I C. 129.

—a condition in a lease that the lesee has no right to transfer his lease does not invalidate the lease as it is intended for the benefit of the lessor 28 I C. 904 (17 C 826 26 M. 157) *Fol.* (10 C. L J 49, 36 C 745, 18 C. W. N 1138) *Dist*

a claim restricting a lessor's right to transfer is inoperative under s 10, unless it is accompanied by a clause of re-entry Because unless there is the clause for re-entry it cannot be said that the restrictive cause is for the lessor's benefit. 14 C. L J 585 10 I C. 374 · 14 C. L J 614 10 I. C. 489

—if the condition of re-entry is absent in the lease it can be made out otherwise 1 Pat L J. 1 3 Pat L W 80 . 33 I C 408

—provisions of ss 10 and 12 make it abundantly clear that restrictive covenant is valid when inserted in a lease 37 C L. J 538 1923 Cal 679, 45 C 940 27 C. L J 511 . 46 I C 129.

—a condition in a lease for pre-emption and pre-surrender is valid under this sec and can be enforced against transferees with notice 9 M L T 484 9 I C 171

—covenant restricting alienation to anybody else than the vendor or lessor is not applicable to insolvency alienation. 1925 Cal 471

—covenant restraining alienation to anybody else than the vendor at a fixed price is not void for remoteness or as a restraint on alienation 80 I C 962.

—a sale with an agreement that the vendee must not sell to any one but the vendor or his heirs and at a fixed value was a restraint on alienation and the condition was not enforcible 19 A. L J 848 64 I C 408

—where a gift is made subject to a condition restraining [illegible] the donee takes absolutely [illegible] 9 I C 951, 5 C. 438,

[illegible] fails when the condi-

—a life interest in lieu of maintenance is just as much a property as an absolute interest and any condition restraining alienation is void 29 I C 251 (C), 38 M 867 24 I C 120 : 29 M L. J. 617.

—a restraint on alienation even if validly imposed cannot bar a compulsory sale at the instance of D. Hr. 17 C. W N. 662 16 C. L. J. 354 . 17 I C 284.

—where a settlement deed executed by a Mahamadan gave property to his sons "to be enjoyed with absolute right" but later on contained clauses enjoining on them to live upon the income and then their descendants were to enjoy, held that the son took absolute interest. 85 I. C. 945 . 1925 Mad. 997.

S. 10 Condition restraining alienation—contd.

——*restraint upon alienation in mortgage bonds* doe: prevent alienation by the mortgagor subject to mortgagee's r 40 I C. 865.

S 11. Restriction repugnant to interest created

——a condition by a testator in restraint of alienation is 35 P W R. 1916 : 32 I. C 605.

——an absolute gift cannot be subject to any limitation. L. J 637 : 31 I. C 543.

——an absolute restriction on alienation of limited estate *widow is bad and the condition is void.* 3 Pat. L. J. 199 : 1918 181 : 45 I. C. 749 F B.

——an *agrahar* gift is a private gift and an absolute *according to law*, so a condition that the donee should not aba *the house* and go to another place is not valid and enforc 44 B. 304 · 22 Bom L. R. 254 : 56 I. C. 361.

——a clause in a partition-deed providing devolution of shar *brothers after death without male issue* does not contravene provisions of the Hindu Law or this Act and is valid 29 M. L 214 . 18 M L. T 124 : 29 I. C. 549.

——covenant against partition is invalid, 27 I C 3, 25 M 3 C [illegible] binding 28 C 769, 12 C N [illegible] 29 I. C. 549 : 29 M. L 214 [illegible] gift is valid though condition attached to it is invalid. 22 C. W. N. 512 : 27 C. L. J. 45 I C. 601, 2 C. W. N. 512

S. 12. Condition making interest determinable on ins vency or alienation

——*provisions of ss.* 10 and 12 make it abundantly clear t restrictive covenant is valid when inserted in a lease. 37 C L 538 : 1923 Cal. 679.

S 13. Transfer for benefit of unborn person
S. 14. Rule against perpetuity.

——to test whether covenant violates the rule against perpet all possible contingencies should be looked to 25 C. W. N. 63 I. C. 196.

——a gift over on indefinite failure of male issue in the l of donor is void 38 C. 603 : 15 C W. N. 693 : 14 C. L. J. : 11 L. 412 : 21 M. L. J. 1119 P. C.

——gift by a Hindu of his entire property to wife, disinher son, with gift over to grandson on attaining majority when void. A. 375 : 48 C. L. J. 106 : 32 C. W. N. 1065 : 26A L. J. 697 : 1 703 : 1928 P. C. 156.

of cost for building purpo covenant running with th covenantor or his assignees 25 C. W. N. 770, 6 Pat. L

S. 14. Rule against perpetuity—*contd*

——a covenant to grant land whenever it is required for the purposes of building a *mandir* or *dharmasala* and empowering the grantees to take the land if refused by the donor or his heirs is bad in law as it offends the rule against perpetuities by preventing the owner and his heirs from alienating his estate before the happening of a condition which may never happen both under Hindu Law and under T P Act 34 I C 482 1 Pat L J. 238 . 2 Pat L. W. 333.

——rule against perpetuity does not rest solely on the religious laws of Hindus or of Mahamedans but on the general considerations of public policy 73 I C 99.

——contract of pre-emption does not offend the rule against perpetuity as thereby no transfer of property is effected 46 A 333 : 1924 All 400 22 A L J 265

——but where two persons for themselves and their heirs for all times agree to a right of pre-emption for each other and their heirs, the agreement offends the rule against perpetuity. 33 C. W. N. 150 . 1929 Cal. 263

——when three Hindu brothers agreed that on the death of one, his property should devolve on the rest the agreement could not be enforced against the heirs and legatees of the parties as it was vitiated by the doctrine of perpetuities 1229 Pat 353 : 117 I. C. 33 10 Pat L T 217

——a contract with regard to land which is calculated to defeat the rule against perpetuity which is one of public policy is void under s 23 Contract Act 24 Bom. L R 449 : 1922 Bom. 84, 26 C. W. N. 874

——a mortgagor's right of redemption is exempt from the operation of the rule against perpetuity. 17 C. W. N. 1053 : 18 C. L. J 228 · 21 I. C. 90

—— where by a compromise decree it was settled that A was to hold the estate for his life after which it was to go to B, held that the interest of B was an absolute one 47 A. 496 : 86 I. C 684 : 1925 All 389.

——a covenant to renew a lease from time to time at the option *of the lessee is* one *running with the land and is not subject to* any rule against perpetuity 44 M. 230 · 60 I. C 591 : 1921 M. W. N. 31.

——in case of permanent lease there cannot be right of pre-emption reserved to the lessor as such covenant offends the rule against perpetuities 26 C. W. N. 874 : 1922 Cal. 474, 64 I. C. 1001 (c) (25 C. W. N. 901, 38 M. 114, 5 C. W N. 343) *Ref.*

——where no interest in land is created but the lease merely reserves the rights of the lessor to ask for a reconveyance whenever he desires the transaction does not offend the rule against perpetuity as the Rule is directed against the creation of interest in land which will not have affect within a certain time. 44 C. L. J. 220 : 1927 Cal. 41 : 98 I. C. 46.

——where lease is described as permanent lease a clause entitling the lessor to terminate lease at any time is void. 87 I. C. 433 : 1925 Mad. 732 : 1925 M. W. N. 157.

S. 14. Rule against perpetuity—*contd.*

——*when no time is fixed for the* performance of an agreement to convey, a contract *for pre-emption* cannot be enforced against the heirs of the *promissor as it* offends the rule against perpetuity 38 M 114, 18 I. C. 203 : 24 M. L J. 84.

——*an* agreement to reconvey land to the vendor after a certain number of years *on* payment of a certain amount does not offend the rule *against* perpetuity. 49 M. 387. 1926 *Mad.* 639, 50 B. 56[illegible] 1926 Bom 497 : 28 Bom. L R. 954.

——contract *creating* mutual right of pre emption does not offend against the *rule* against perpetuities and it is enforceable against the *legal representatives* of parties. 49 A 527 : 1927 All 170 ; 25 A L. J 289 : 100 I C. 683 F. B, 47 B. 191 *diss*, (45 A. 491 1923 All. 511 : 82 I C. 643, 45 A. 478 : 1923 All 514 · 82 I C 640 *overruled*

——a vendor can reserve an inalienable interest *for* himself and his descendants which was to revert to vendee in the absence of the *vendor's heirs* 1925 All. 65 : 92 I. C. 326.

——where the *sale of properties* excluded an item *from* passing to the vendee *till the extinction* of the lineal descendants of the vendor *it offended against* the Rule 1926 All. 283 : 91 I C. 491.

S. 15. Transfer to class, some of whom come under ss 13 and 14.

——*this sec.* which embodies the rule in Leake vs Robinson is *applicable* to Hindu transfer. 38 C. 468 ; 15 C. W. N. 393, 13 C L. J. 434 · 10 I. C. 641 P. C.

S. 17. Transfer in perpetuity for the benefit of public

——when a dedication is made for religious purpose it will not be *invalid* merely because it transgresses the rule against perpetuities. 24 I. C. 72 : 1 O. L. J. 204

S. 18. Direction for accumulation.

——accumulation from bequests according to testator's *directions from* surplus income from the *debutter* estate may create a *religious* and charitable trust. When the charitable gift is unconditional a direction for accumulation is invalid. 23 C L. J. 241 : 33 I C. 102.

——*provision for* accumulation of the surplus income is not invalid *if there is* a direction of a gift of that accumulation, it fails *only when* it offends some independent rule of law 47 C. 76, 56 I. C. 373.

S. 19. Vested Interest

——*when* under a compromise decree it was settled that *A* was to *hold an* estate till his death after which it was to go to B, *interest* acquired by B was a vested interest. 47 A. 490 : 89 I C. 684 : 1925 All. 389.

——those who are directed to take by right of *inheritance after a life* estate, take a vested interest though possession and *enjoyment* is postponed after the death of the life estate holders

S. 19. Vested Interest—contd

38 C 465 15 C W. N. 393 13 C. L. J 434 : 8 A L. J. 433 : 10 I C 641 P C

——in order to make a remainder to be vested there must be direct gift 22 Bom L. R 71 35 I C 313.

——when enjoyment of the property by the donee is to take place from the death of the donor, the vesting of the right in the donee takes place as soon as the gift has been executed and registered 1917 M W N 634 42 I C 265.

S. 21 Contingent interest

——a bequest to daughters to take effect "when they will be married" was held not to be a contingent interest having regard to the construction of the will so far the maintenance was concerned. 35 C. 327 15 C W N 121 13 Bom. L R 67 1911 M W. N. 30 : 9 I. C 122 P C.

S. 25. Conditional transfer.

——where the trust constitutes a charitable gift but the conditions are illegal the charity takes the gift without those conditions 22 C L J 593 34 I C 657.

S. 26 Fulfilment of condition precedent

——in case of a compromise of dispute giving power to a party to transfer the property subject to the condition of consent being obtained of three persons, two persons died and the property was transferred with the consent of only one person, held *per Boys.* J., that there was substantial compliance with the condition and the transfer was valid , *per Sulaiman J*, that the consent of the heirs of the persons deceased not having been obtained there was no substantial compliance with the condition and the transfer was invalid 90 I. C 887 . L. R 6 All 617 . 1926 All. 181

S. 28 Ulterior transfer conditional on happening or not happening of specified event

——it is well settled principle embodied now in ss 28 and 30 that in the case of a condition subsequent if the ulterior disposition is not valid the prior disposition is not affected by it 50 A. 375 : 48 C L J 106 32 C W. N 1065 . 30 Bom L R. 1331 : 1928 P. C. 156 . 26 A L J 897 109 I C. 703 P C.

——the performance of condition subsequent which was a defeasance clause being impossible, estate becomes absolute. 46 A. 575.

S 35. Election

——an election to be binding must be with a full knowledge of the right of the person entitled to elect. 21 C. W. N 130 : 38 A. 627 : 1916 M. W. N 577 : 36 I. C. 104 P. C.

——when a person has two remedies which are co-existent and inconsistent, and he pursues one remedy and fails there, equity will prevent him from pursuing the other remedy. 52 I C. 363

——to constitute a waiver or election by a Hindu widow it must be shown that she was fully aware of her right under the law and

S. 14. Rule against perpetuity—*contd.*

——*when no time is fixed for the performance of an agreement to convey, a contract for pre-emption cannot be enforced against the heirs of the promissor as it offends the rule against perpetuity.* 38 M. 114 : 18 I. C. 203 : 24 M. L. J. 84.

——an agreement to reconvey land to the vendor after a certain number of years on payment of a certain amount does not offend the rule against perpetuity 49 M. 387 : 1926 Mad 699, 50 B. 565 : 1926 Bom. 497 : 28 Bom L R. 954.

——contract creating mutual right of pre emption does not offend against the rule against perpetuities and it is enforcible against the legal representatives of parties. 49 A 527 : 1927 All. 170 ; 25 A. L J. 289 : 100 I. C. 683 F. B , 47 B. 191 diss , (45 A 498 : 1923 All. 511 : 82 I C. 643, 45 A. 478 : 1923 All. 514 : 82 I C 646) *overruled*

——a vendor can reserve an inalienable interest for himself and his descendants which was to revert to vendee in the absence of the vendor's heirs. 1925 All. 65 : 92 I. C 326

——where the sale of properties excluded an item from passing to the vendee till the extinction of the lineal descendants of the vendor it offended against the Rule. 1926 All. 283 ; 92 I C. 401.

S. 15. Transfer to class, some of whom come under ss. 13 and 14.

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——those who are directed to take by right of inheritance after a life estate, take a vested interest though possession and enjoyment is postponed after the death of the life estate holders

S. 19. Vested interest—contd

38 C 468 15 C W. N. 393 13 C. L. J 434 · 8 A. L. J 433 10 I. C. 641 P C

——in order to make a remainder to be vested there must be direct gift 22 Bom L R 71 35 I C 313.

——when enjoyment of the property by the donee is to take place from the death of the donor, the vesting of the right in the donee takes place as soon as the gift has been executed and registered 1917 M W. N 634 42 I C 265.

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——a bequest to daughters to take effect "when they will be married' was held not to be a contingent interest having regard to the construction of the will so far the maintenance was concerned. 3 C 327 15 C W N. 121 13 Bom L R 67 · 1911 M W. N. 30: I. C. 122 P C.

S. 25. Conditional transfer.

——where the trust constitutes a charitable gift but the conditions are illegal the charity takes the gift without those conditions· 22 C. L J 593 · 34 I C 657.

S. 26. Fulfilment of condition precedent.

——in case of a compromise of dispute giving power to a party to transfer the property subject to the condition of consent being obtained of three persons, two persons died and the property was ... held per Boys. J., ...ition and the ... of the heirs ... there was no ... transfer was

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——an election to be binding must be with a full knowledge of the right of the person entitled to elect. 21 C W. N. 130: 38 A. 627: 1916 M. W. N 577 36 I C. 104 P. C.

——when a person has two remedies which are co-existent and ...

S. 35. Election—*contd.*

with that knowledge made the election. A *Pardanashin lady* is entitled to special protection in this respect. 37 C L. J. 20 · 1923 Cal. 97

——donor making gift beyond his powers and subsequent execution of will by donee, if devisee is precluded from contesting the will, 42 M L J. 583 : 64 I C. 481 · 1922 Mad. 357.

——on demise of property belonging to a legatee, the legatee must choose between his property and the legacy. 1925 Mad. 164

——the doctrine of election is based on the principle of compensation and not of forfeiture The *quantum* of compensation is not what the court considers He who accepts benefit under a deed or a will must adopt the whole contents of the instrument conforming to all its provisions and renouncing every right inconsistent with it 1919 M W. N 144 : 36 M. L. J. 507 : 49 I. C 527.

——when permanent lease is granted by a prior holder of the estate and his successor receives rent without knowing the circumstances of the lease, such acceptances of rent does not amount to an estoppel or waiver 78 I. C 191 : 1925 All. 190.

——when a person takes a mortgage in consideration of consenting to a decree for payment by instalment in a suit on a pro-note, he can execute the decree and enforce the mortgage, the doctrine of election not applying to the case. 10 M L T. 137 : 11 I C 837

Ss 36-37. (Apportionment).

——when an assignee from tenant subsequently gets an assignment of the interest of the landlord, the assignor of the latter interest is entitled to the rents accrued up to the date of the assignment. 64 I C. 178 (c)

——from the day of the deposit to redeem a mortgage the property is transferred to the mortgagor and under s. 37 the mortgagor is entitled to the collections made therefor 1922 A. 275.

——this sec. embodies a rule of justice, equity and good conscience which should be applied to execution sales. 41 M. 330 · 43 I C 78 · 33 M. L. J. 618, (26 M. 540, 38 M 86) *fol*

——an assignee from a lessee becomes the lessee from the date of assignment and he is liable for the rent after the date of assignment as rent accrues from day to day 38 M. 86 : 12 M L T 65 : 17 I. C 933

——rent does not accrue from day to day but is payable according to the terms of the contract. 28 C. W. N. 1039 : 1924 Cal 1069

——when contribution is ordered between different funds each of them is to be placed in the same position as if the payment was made at the proper time. 9 A. L J 499 : 14 I C 179.

——as soon as the title of the assignee is completed by the registration of the deed of assignment, he is entitled to claim rent The tenant can escape liability if he can establish that he has paid rent to the assignor in good faith before notice of the assignment either from the assignor or the assignee. 17 C. L. J. 372 : 19 I. C. 863

S. 38 Transfer by person authorised under certain circumstances to transfer.

[illegible] haso [illegible] ther [illegible]

S. 39. Transfer where third person is entitled to maintenance

——the right of Hindu widow to maintenance is not a charge upon the estate of her deceased husband unless it is fixed and charged upon the estate by a decree or agreement The widow cannot follow the estate in the hands of *bona fide* transferee. 55 I C 28 : 32 P. W R 1920

——the junior member of an impartible estate is not entitled to a charge for maintenance against a transferee of the estate in the absence of a special custom 3 Pat L J 648 48 I C 613.

——under this sec notice must be the notice of the intention to defeat the right of the widow which can be gathered from all the circumstance of the case 43 C L J 604 1926 Cal 1068 · 97 I C. 194

S. 40. Burden of obligation.

——judicial sales would be robbed of all their security if vague references to antecedent contracts could be held to invalidate the buyer's title. 45 M L J 770 71 I C 625, **P C**

——a charge for the maintenance of the junior member and his family, created by the Zemindar, for the time being, binds his heirs and legatees 42 M 581. 23 C W N 549 29 C. L. J 551. 25 M. L. T 400, 49 I C 704 **P C**

——a covenant restricting the use of property by the owner is not binding on the purchaser unless he has notice as it does not run with the land 45 B 170 : 59 I C 506 22 Bom. L R 1158

——an obligation arising of restrictive covenant is generally not binding under s 11 but it is binding under this sec against the transferee with notice 1929 Pat 349

——where the vendee has constructive notice of the covenant entered in a registered lease this sec. will apply and the covenant can be enforced against him 89 I C. 444, 1926 All. 70 · 23 A. L J 885.

——a contract for the grant of a lease does not run with the land and cannot bind the representatives of the original parties thereto 87 I C 477, 47 A 582 : 1925 All. 427

——a contract of pre-emption can be enforced against the personal representatives as well as transferees of the original parties in the same manner and to the same extent as the restrictive covenant mentioned in the first part of this sec. 46 A 333 : 1924 A. 400 : 22 A. L. J 265.

——a contract of pre emption is enforcible against a transferee with notice. 48 A. 12 : 1926 All 70.

S. 40. Burden of obligation—contd.

——judicial sales *would* be robbed of all their securities if vague references to antecedent contracts could be held to invalidate the title of the purchaser. 1922 P. C. 393

——when a *property* is burdened with a charge, a transferee with notice of such charge *takes* it subject to the obligation attaching to the property. *41 B. 372 ; 39 I C. 96.*

——*but* a covenant restricting the use of property by the owner is not *binding* on the purchaser unless he has notice thereof as it does *not run with the land.* *45 B. 170 : 59 I. C 306* 22 Bom L. R. 1158

——the covenant in a sale deed to reconvey *creates* only a personal *liability* and it does *not run with* the land. Even the heirs *of the* vendor are not bound by it. *35 B. 258 : 10 I. C. 814*

——a covenant in a *putni lease* providing the reconveyance of certain lands *comprised in* the putni lease whenever the lessor may require them being *a positive* covenant does not run with the land 44 C L J. 220 *1927 Cal 41 : 98 I. C. 46, 6 Pat. L. J. 163 Rel. on*

——an *agreement* that the transferer should retain a certain portion *of the property* transferred and that the transferee should pay the *whole of the* revenue, is not a covenant running with the land and *the transferees* of the vendee are not bound by it. 11 A. L. J. 212 *: 19 I C. 67, 19 I. C. 126 :* 11 A L J 231

——the *doctrine* of this sec. does not apply to Revenue Sales 45 B. 45 : 59 I C 118

——the principles of this sec. do not apply to a case where a *deed of* sale in favour of the plff. creates an easement 39 I C 778 : 1917 P W. R 48.

——where there is a charge on immoveable property to secure payment *of* a sum of money supported by consideration, a purchaser even *without* notice of the charge takes the property subject to the charge. *51 I. C 963 ; 25 M. L. T. 347.*

——the term "transferee" in the sec includes not merely a *transferee under* a private alienation but also a purchaser in *execution of* a decree. 38 I C. 107 : 5 L. W. 234

——a covenant binds the transferee though a portion of it does *not relate* to the thing demised. 1 Pat L. T 84 : 55 I C 113

——*where the* equity of redemption has been sold in execution *of decree for* mesne profits obtained by the usufructuary mortgagee *for the period* he remained out of possession the mortgagor's right *of redemption* is extinguished. 20 C. W. N. 425 : 23 C L J. 411 : *1916 M. W. N. 234 ; 33 I. C 505* P. C.

——the entry in the records is always important evidence as to the *ostensible* owner dealing with the property and in certain *circumstance* it may be taken as sufficient to attract the application *of sec 41* 116 I C. 779 : 1929 Pat. 305 : 10 Pat. L T. 254

S 41. Transfer by ostensible owner

——this sec. was intended primarily to apply to cases where an *ostensible* owner has acquired a title *benami.* Religious endowments are *actually* protected from its operation, as the idol is the shrine

S. 41. *Transfer by ostensible owner—contd*

Itself and no particular being can give consent express or implied. 73 I. C. 711

——s 41 is based on the principle of representation or holding [illegible]

Cal. 1034

——this sec. is not limited to the purchaser from the ostensible owner but it extends to subsequent purchasers. Even if one of them has some sort of constructive notice, the last purchaser cannot be dislodged from his position as a *bona fide* purchaser for value without notice without *proof of circumstances bringing such notice* home to him. 43 C L J. 452 1926 Cal 916 96 I C 199

[illegible] that it was by consent [illegible] that another person [illegible] roperty, (2) that such [illegible] deration, (3) that the transferee has acted in good faith and with reasonable care 48 C. L J 374 · 33 C W. N 526 114 I C 142 1929 Cal 83 I D 1929 Cal. 206.

——this sec affords a protection to *bonafide* purchasers from ostensible owners provided its conditions are fully satisfied The sec lays down an exception to a general rule that a person cannot convey a better title than he himself has 85 I C 540 1925 Cal. 993, 5 *Pat* L. J. 521 57 I C 353, *so the condition of the sec must* be strictly complied with 5 Pat L J 521 57 I. C 353. 1920 Pat 305

——s 41 must be read in such a way that it must not conflict with sec 47 of the Registration Act 25 I C 725 : 12 A. L. J 993

——to apply the sec the condition precedent is that the persons interested in the property must have given their consent express or implied Consequently religious endowments are actually protected from its operation, as the idol is the shrine itself and no particular being can give consent express or implied. 73 I C. 711.

——where one man allows another to hold himself out as the [illegible] for value from [illegible] shall not be per- [illegible] *overthrow that* of the purchaser by showing either that he had direct notice or something which amounts to constructive notice of the real title or that there existed circumstances which ought to have put him upon an enquiry that, if prosecuted, would have led to a discovery of it 36 C L J 9 1923 Cal. 240

——one who culpably stands by and allows another to holp himself out to the world as the owner of property and thereby sells it to a *bonafide* purchaser cannot afterwards assert his title against the latter 36 C. L. J. 9 : 1923 Cal. 240 : 70 I. C. 194

S. 41. Transfer by ostensible owner—contd.

——the rule contained in this sec is no bar to a minor plff no estoppel against an infant can be created by the acts of h guardian. 17 C W. N. 10 : 16 C. L. J 185 : 16 I C. 825

11 B L 1 inding on th xecution of

[illegible] P. C

——s 41 applies to auction sale also. 31 I C. 494, 16 I. C 811 *fol*, *contra*, the principle does not apply to execution creditors who are not estopped by *consideration* affecting the Jt Dr. 43 M 135 : 53 I. C. 579 . 26 M. L. T. 271, it does not apply to sale under the order of the court under which the Jt. Dr. himself does not join in the actual transfer. 29 Bom. L. R. 471 : 1927 Bom 355 : 102 I. C. 64

——where a *person purchases* property in an auction sale under circumstances which *do* not lead him to an enquiry this sec. *does not* apply 21 A L J. 498 . 74 I. C. 911.

——s 41 like s. 115 Evi. Act applies to a case where the person mistake of fact 18 N L.

facts found the principle of 3 A. 490, 36 A. 305) *Ref.*

should be the specific point of an enquiry which might be expected to lead to some result, above case and 11 B. L. R 46 · 19 W. R. 292, 26 A. 490, *Ref.* 1922 Nag. 25 · 68 I. C. 332

——what is reasonable inquiry into transferrer's title 64 I. C 14

——the transferee must prove that he took reasonable care to ascertain that his vendor had power *to make the transfer* and that ... for consideration 68 I. C.

W. N. 674 as evidence of title, N 674 of certain property is own the vendor 666

——the *expression* 'reasonable care" in sec. 41 means such care as an ordinary man of business or a person of *ordinary prudence* would take. 43 C L. J 452 ; 96 I. C. 199 ; 1926 Cal. 916 · 31 C W. N 205, 48 C. L J 374 ; 33 C W. N. 526 · 114 I. C. 142; *1929 Cal.* 83, 1 Pat. L. J 521 · 1 Pat. L. T. 546 ; 57 I. C. 353 ; 1920 *Pat.* 305 some specific circumstance should be pointed out as the starting point of an inquiry which *might* be expected to lead to some result 48 C. L J 374.

——the ordinary standard of diligence required to ascertain whether the transferor has power to transfer is calling for the title

S 41 Transfer by ostensible owner—*contd.*

under which he claims, and inspecting the title deeds 1928 Mad. 778 : 111 I. C 539.

——unless the purchaser makes a detailed inquiry into the title of his vendor for a period of more than 12 years and insists on the production and if possible possession of title deeds of the vendor, he cannot claim the benefit of this sec 17 C W N 10 16 C. L J. 185.

——estoppel can arise only when the owner of the property allows it to be dealt with by the ostensible owner A dealing with joint Hindu family property by one of the members as his own does not render him an ostensible owner 1928 Mad 635 · 110 I. C 548

——when the plff resided in the same locality and knew the family for a long time and advanced money without making any inquiry as to the title of the reversioner, he cannot claim the production under this sec as a *bonafide* transferee 20 C. W N 265, 1916 M W N 142 34 I C 673 P. C, 8 A L J 358 : 10 I C 961.

[illegible] the last Hindu owner is [illegible]less he had enquired if [illegible] 43 A. 263 64 I C 14 :

——where the father had purchased property in the name of the son and was in possession by receiving rents and the vendee from the son had various indications which should have led him to make inquiries into the vendor's title the vendee could not plead the estoppel of the father 47 I C. 367 1918 P W R 159 : 1918 P R 73.

——a purchaser is not bound to inquire whether the seller's wife is *enceinte* and so the right of the son in the womb cannot prevail against the purchaser 16 M. L T 508 : 26 I C 61 · 27 M L J. 580.

——if a purchaser or mortgagee has notice that the vendor or mortgagor as the case may be, is not in possession of the property he must make inquiries of the person in possession otherwise he will take the property subject to the right of such person 18 C W N 657 19 C L J 352 20 I C 195

——a person invoking the plea of estoppel must show that he made *bonafide* inquiries 43 I C 556, 1918 P W R 33

——it is open to the parties to a mortgage to impeach the genuineness of the mortgage to the detriment of the bonafide purchaser for value without notice from a purchaser in court sale. 22 C L. J. 574 : 29 I. C. 841

——where a husband purchases property in the name of his wife who mortgages the same, the purchaser in execution of the decree against the husband is his successor-in-interest and is affected by the same estoppel as would affect the husband under s. 41. 26 C. W. N. 436 : 65 I. C. 245.

S 41. Transfer by ostensible owner—*contd.*

——where during the husband's absence on pilgrimage the wife sold a piece of land which was mortgaged by her before the husband's departure, the purchaser who had paid off the mortgage after being satisfied that the wife was the owner was protected by this sec 20 C. W N. 103 : 32 I. C. 82.

——where some of several co-sharers are entered in the Revenue Records as 16 ans. owners and on the basis of that a mortgagee enters into a mortgage with them, his interest is protected by the sec. 46 A 377 · 79 I. C. 874 : 1924 All. 384

——a transferee from Hindu widow who takes the property from her before the reversioner's right has accrued, is not protected by this sec. 46 A 637 : 22 A L. J. 690 : 1925 All. 79 . 87 I C. 938

——when an owner of properties who allows another to mortgage it as an owner and in fact attests the mortgage deed cannot turn round and set up his ownership afterwards. 90 I C. 517 ; 20 I C 291 . 1913 P. L. R. 278, (20 C. 296 **P. C.**, 18 W. R 166 **P C** 22 C. 909 **P C.**) *Ref.* So also in case of transfer by *benamdar* 46 I. C. 102 ; 1918 P. W. R. 126.

——in the absence of any proof or suggestion that the *pardanashin* lady of a family misled by word or conduct any alienee from a male member, the mere fact that the lady left the management of the family in the hands of male member is insufficient to show that the male member represented the female and she is estopped 40 C 378 17 C. W N 121 : 17 C L. J. 303 : 17 I. C. 758 : 1913 M W N. 125 . 11 A L. J 169 : 25 M. L. J. 55 **P. C.**

——the possession of the manager cannot be treated as sufficient evidence of ostensible ownership with the consent, express or implied of the real owner. 44 A. 674 : 20 A. L. J. 654 : 1922 All. 392 : 36 A. 308 25 I C 158

——a *bonafide* mortgagee without notice of defect of title of the mortgagor may be awarded a decree under s 41 even though the sale of the property to the mortgagor was collusive 9 M. L. T 365 · 9 I C 504.

——where a Mahamedan lady after the death of her husband represents herself to be the owner with the consent of the heirs, receives rents from tenants and is entered as sole owner in public records, a transfer by her for valuable considerations and in good faith is protected by this sec. 63 I. C. 125

——the word "voidable" does not mean 'voidable in entirety'. 1928 Mad. 778 : 111 I. C. 539.

S 43 Transfer by unauthorised person.

——this sec is based on equitable principles. It is only the transferee who ... the belief that the transferer has absolute ... [illegible] ...rer, that is ... quired. 48 A. 15... ...l. on ...hat as between the ... cannot plead sub... transferee to pay

S. 43. Transfer by unauthorised person—*contd.*

money for the transfer, it being an extension of the law of estoppelc. 4 Pat. 478 86 I. C 721 : 6 Pat L. T 497.

——this sec. has no application to persons who merely sign a sale-deed whereby another person who has no title professes to transfer the property as his own 27 C. W. N 433 · 1923 Cal. 423.

——the doctrine of estoppel enunciated by this sec. is inapplicable to a transfer of a *spes successionis* such as the interest of a reversioner 48 C. 536 25 C W N 496 : 33 C L J. 457 : 65 I. C. 27, 41 M, 749 47 I C. 733 34 M. L. J. 563 : 24 M. L T 1

——the doctrine of title feeding the estoppel is inapplicable. Where the reversioner joins in a conveyance by a widow he is not estopped from claiming properties and challenging the alienation as being without legal necessity. 46 C 566 : 28 C W N. 521 . 17 A. L J. 66 . 36 M L J 68 P C.

——before advantage can be taken of this sec it must be shown that there was an erroneous representation and whether there was ' fact 68 I. C 203 (C). 48 175. 34 M 159, 27 I C, L J, 144 · 27 I C 982, J 120 . 49 I C 147 : 8 L. W. 100

——but no fraud is necessary, 20 C 296 P. C 34 M 159

——this sec. does not apply to a D Hr putting the property to auction sale though he cannot set up a secret incumbrance 40 C. 173 17 C W. N. 137.

——this sec, does not apply to cases where the land really belongs to the Govt. 33 M L J 370 : 40 I C 581 28 M L, J. 44 : 27 I. C 785

a temporary settle- turn subleased to renewed from time ve the contractual of their relation- C. L J. 308 23 I C 16

——the alienation of a service inam land is wholly void and the enfranchisement of the inam at a later date does not entitle the alienee to invoke the aid of the provisions of s 43, 39 M 930 1915 M. W N 838 . 30 I C. 889, 28 M. L J. 44 . 27 I. C 785, 30 M 255 1913 M. W N. 99, 415, 24 M. L J 462 1913 M. W N 415 · 19 I. C, 881, 41 M 418 1918 M. W. N 23 43 I. C. 935 F. B

——the principle of this sec applies equally both to the sales and to the mortgages. 29 M L. J 733 . 29 I. C 439 (30 M. 255, 20 C. 1, 2 C. L J 6, 34 Mad 159) *Dist.*

——where mortgagors acquire the beneficial interest in the enefit of the mort- 4 381, 8 A. L J. 184, W. N. 444 . 44 I.

S. 43. Transfer by unauthorised person—*contd.*

C. 984 27 C L. J. 289 . 43 I. C. 740, 33 I. C. 975, and to leases 27 I C. 785 : 28 M. L J. 44, 19 C. L. J. 408.

——*for the purposes of this sec. an exchange stands on the* sam footing as a sale 33 C. L. J. 184 : 60 I. C 819.

——the conveyance of non-existent property though inoperative as a conveyance is operative as an executory agreement 19 *Cal. 535.*

——though an assignment is of a defective title yet when the title of the assignor becomes good it will enure to the benefit of the assignee. 33 C. L. J. 184 : 60 I. C. 819, 40 C. 173 : 17 C. W. N 137 16 C. L. J. 202 : 16 I. C. 365.

——*where certain* persons purport to sell property they are jointly liable to make good the property out of any property they had at the time of sale or which they had subsequently acquired. 35 A. 541 . 21 I. C. 654 : 11 A. L. J. 746.

——annual rent to be paid under a lease may be considered as valuable consideration, although no premium was paid. 43 C 34; 19 C. W. N. 1082, 32 M. L. J. 24.

——acquiring title afterwards is for the benefit of the purchaser, 23 C. L J. 501, 7 C. L. J. 381, 18 C. L. J. 181, it applies to Hindu conveyance also 21 C. W. N. 218, and to Mahamedans 7 C. L J. 381, and to all persons claiming under the transferer. 19 C. W. N 1272

——where the husband of a Mahamedan lady under a power of attorney from wife executed a mortgage deed in favour of the pltf but the wife questioned the mortgage on the ground that the power [illegible] during the pendency of the [illegible] ...ted certain share, held that [illegible] against the property which [illegible] the husband. 46 A 310:

[illegible] a co-owner, is only subject to [illegible] of his transfer and cannot be [illegible] subsequent to his transfer. [illegible]

S 44. Transfer by one co-owner.

——where one of several co-sharers who are in possession of *different parcels of land by mutual arrangement transfers his share* in a parcel which is in the possession of other co-sharers the transferee can sue for partition of that parcel as against them. 33 *C. L. J. 231 : 33 I. C. 17.*

——this sec. provides for partition as a means of making a possessory right available to a transferee from co-owner 25 M. L. T 229 : 25 I. C. 401.

——s 44 does not override the provisions of Hindu Law. 37 I C 168 : 31 M. L. J. 275 : 1917 M. W. N. 149.

——a stranger purchasing the share of an undivided Hindu co-parcener cannot claim joint possession of the family dwelling house. *He can either ask for delivery of possession by partition in execution*

S. 44. Transfer by one co-owner—*contd*

proceedings or bring a separate suit for partition. 23 C. L J. 587 20 C. W. N. 675 · 35 I. C 294.

——the requirements of sec. 44 are satisfied if it is shown that the house is an undivided one and that members of the house reside in the house occasionally. 1929 Cal 231.

S. 48. *Priority of right created by transfer*

——a subsequent purchaser cannot claim a better title than that of his vendor unless there is some special equity in his favour 14 I. C 585.

S. 49. Transferee's right under policy

——a mortgagor has no right against the insurance company which insured the machinery of a mill againt fire 1923 Rang 6 1 Bur. L J 28

S. 50 Rent bona-fide paid to holder under defective title.

——to get the benefit of the protection of s. 50 the tenant must pay rent as rent and must not pay rent in advance which simply becomes a mere loan to the mortgagor. 94 I. C. 538 1926 Cal 204. 29 C. W. N. 953, 1921 Pat 352 63 I C 587

——payments made by tenants to mortgagor after mortgage are valid against mortgagees if made without notice of the mortgage. 85 I C. 522: 1925 Cal 251.

——if before the due date the landlord makes an assignment, his receipt of rent cannot be treated as a discharge by him 1921 Pat 352 : 63 I C 587

——a mortgagee is not bound by the arrangement between the tenant and the mortgagor made subsequent to the mortgage as regards the payment of rent but a purchaser with a notice of such arrangement is bound. 1926 Cal. 204 : 94 I C. 538

S. 51 Improvements made by *bona-fide* holders under defective titles

[illegible] fected improve- [illegible] *bona-fides* was [illegible] certain decree [illegible] according to the circumstances of the particular case 1926 Mad. 609 23 L. W. 496 96 I C 483 1926 M. W N 958, 48 I C 859, 29 I C 269

——a purchaser from Hindu widow is not to be compensated because a person dealing with a Hindu widow would ordinarily [illegible] '30 23 A L. J 207, [illegible] I. C 195 : 1925 Mad. [illegible] 463 40 I C. 71, 36

——acquiescence by real owner to the transfer by limited owner operates by way of estoppel. 56 I C. 874.

——where the minor on attaining majority made delay in suing to eject the purchaser from adult member who has erected building

S. 51. Improvements made by *bona-fide* holders under defective titles—*contd.*

on the land the purchaser was entitled to compensation. 23 I. C. 350 : 1915 P. L. R 54

excess area, held both under this sec. and under the principles of equity the vendor would be bound to pay compensation for the improvement. 1926 Mad. 314 : 91 I. C. 1.

——a person who plants trees on another's land knowing he has no valid title to it, cannot claim compensation for loss suffered. 1924 Nag 142, 28 I. C. 51 : 1915 M. W. N 148.

——what is "good faith" is a question of fact. 56 I C. 492. 14 S. L. R 12

——whether a person making improvements is entitled to be paid is a question largely dependent on facts 1928 Mad. 343. 111 I C. 22.

——a person may act in good faith even if he acts under the mistake or ignorance of law or with a certain decree of negligence 1926 Mad 609 ; 23 L. W. 496. 56 I. C 492 · 14 S. L. R. 12

——"good faith" means honest belief, even negligent belief may amount to honest belief. 24 I. C. 940 : 1 L. W. 369, 36 M. 194, 1925 Mad. 921 : 95 I. C. 789.

——but the definition of "good faith" in the General Clauses Act as meaning merely "honestly" does not apply to Acts passed before 1897. To constitute "good faith" proper enquiry is necessary. 25 A. L. J. 926

——the good faith, of a mortgagee by conditional sale cannot be inferred from the fact that he spent money over the mortgaged property believing that he was absolutely entitled to the property. 1928 All. 381 : 26 A. L. J. 887.

——where a mortgagee under a *bona-fide* belief that under the terms of the mortgage bond he has become absolute owner of the property makes improvements, he is entitled to compensation to the extent of the value of the improvements 42 I. C 438 · 33 M L J 316 : 6 L. W. 583.

J. 118, (20 B 298) Dist.

——where there is no special contract a tenant cannot claim compensation for permanent structures erected on the land without the permission of the landlord. 1918 M. W. N. 46 · 43 I. C. 641; 35 M. L. J. 281, 51 I. C. 350, 27 C. 470, 48 I. C. 354, 28 I. C. 817

——a tenant cannot claim compensation for improvements which he was bound to make under the term of the lease. 27 I. C. 351 · 1 L. W. 1074

S. 51. Improvements made by *bonafide* holders under defective titles—*contd.*

——the option is with the lessor to take buildings erected by the tenant on payment of compensation or allow the tenant to remove them before he quits the premises. 38 M. 710 21 I C. 583 : 1913 M. W. N. 974 : 25 M L. J. 635.

——under this sec the mortgagor has the option to pay the value of the estimated improvement on the one hand or on the other hand to sell his interest to the transferee at the then market value irrespective of the value of the improvement. 28 Bom L R 993 : 97 I. C 700 : 1926 Bom 599, 40 M 1134 *Ref*

——when a purchaser *pendente lite* believeing in good faith in the soundness of his title makes improvement he is entitled to be compensated. 34 I C. 957 · 1916 P W R 92 · 1916 P L. R. 70

——but such purchaser is not entitled to compensation when he has full knowledge of the risk in making the improvements 25 M. L J 324 1913 M. W N. 776 21 I C 219

——the purchaser of an immoveable property making improvements is not entitled to compensation if he had notice of a prior valid contract of sale with a person who obtains a decree in a suit for specific performance of contract. 41 C 852 19 C W. N. 89 : 19 C. L J 420 : 23 I. C 214

——the purchaser claiming compensation for improvements must have acted under the honest belief of a good title to the property 33 C 1119, 36 M 194 1911 M W. N 425 : 12 I C. 444 : 10 M L T 373, 33 A. 752 11 I C 218

——the word "transferee" in this sec includes a transferee under an invalid transfer and the words 'the person causing the eviction" include a transferer under an invalid lease 40 M 1134. 1917 M. W N. 757 · 33 M L J 252 43 I C. 138, 51 B. 1040 1927 Bom. 611 : 109 I C 722 ; 29 Bom. L R 1414.

——the rise in the value of the property as a marketable subject is the measure of damages and not the amount of expenditure, 40 C 555 17 C W. N 797 18 I. C 946 25 M L. J 176 P. C

——pending of a small amount every year in the usual manuring and levelling of the lands etc does not entitle a person to recover the same as the value of improvements 24 I C 879 1 L W 371.

——where the deft's claim for improvements was five times the mortgage amount the claim for improvements could not be upheld 52 B 307 · 1928 Bom 150 30 Bom L. R 427 . 109 I. C 532

——the evidence of improvements must be precise 24 I. C 918 1 L W 360

——this Act is not exhaustive and does not exclude any equitable principle regulating the rights and liabilities of the parties where no provision has been specifically made 112 I C. 765 . 1922 All. 12, 27 A. L J. 105.

S. 52 (Lispendens)

N.B—*To set at rest the conflicting rulings on the meaning of the words "active prosecution" and "contentious" the word "pendency"*

S. 52. (Lispendens)—*contd.*

has been substituted for the word "active prosecution" and the word "and" has been ... ...rd "*contentious*".

...d to cases where the doctrine ... ansfer and it operates only in favour of a plff. and cannot be invoked by the deft 40 I C. 636

——the *doctrine of lis pendens* is not based on constructive notice but *on impossibility* of any action being brought to a successful end. 84 I. C. 490 : 1925 Cal 239.

——the *doctrine* does no apply to a case where the parties are ranged *on the same side* and between whom there is no issue, 41 M. 458 : 44 I. C. 471 : 34 M. L. J. 363.

——court sales and private sales equally come under the doctrine of *lis pendens*. 1924 Mad 307 : 1924 M. W. N 14 : 45 M. L. J 835.

——the doctrine applies to involuntary transfers also 66 I C. 631, (25 C 179, 266, 966, 15 C. 94, 756). *Rel.*

——in ... continues up to the date ... the property is sold and the ... 1925 Mad. 1039, 26 C W. N ... 42 I. C. 624 (C), 100 I. C ...

——an alienee pendente lite, after preliminary decree but before final decree, is bound by the decree and cannot be allowed to reopen question already decided in the suit. 82 I. C 452 : 1925 Nag 132 : 8 N. L. J 158

——after the passing of decree there is no *lis pendens* 28 C. W. N. 963 : 39 C. L. J. 590 : 1925 Cal. 23.

——but the doctrine applies to ... stage 51 B. 37 : 100 I. C. 58...

—— ... ... lous suit *does not* affect ... 339 P C.

——a lease of mortgaged property pending mortgage suit is affected by this sec. 29 C W. N. 94 : 40 C. L. J 500 : 1925 Cal 251 85 I. C 522, 21 C W. N. 88 : 39 I C. 182, 17 C L J 3... I. C. 1.

——a person who acquires title during the pendency of a suit for specific performance is bound by the decree in the same 49 C 415 : 34 C. L J 79 : 1922 Cal. 412, 9 C. L J. 96, 17 C L. J. 427 *fol.*

——when the jurisdiction of court has once attached, *if it can't be* ousted by a transfer of interest, there would be no *end to litiga*tion and justice would be *defeated*. 49 C. 495 : 34 C. L. J 31 : 1922 Cal 412.

——the doctrine of *lis pendens* applies to partition suits 52 B. 208, 30 Bom. L R. 102 : 1928 Bom. 65 : 108 I. C. 17

——the strong weight of authority, though *not the express* language of the sec. is *in favour of the view*; this *doctrine applies* to execution sales as well as to sales for non-payment of *Govt. Revenue* 3 Pat. L. T. 296 : 65 I. C 325, 1922 Pat. 542, 26 C 966 *fol.*

——this doctrine does not apply to administration suits 1 P ... L J 133 *contra* 84 I C 880 : 1925 Cal. 393, *see next case*

52. (Lis pendens)—*contd*

——where during the pendency of a suit for the administration of ust property one of the beneficiaries alienates the property the nee takes the property subject to the further orders and direc- . . . oceedings of the suit. 55 C . . . 928 P C 38 108 I C. 342 : . M. W N. 149 P C. . . ers 66 I. C. 631, 25 C. 179.

——where pending a rent suit certain property was transferred l no question of title was involved in the suit the transfer was not cted by the doctrine 55 C. 701 32 C. W N 268 1928 Cal 441 : I. C. 340.

——if notice is essential to apply the doctrine 1922 Cal 358 : I. C. 273.

——letting out of land for cultivation is not a transfer within sec L R 3 A 108

——this doctrine does not apply to a mortgagor who has given ler that mortgage an express power of sale and he cannot by rting a suit for redemption derogate from that which he, in ress terms, conferred on the mortgagee 45 M. 774

——purchaser under a money decree takes the property subject the charge of mortgage decree 3 Pat L T 757 67 I C 262

——the doctrine applies to suits for the specific performance of eements to sell immoveable properties It applies both to private es and court sales 45 M.L J 825 . 1924 M W N 14 1924 Mad 307.

——final compromise of a mortgage suit does not make it non-ntentious. 45 M L. J. 682

——when a creditor of a deceased person sued his heirs for overy of money due from him, for sale of certain pledged goods l if necessary for administration of the estate and the heirs ecuted a mortgage of immoveable property and an order was de in the suit for administration of the estate, the mortgage was t affected by the doctrine of *lis pendens* 51 C 1033 1925 Cal 395.

——a party cannot repudiate a transaction because the Receiver the suit acted beyond his power in sanctioning the same, after the nsaction had been carried into effect and the Receiver and the ty had taken advantage thereof 94 I C 538 1926 Cal. 204

——the sec. does not invalidate a sale *pendente lite* but only kes the property in the purchaser's hands subject to the decree ssed in the pending proceedings 43 M. 696 58 I C 501 1920 W N 299

——where an ijaradar made a settlement of the lands on the piry of the term of the ijara pending a suit against him by the oprietor to eject him, the settlement-holder was liable to be ejected the proprietor. 47 I. C 365.

. . . in the course of a suit for 52 and cannot affect the decree or in execution. 37 B

S. 52. (Lispendens)—*contd.*

——a decree awarding maintenance and creating a charge for it upon a particular property is final and an alienation after such decree and before its execution is not affected by this sec. 37 B 62 21 I. C. 54, but in case of a decree for maintenance after confirmation of sale is. 1915 M. W. N. 15 : 26 I. C. 353 : 28 M. L J. 665

——a misdescription of property involved in a mortgage suit is sufficient to render the doctrine of *lis pendens* applicable to it in the case of a person having knowledge of the real facts 26 C W N. 36 : 34 C. L. J. 256

——a transfer made during the interval of the plaint being returned to make up the deficit stamp is not affected by the doctrine of *lis pendens*. 60 I. C 439 (c).

——a subsequent restoration of a suit dismissed for default ... for restoration during which ... 727 (c).

... ate of the order allowing a ... 63 is affected by *lis pendens*

... the pendency of the suit for pre-emption the ... the vendor, the doctrine ... 671 : 1925 All. 487 : 88 I ... 666 : 1927 All. 336 : 25 A.

——the doctrine of *lis pendens* applies to pre-emption suits as well as to other suits. 90 I C. 238, 89 I C. 219, 23 A. L J. 615

——a suit of pre-emption is not affected by a re-sale of the property in question to the vendor after the institution of the suit 11 I. C. 645, 47 A. 625 : 88 I. C. 761, 1925 All 502 : 88 I. C. 202.

——the doctrine does not apply to a case where a person having an equal or superior right to a plff. pre-emptor, asserts that right ... the pendency of the plff's suit and the vendor ... privately in recognition of ... 53 : 10 I. C 357.

... not apply to a sale by the ... for redemption where, by ... igagor gave the mortgagee ... 2 M. W N. 447 : 1922 Mad

... apply only to properties in the suit and in ... he date of its institution ... t to the institution of ... ence only on the date ... Mad 457.

——the doctrine does not apply to the case of a sale deed executed before but registered after the suit was filed. 83 I C 131 1925 Mad. 359, 87 I. C 568 : 48 M. L. J. 496 : 1925 Mad. 710, 21 M L J 399, (3 P. L J 713) *Diss.*

——the doctrine rests on the principle that the law does not allow litigant parties to give to others, right over the property in disputes, prejudicing the oposite party. 19 C.W. N. 152 . 24 I C 513

S. 52 (Lispendens)—contd.

——a lease for a year by the Jt Dr who was in possession pending the execution sale of the property was the ordinary and enjoyment and was not the lessee was entitled I. C 232 1915 M. W.

——the doctrine applies to a purchaser at the execution sale during the pendency of a suit which terminates in a consent decree. The fact of payment to obtain consent does not affect the application of the principle. 4 Pat 619 : 90 I C 251 6 Pat. L T 483

——the doctrine does not apply to moveable property. 36 B. 189 : 13 I. C 849 : 14 Bom L R. 9

——but the principle of this sec may be applied to cases where the transferee of moveables *pendente lite* has notice of the *lis* 16 M. L. T 158 25 I C. 133, (36 B 189, 15 A 108) *Dist*

——it is more than doubtful whether the principle of *lis penders* applies to moveable property, such as money 62 I. C. 900.

——a hut is an immoveable property 9 I C 1

——a mortgage-debt being immoveable property this sec. applies to transfer thereof during a partition suit 18 I C. 492.

S. 53 (Fraudulent transfer)

Applicability of the section.

——to validate a transfer both payment of consideration and good faith are essential elements 34 C 999 : 11 C. W. N. 839 6 C L. J. 410, 25 B 202.

——the sec. does not apply when the transferee acts in good faith 21 C W. N 401 : 23 C L J 570 22 C W N. 427, 34 C 999 11 C W N 889 · 6 C. L. J 410. 35 C. 1051 : 7 C. L J 586 : 12 C. W N. 761, 71 I C 20, 42 M 143, 46 M 478 even though the consideration is inadequate 13 M. L. T 145 18 I. C. 691, 1911 P L R 114 : 9 I C 1018.

——the test of good faith is whether the transfer is a mere cloak of retaining a benefit to the grantor, or whether it was intended thereby that the grantee should have the property and keep it. 34 C. 999 11 C W N 889 6 C L J 410.

——the mere fact that the transaction is hollow does not make it less a transfer within the meaning of sec 53. 86 I. C. 873 ; 27 Bom L. R 205 1925 Bom 287

——the intention of the transferee is the determining factor as to the validity of the transfer If the transferee buys in good faith and for valid consideration his purpose cannot be set aside by reason of the transferor having sold the property for the express purpose of defeating or delaying creditors 89 I. C 953.

172 . 8 Lah 544

Applicability of the section—contd.

——a partition among the members of a Hindu joint family is a transfer to which this sec. will apply. 1926 M. W. N. 641 : 97 I. C. 70 : 24 L. W. 180, 44 M. L. J. 513 fol.

a been repeatedly applied by ...e, 8 Lab. 544 . 1927 Lab 420.

accordance with the general

Transfers, fraudulent or not.

——however suspicious a transaction may be there must be evidence making out fraudulent intention. 1928 Mad. 793 : 112 I. C. 228 : I. L. T. 40 Mad. 293.

——circumstances constituting fraudulent transfer coming under this sec. reviewed 23 C. W. N. 817 : 50 I C 264 . 36 M. L. J 483 : 21 Bom. L. R. 472.

——a transfer cannot be impeached as fraudulent when it ... intended a sale of his immove... its own protection and where ... doubted. 21 C L. J 441 ...

I. C. 161.

——transfer in good faith and for consideration cannot be assailed. 1928 Pat. 199 : 106 I. C. 356

——the proviso to this sec protects a bona-fide purchaser f... ...m the fraudulent grantor ...3 M. 478 : 1923 Mad 358 ...ke inquiry of person who ...lefects in the title is not a ... Mad. 558 : 44 M. L. J ...

——to make the transfer valid there must be both consideration and good faith. Payment of part of the consideration will not do. 99 I. C 769 . 1927 Mad. 278 : 1927 M. W. N. 1.

——the fact that the transfer was executed at a time when the executant was well aware of the probability of a decree for a substantial sum being passed against him, should be considered by the court in coming to a conclusion on the question whether the transfer was fraudulent. 47 I. C. 932 (c).

——a mortgage effected in favour of maternal uncle for consolidating the old debts during the pendency of suits by other creditors is not illegal if the debts were not proved to be false ... 51 M. 349 : 32 C. W. N. 821 : 48 C. L. J. 11 : 109 I. C. 626 : 1928 P. C. 139 : 30 Bom. L. R. 1353 P. C.

Transfers fraudulent or not—*contd.*

——a transfer in fraud of creditors is void if the transferee takes it with the knowledge of the fraudulent intention of the transferor even if the transferee has paid the full consideration and a part of the consideration has gone to a creditor of the transferor. 22 C. W N 427; 45 I. C. 441, 23 C W N. 769 51 I. C 736. 1923 Nag 103.

——but the mere fact of the indebtedness of the vendor or knowledge on the part of the purchaser that the sale may defeat or delay the creditors is not sufficient to negative the *bona-fides* of the purchaser 23 C W N. 769 51 I C. 736, and where under a [illegible] on creditors, the creditors [illegible] the mortgage money, the [illegible] iforcible 4 P L T 409

——when a Hindu made a gift of all his properties in favour [illegible] became insolvent and [illegible] in fraud of creditors, [illegible] liable to maintain the [illegible] R 219 93 I. C 1013;

——s. 53 cannot be invoked simply for the reason that there is probablity or even certainty of a transfer having the effect of delaying or defeating the attachment of decree-holder There must either be the additional fact of the transfer being for a grossly inadequate consideration or something else which would raise the presumption of fraud 25 A L J 829 1927 All 714 104 I C 406

——a waqf executed as a device to defeat creditors is governed by this sec 27 A L J 460 1929 All 277.

——converting immoveable property into cash is the most obvious and effective method of defeating and delaying creditors. 80 I C. 147; 1924 M W N 117. 1924 Mad 450. 46 M. L J 125

——a *malafide* partition between father and son effected with the sole object of defeating the claim of the creditors of the father is voidable although this sec does not strictly apply to partition. 94 I. C 282

——a partition among the members of a joint Hindu family is a transfer to which the provisions of s 53 would be applicable. 44 M. L J. 513 1923 M W N 320 73 I C 978

——the mere fact that a deed of settlement was executed on account of natural love and affection does not necessarily show that the intention of the transferor was not to defeat his creditors. 82 I C 945; 1924 M W N 869 1924 Mad. 779 So also a gift of property to wife 109 I C 272 1928 All 476

——it is not fraudulent to shield some particular property from being proceeded against by creditors while there are other properties by which dues of the creditors may be satisfied, and mere delay caused to the creditors towards the realisation of their dues is of no consequence so long as there has been no deprivation of the creditors in respect of their dues 94 I. C 33.

Transfers fraudulent or not—*contd.*

——if property is sold at an undervalue on the understanding that *the seller* shall be entitled to occupy it at a low rent that is strong evidence of bad faith. 21 C. L. J. 302 : 9 I. C 623.

——the transferor's fraud is in every case essential and in addition to that there must be a want of good faith in the *transferee*. *1929* Lah 409 : 30 Punj L. R. 306 : 11 Lah L J 251.

How far the transfer is valid.

——a mortgage for the purpose of discharging a real debt due *by the* mortgagor, does not, to the extent of the consideration applied therefor, come under this sec 36 M. 29 ; 11 I C. 868, (21 C. 825) *fol.* 30 M 6 *dist*

——where part of the money advanced under a mortgage is applied for the discharge of the debts of the mortgagor, the mortgage cannot be held to be wholly void under this sec. even where it appears that the transaction was intended to defeat creditors of the mortgagor 80 I. C. 147 : 1924 M. W. N 117 · 1924 Mad. 450.

——in the absence of any conflicting equities the mere fact that the ... [illegible] ... right. The ... not prevent ... signed to the ... mption of the ... 53 : 43 C 203

29 I C. 580, 35 M. 354, *fol*

... which is impeached on the ground ... mortgagor have been paid ... ortgage is binding on the

——the transfer may be partly valid when separable, 35 C 1051 : 7 C L. J. 586 : 12 C. W. N. 761, and is voidable when inseparable, 24 M. L. J. 266 : 18 I. C. 768 : 13 M L. T. 206, but when a substantial portion is fraudulent the whole is fraudulent 4 Lah 211 : 72 I. C. 452.

——a mortgage can be enforced for so much of the consideration as is proved to have been paid by the mortgagee to the mortgagor 21 C W N. 401 ; 23 C. L. J. 570 : 29 I C 690

... consolidating the old debts ... 11 · 22 C W ... 349 : 48 C L. J ... 26 A. L. J. 656 : 30 Bom L R

... P. C.

Preference of some creditor. validity of.

——a debtor can prefer one creditor to the other, 20 C. W. N. 393 : 23 C. L J. 406 : 43 C 521, **P. C.** 27 M. 227 : 18 C. W. N 411, 20 C. L J 571 **P. C.**, 44 C. 662 : 21 C W. N. 585 : 25 C. L. J. ... **P. C.** 78 I. C. 106, 45 M. 90 ; 1922 M. 447, 33 I. C 625, 41 I. C. 733 63 I. C. 111 ; 2 Pat. L. T. 577 but the transfer must be *bona fide*, 23 C W N. 817 **P. C.**

Preference of some creditor, validity of—contd

—a debtor can pay his debts in any order he likes and prefer any creditor he chooses and even if by such preference other creditors suffer it would not stamp the transaction as fraudulent 44 C 662 21 C W. N 585 · 25 C L. J 508. 40 I. C. 242 19 Bom. L R 421 P.C

—where there is no question of bankruptcy law there is nothing to prevent a debtor from paying one creditor in full although the result may be that the rest of his assets proves insufficient to liquidate other debts 43 C 521 20 C W N. 393: 23 C L J 406t: 32 I. C. 343 19 M. L T 203 P C, 20 I C 355 · 1913 P. W. R 197

—the rule under this sec does not apply to a case in which a creditor takes property in s
the result of the transfer t
creditors of the transferor
410, (25 B 202, 24 C 825)
C. 1037

—where a debtor executed a mortgage to one of his creditors
sufficient.
he fact of
f the other
C W. N

—the security given by a debtor to one creditor, the effect of which is to defeat an expected execution of another creditor, is not fraud within statute because s 53 invalidates a transfer which removes the debtor's property from the *creditors as a body* to the benefit of the debtor; but in this case the property was available for some one creditor. 54 C. 687 104 I C. 833 1927 Cal 836, 43 C. 521 *fol* same principle, 1928 M. W. N 617 1928 Mad. 860.

—the deed of assignment executed by a debtor is void against his creditors when the debtor is in a state of insolvency or when the effect of the deed is to leave the debtor within the means of paying his present debts 18 C W. N 841 20 C L J. 571 37 M 227 23 I C 714 P C

Onus of Proof.

—the onus that lies on the plff to prove that a transfer is collusive, fraudulent and without consideration is not discharged by producing witness to prove signature to certain documents necessary for deducing title and to topographical position of the property. 25 C W. N 409 62 I C 356 1921 M. W. N 80 P C

—a Jt. creditor cannot avoid a transfer by the Jt. Dr. prior to his attachment without showing that it was voidable under this sec 42 I C 554 6 L. W. 518

—the onus of proof on the transferee is satisfied if the transferee proves the passing of consideration He need not go further and show absence of fraudulent intent 1919 Pat. 226: 50 I. C. 463.

Whether the transfer is voidable or void and how it can be avoided.

——the transfer is voidable and not void, 23 C. L J 570 : 21 C. W. N. 401, 1923 Nag. 195 : 71 I. C. 409, and is binding unless set aside by suit 41 M. 612 F. B, 30 M. L. J. 565 *Apprd* 15 C L J. 649 : 14 I. C. 715 not *fol.*

——a deft can by his defence avoid a transfer voidable only under this sec. 16 C. W. N. 717 ; 15 C. L. J. 649 : 14 I. C. 715 *contra. below*

——Plea of fraudulent transfer cannot be pleaded as a defence. A suit is to be instituted by the affected creditor, 30 I. C. 953, 41 Mad. 611 *fol*, but the latter case has been overruled by the following case of 43 M. 760 F.B.

——an attaching D. Hr. can take the plea in defence to a suit under Or. 21 R. 63 C. P. C by a transferee whose claim was disallowed holding the transfer to be fraudulent, and intended to defeat or delay the creditors. 43 M. 760 : 1920 M. W. N. 572 : 39 M. L. J. 351 : 59 I. C. 947 F. B, 55 I. C. 752

——a suit under s. 53 is not necessary where the transfer is void or has been found to be a sham transaction. 34 I. C. 778 : 19 M L. T. 390 : 30 M. L. J. 565, 55 I C. 766 : 11 L W. 106, 1919 Pat 403 : 53 I. C 892.

——a transfer is voidable at the option of the creditors Attachment in execution is sufficient exercise of option. 3 Pat. L T 613 : 68 I. C. 369 : 1922 Pat. 572, 43 B. 707 : 52 I C 682

Who can avoid the Fraudulent transfer ?

——a suit to set aside a transfer alleged to be fraudulent must be brought by or on behalf of all the creditors. 34 C 999 : 6 C L J 410 : 11 C. W. N. 889, 32 C 198, P. C. 16 B. L. 27 B. 146, 32 I. A 1 P C.

——s. 53 applies even though a single creditor may have been defrauded and hindered in realising his debt. 2 Pat. L. J. 546 : 40 I C. 685.

——in setting aside the fraudulent transfer the creditor need not be a judgment creditor. 1923 Lah 478 : 73 I. C. 719 but in case of ordinary creditor a representative suit must be brought. 1923 Lah. 478 : 73 I. C. 719.

——it is not necessary under this sec that the creditor impugning the alienation should have been a creditor at the time of the alienation. 82 I. C. 945 : 35 M L. T. 100 : 1924 M. W. N. 869 : 1924 Mad. 779.

——If a man fraudulently transfers property to avoid existing obligation, it can be impeached by creditors of later date 19 A L. J 299 : 6) I C. 896

——the right of each creditor is individual, so inaction or laches ... ers of their right ...

... only one creditor ... all such creditors ... Expl 6, C. P. C. ...

... as have been defrauded ...

Who can avoid the Fraudulent transfer ?—*contd.*

M. L J 565 : 34 I. C 778 : 19 M. L. T 390, 42 M 143 51 I C. 714 : 1919 M. W N. 39, 71 I. C. 20 *contra*. All the creditors must sue. 2 Pat L T. 217 : 6 Pat L J. 48 · 1921 Pat 47 . 63 I. C. 788, 42 I C. 498, 23 I C. 341 : 7 Bur L. T 257

——an auction purchaser at a sale in execution of a decree is not a "subsequent transferee" *entitled to impeach a previous transfer* under s 53 53 I C 205, 39 B 507 . 29 I C 497

——a simple mortgagee who has obtained a decree for sale whose right to a personal decree is not barred, is a "creditor" within s 53 and can bring a suit to set aside an alienation, in fraud of creditors. 29 I C 62 : 1915 M W N. 337 · 2 L. W. 479.

——an Official Receiver can maintain a suit under s 53 to set aside a transfer as being in fraud of creditors 23 L. W 643 95 I. C. 300 . 1226 Mad. 826.

Position of parties when the fraudulent purpose is not carried into effect

——when the purpose for which fradulent assignment is made ---- *the property from* C L J 82 · 1923 22 C. L J. 197. (mortgage) 36 C. L J 197 29 I C. 616 22 I C. 86, 33 M L J 696 45 I. C 333 (Mortgage), 1916 M W. N 107 32 I C 810 23 I C 620 1 L W 169, 52 I C 866, 13 M L T 227; 17 I C 323, 30 M 6, 24 C 825, 1915, M W N 273 28 I C 702, 94 I. C. 33 1926 Cal 850

——a partial yet substantial execution of an illegal purpose or effectuation of fraud disentitles the disposer to the assistance of the Court 1926 Cal 850 94 I C. 33.

——when two or more persons are engaged in fraudulent purpose *to injure another, neither law nor equity will interfere to* relieve either of those persons as against the other from the consequence of their own misconduct 36 C L J 491, 1923 Cal 90, 43 I C 352 32 M L J 484 52 I. C 402.

urt in a cannot 63 I C.

——where the owner of property executed a fradulent transfer with some ulterior notice but continued in possession of the property for more than twelve years, he is entitled not only to confirmation of possession but is entitled to recover possession if he is subsequently dispossessed even though the fraud intended to be effected was carried into effect. 53 I. C. 114, (35 C. 551, 27 C 231, 33 C 967, 13 C. L J. 625) *Ref.*

S. 54. Sale.

——a sale of properties, even though of less than Rs 100 in value, if made by a document can be made only by a registered document. But the documents though unregistered can be used as evidence of the nature and terms of the transaction which fell through. 30 C W. N. 254 : 93 I. C. 115 : 1926 Cal 705, 1925 All 205

——the expression "sale by delivery of property" only refers to a case where the ... [illegible]

——when in pursuance of an agreement to transfer property the intended transferee has taken possession though the requisite legal documents have not been executed and registered, the position is the same as if the documents had been executed, subject to the ... be obtained between parties ... and at the same time as the ... be determined. 27 C. W. N. ... W N. 463 : 31 C. L J. 75 ... I. C. 104, 22 C. W. N. 522 : 41 I. C. 850, 20 I. C. 707 (c), 33 C. L. J 437. 61 I C. 687.

——even in the absence of a registered conveyance of mortgage, ... [illegible]

Bom L R. 851 P. C.

——in case of sale of property under the value of Rs 100 in the absence of registered deed there must be real delivery of property, constructive delivery is not sufficient. 33 C. L J. 440 : 25 C W. N. 985 . 2 Pat L T 397 : 23 Bom. L R 629 : 29 M. L T. 413 P. C. 48 C. 509 : 63 I. C 770 P. C., 29 I. C. 413 (C).

——a purchase of the right of redemption of a possessory mortgage cannot be effected except by a registered deed. 49 I C 426 (c)

——where registered instrument is required mere admission of ownership cannot create any title. 41 C. 148 : 20 I. C. 679.

——title in property can be transferred only by a conveyance and not by mere agreement between parties 33 C W. N. 16

——mere non-payment of consideration does not defeat a conveyance. 29 C. L. J. 250 : 51 I. C. 104, 47 I. C 202 (c) 34 I. C. 106 (c), 17 C W N. 1161 : 19 C. L J. 146 : 20 I C. 325, 19 I. C 362 (c), 40 I. C. 489 . 1917 P. W. R. 46 34 I C. 106 (c).

——"price" in the sec. obviously means money, where the thing given in exchange is something other than money, the transaction is not sale 102 I. C. 142 : 1927 Oudh 204.

——the price may not be ascertained in the first instance The contract may either appoint a way in which it is to be determined or it may stipulate for a fair price; but in all sales price is an essential ingredient 104 I. C. 527 : 1927 Cal 889

S. 54. Sale—*contd.*

——the interest of a mortgagor in the property he has given in usufructuary mortgage is "tangible property" within the meaning of the sec. and when its value is below Rs 100 the mortgagor can sell the same by placing the buyer in physical possession of the property 1928 All. 726 : 26 A L. J 1084 F B.

For other cases, see, "Registration Act ss. 17 and 18"

S 55. Rights and liabilities of buyer and seller.

——the vendor is deemed to have implied to agree to give possession to the vendee. 45 M. L J 431.

——the vendor has a lien on the property sold for the unpaid purchase money 1923 Pat 20 70 I C 804

——non-disclosure of any defect by the seller of which he is aware amounts to fraud. 50 C 615. 1923 Cal. 641

——material defect includes defect of title and encumbrance on the property. 85 I. C 999 1925 Mad 968

——even where there is no express covenant for title in a contract of sale, s. 55 (2) implies one and based on that a suit for damages will lie. 27 C W. N 1025. 38 M 1177, 25 I. C 618. 38 M. 887

——when the vendor fails to perform his part of a contract to sell, the purchaser is entitled to get back his purchase money and to a charge on the property 25 Bom L R. 1144

——knowledge of the purchaser as to the defects in the title of the vendor does not deprive him of his right to recover damages, 44 P L R 1922

——when properties are sold free from encumbrances and the purchaser pays off mortgages on the property or pays off mortgage d [illegible] moneys spent to clear his t [illegible] 42 M L J 444 P C. 23 C [illegible] W N 705 50 A 371 26 [illegible] 98 108 I. C. 687 30 Bom. L. R 834 P C.

——the statutory liability enforced upon all vendors of immove-

[illegible]

I C 545

——purchaser taking possession is liable to pay interest on unpaid purchase money 46 B. 196

——when in case of sale of land vendee agrees to pay the vendor and his descendants certain sum anually for the worship of God, the covenant does not run with the land There is no such thing as between a vendor and purchaser as a covenant to pay money running with the land. 28 C. W. N. 271 ; 39 C. L. J. 532 80 I C. 210 ; 1924 Cal. 487.

S. 55. Rights and liabilities of buyer and seller—*contd*

——the covenants contained in s 55 apply to contracts of sale and also to completed contracts. 94 I. C 561, 50 M. L. J. 228: 1926 Mad. 569 : 1926 M. W. N. 271, 40 M. 338 *Diss.*

——where an agreement for purchase and sale contained a [illegible] the vendor's title [illegible] ntitled [illegible] licitor [illegible] 68 : 24 I. C. 452.

——in a speculative purchase the vendor is not liable for damages in case the purchaser cannot get possession of the property 47 I. C. 340 (C)

——there is no implied covenant under s. 55 (c) that the vendor shall put the vendee in possession of the property. 94 I C. 302 : 1926 M. W N. 209 : 1926 Mad. 495

——the law is well settled that where the purchaser discovers defects in the property before conveyance he can either rescind the contract or successfully oppose a suit for specific performance, but if he discovers material defects after conveyance he must make out a case of fraud in order to set it aside 52 C 914 · 41 C. L. J. 571 90 I. C 851

——s. 55 (2) applies not only to cases of completed sales but also to agreements to sell 40 M. 338 : 39 I. C. 358 : 32 M. L. J. 150 F. B

——as the T. P. Act does not apply to any transfer by operation of law the implied covenant of title under s. 55 (2) is not annexed to the interest of purchaser by court sale. 51 M. 658 : 1928 Mad. 894 · 1928 M. W. N. 419 : 110 I. C. 830

——when the title of the vendor is found to be defective and the vendee is evicted by third person he is entitled to recover damages from the vendor the measure of which damages is the differences between the market value of the property on the date of eviction and the price originally paid. 1929 Lah. 416, (38 C. 583, 40 M. 338 F. B 1 Lah. 380) *Rel on* 1929 Bom. 473 *Dist.*

——the implied covenant for title under s. 55 (2) is broken on the date of sale and does not admit of continuing breach. 1913 M. W. N 1029 : 21 I. C 740 : 14 M. L. T. 521, (31 M. 512, 11 A. 27, 25 B. 593) *Rel*

——a purchaser may be guilty of negligence in not inquiring for the title deeds or the earlier title of the property which he has contracted to buy, but he cannot be guilty of negligence in not inquiring for the title deeds of an adjoining property which *prima facie* he has no right whatever to ask his vendor to produce [illegible] I C. 19, 27 Bom. L R. 73 · 1925 Bom. 183

——the vendor is liable for the amount of undisclosed encumbrance for which no provision has been made in the sale deed [illegible] I. C. 756 : 1925 All 704 : L. R. 6 All 319

——buyer's having notice of facts indicating that the seller has no power to transfer the interest proposed to be conveyed does not imply a contract to the contrary. 40 M. 338 : 1917 M. W. N. 171 · 39 I. C 358. F. B

S. 55. Rights and liabilities of buyer and seller *–contd.*

——when the vendor covenants to indemnify the purchaser against all losses that the latter might be put to in defending his title, the vendor is bound to pay all the reasonabl costs of litigation. 43 M. 898 : 60 I. C. 164 · 39 M L. J 316

——the vendee should make enquiry of persons in actual possession. 35 *Bom L. R. 269, 10 B 356, 13 I. C 817*

——if the vendor's title is good the vendee's title is also good whatever may be the source of that title 24 I C 262.

——the purchaser is to tender a conveyance to the vendor for execution as required by sec 55 (1) (d) 31 C L. J. 87 55 I C 791. 1920 M. W. N 176 P C

——where the plff sues for possession on declaration of title with an alternative prayer for specific performance of a contract of sale he could not compel the registration of the sale deed without following the procedure prescribed by sec. 77 of the Registration Act. 27 C L. J. 538 44 I. C. 361

——it is the duty of the vendor to ascertain that the subject matter of sale exists 1 Pat L J 140 35 I. C. 539 2 Pat L W 389.

——a vendee of mortgaged property which is sold subject to the mortgage can contest the legality of the mortgage bond when sued upon it. 18 C L J 354 21 I C. 79.

——a purchaser is not bound to pay the balance of the consideration money till the vendor has put the property in the condition in which it was to be conveyed to him. 10 I. C 526 (C).

——the vendor has a charge on the land sold under s. 55 (4) (b) for the amount due though a promissory note is executed for the unpaid amount. 18 I C 81 1913 M W. N. 826

——the vendor's lien shall continue until there is a contract between the parties that it shall cease 1928 Mad 486 107 I. C 302

——when there is no agreement between the vendor and the vendee that the sale is free from incumbrance the vendor has the right to get interest on the unpaid purchase money. 97 I. C 586 : 1926 Mad 1031

——the vendor's right for non-payment of any part of the consideration for conveyance is to recover the unpaid balance of the purchase money as such non-payment does not invalidate the sale 20 C W N 638 : 35 I. C 284

——the charge mentioned in s. 55 (4) (b) is not a personal right of the vendor himself and therefore can be transferred 42 C 849 : 19 C. W. N 899 : 29 I C 869

——an assignment of the vendor's lien is valid 44 C. 573. 25 C. L J 259 21 C. W. N 473 15 A L J 154 1 Pat. L. W. 294 : 39 I. C. 346 P. C

——but the vendor's charge cannot be enforced against subsequent transfer for value without notice. 38 A 254. 14 A. L. J. 304 : 35 I. C 289.

S. 55. Rights and liabilities of buyer and seller—*contd*

——an agreement to pay the balance of purchase money under a sale, in instalment, does not operate as an abandonment of the vendor's charge granted by s 55 (4) (b), 43 A. 544 63 I. C. 495.

——interest on the unpaid purchase money runs from the date when one enters into possession. 43 B. 181 : 23 C. W. N. 441 : 29 C L. J. 138 . 48 I C. 404 P. C.

——a direction to pay the consideration money to the third person not being a "contract to the contrary" under the above section, the vendor by giving such a direction does not lose his charge for the purchase money. 39 M. 997 : 1916 M. W. N. 306 · 37 I C. 429 · 20 M. L. T. 375, F. B.:(33 M. 446 : 5 I C. 87, 21 M. L J. 339 : 10 I. C. 98) *overruled.*

——the vendor cannot retain possession of the property for the lien of his unpaid purchase money and he is liable forlmesne profits. 1923 Pat. 205.

——written agreement evidencing the payment of over Rs 100 as earnest money for a sale requires registration when the buyer has [illegible] ry as that agreement does in [illegible] P. Act. 31 C. W N. 125 : 44 L. R 1372 : 1926 P. C 94 : 7 [illegible] *But it is to be seen how far the amendent of s 49 of the Registration Act has affected this ruling* [illegible] only to the [illegible]

S 56. Sale of one of two properties subject to a common charge.

——where a property is mortgaged and a portion of it is afterwards [illegible] the assignee [illegible] respect [illegible] 124 Mad. [illegible]

——as between the vendor and the vendee they can enter into a stipulation contracting themselves out of the statutary charge given by this sec. 24 A, L. J. 527 : 95 I. C 343 : 1926 All 415.

——when some of the mortgaged properties were subsequently leased for mining to another who had notice of the mortgage and the lessee contended that under this sec. he was entitled to insist upon the mortgagee to proceed first against the items of properties [illegible] of s. 56 cannot apply to [illegible] valuable interest in the [illegible] royalty from the lessee [illegible] C. W. N. 183 : 94 I. C. 755 :

S. 55. Sale of one of two properties subject to a common charge—*contd*

——where a decree for sale does not direct the properties to be sold in any particular order the executing court cannot at the instance of the purchaser of some items direct the D. Hr. to proceed against the other items first. Where the purchase is subject to mortgage the purchaser has no equity on his side. 6 Pat. L. T. 393 : 1925 Pat. 484 : 1925 P. H. C C 164.

——the rule of equity contained in s 56 is limited to a case in which the party claiming marshalling is a purchaser and the party against whom it is claimed is the original mortgagor and has no application as purchasers of several properties subject to the same mortgage 42 A. 336 : 59 I. C 67

——this sec. applies only as between a seller and the purchaser and not as between a mortgagee of the seller and the purchaser. 35 B. 395 . 11 I C. 989 : 13 Bom L R. 678.

——this sec does not apply to an auction sale 27 A L J. 419 1929 All. 309

Ss. 58- 99. Mortgage (General).

N. B Mortgages are practically of 9 kinds, (1) simple mortgage (mortgaged property being security for the payment of money) s. 58 cl. (b) (2) mortgage by conditional sale (ostensible sale with a condition of re-payment but *no personal liability*) s 58 cl (c) (3) usufructuary mortgage (by delivery of possession in lieu of debt or its part) s. 58 cl (d) (4) English mortgage (absolute sale with a condition of re-payment and retransfer and *personal liability*) s. 58 cl (e) (5) equitable mortgage (by delivery of title deed as security) s 58, cl. (f), (6) combination of 1 and 3 (7) combination of 2 and 3 (8) anomalous mortgage s 98 Tr P. Act now s 58 cl (g) and (9) statutory or constructive mortgage (by payment of decretal amount of rent under sec. 171, B T. Act) and this Act deals with the first eight kinds of mortgage.

——hypothecation to secure contingent liability is mortgage. 1925 Pat 288

——*a formal transfer of interest or the express mention of a* power of bringing the property to sale is not essential for a mortgage 1915 M W N 21 26 I C. 274, 21 M. L J 562, 23 M L. J 131, 27 M. L J. 58 *fol*

F B. rents and 596, the interest W. N. 821 F B. 105 F B., 29 A.

——a mortgage takes effect from the date of execution of the deed although consideration is paid afterwards. 1 Pat 281 · 65 I. C. 329

S. 58 Cl (b) Simple mortgage.

——the term "mortgage" includes instruments which create no actual transfer of interest or confer express power of sale. Such an

S. 58. Cl. (b) Simple mortgage—*contd.*

instrument may be a simple mortgage. 27 M. L. J. 58, 1924 M. W. N. 501 : 24 I. C. 24, 16 I. C. 209, *fol*, 10 M. Mad. 509, 9 M. 218, 21 M. 326 *Dist.*

——an hypothecation-bond executed prior to the passing of T. P. Act, though not expressly containing a power of sale is a simple mortgage within s. 58. 9 M. L. T. 309 : 9 I. C. 163.

——if the mortgagee agreed to take a portion of the usufruct as interest and pay over the balance to the mortgagor, it is a simple mortgage and not usufructuary. 21 B. 267.

——where the single instrument styled a simple mortgage provided, "if the whole or portion of the interest remains unpaid by the due date the mortgagee shall take possession of the mortgaged properties immediately thereafter and enjoy the said properties as under a usufructuary mortgage" held that the mortgagee retained the position of simple mortgage, and as the mortgagor had not fulfilled his obligations the decree for sale of the mortgaged property was right. 15 C. W. N. 441 : 13 A. L. J. 581 : 1911 M. W. N. 429 : 13 Bom L. R. 447 P. C.

——a document securing repayment of amounts borrowed but which does not mention any fact of hypothecation of immovable property nor refers to a right to bring any immoveable property to [illegible] cannot, merely because it [illegible] the executant agrees [illegible] be construed as amount- [illegible] C. 973 : 12 A. L. J. 290.

——a simple mortgagor's right under this Act is only to hold the property as security for his loan while the mortgagee continues to possess the property, and so when a simple mortgagee sues for sale, such suit is not one for possession of an interest in immoveable property. 44 C 425. 21 C. W. N. 177 · 27 C. L. J. 212 : 37 I. C. 277 30 M. 426 *fol.*

S. 58. cl (c). Mortgage by conditional sale, distinction between such mortgage and out-and-out sale.

——in a mortgage by conditional sale, there is no scope for the application of the rule against property. 1928 Mad. 28 : 106 I. C 153 : 54 M L J. 96

——to decide as to whether a deed is mortgage by conditional sale or an out-and-out sale, oral evidence of intention is inadmissible. [illegible] 58 : 1 Bom L. R. 523 P. C., 25 [illegible] P. C, 28 C. 283 · 5 C. W. N 235 [illegible] 22 C. W. N 257, P C [illegible] missible [illegible]

——a transaction with a condition of repurchase on reversal of such circumstances such as inadequacy of price, reservation of such mineral rights was held to be a mortgage by conditional sale 41 C. L J 481 · 47 M 729 : 82 I C. 993 : 27 Bom L. R. 4 P. C

——oral evidence of the acts and conduct of parties such that possession remained with the vendor, notwithstanding the execution of a deed of out-and out sale, is admissible to prove that deed was intended to operate only as a mortgage. 25 C 603 : 2 C W N

S 58. Cl. (c). Mortgage by conditional sale, distinction between sale, mortgage and out-and-out sale—*contd.*

562, F. B. *contra*, 28 C. 70, 25 M. 7 22 A. 149: 27 I A. 58 P C 27 A. 612, but it is admissible when the question is not between parties to the deed. 27 M. 329, 1 C. L J. 338, 28 A. 473 3 A L. J. 314, 42 C. L. J. 74 : 90 I C. 100 1925 Cal. 1151.

——oral evidence of acts and conduct of parties is admissible to show that the ostensible conveyance is in reality a mortgage by conditional sale 28 C. 256 : 5 C W N 351, 28 C 289. 5 C. W N. 326, 15 C. W. N. 521, P C. (28 C. 70, 27 A 612) *Reversed*

——evidence as to subsequent conduct of the parties themselves showing their intention is not admissible in a case where no third parties are involved or no question of fraud arises 42 C. L. J 74: 90 I. C 100 · 1925 Cal 1151

——the test is whether the relationship of debtor and creditor subsists between the parties 15 I. C 423, 35 B. 258. 10 I C. 814

——sale for a period of 50 years was held to be a mortgage. 1925 Cal. 105.

——the use of the word '*bikrita*' is not sufficient to make a mortgage an out and out sale. 1928 Cal 825: 114 I C 81

——by the first part of a deed absolute rights were conferred on the vendee but the concluding portion provided that if within a period of seven years a particular amount, *i e.*, the consideration for the document was not repaid then the vendor was to give up the land and get divested of title, held that the transaction was an out-and-out sale 87 I C 546

——in construing a document between Mahomedans in order to find whether the transaction is a mortgage by conditional sale or an out-and-out sale, it should be remembered that documents are executed by Mahamedans in which they conceal or at least try to conceal, the real nature of the transactions and attempt to make out that the transaction is an out-and-out sale, although the intention of the parties is to create a mortgage 42 C L. J. 74. 90 I C. 100. 1925 Cal 1151

——two documents executed on the same date were constructed to constitute a mortgage 33 A. 122, 12 A. 387, *Dist* 31 A 300, 19 A. 434, 39 B 119

——where two successive documents of sale and contract to repurchase were executed and power was given to the vendor to deposit purchase money in court on vendor's refusal to accept it, to determine whether the documents constituted mortgage by conditional sale or not, the intention of the parties was to be gathered from the document (here it was held to be out-and-out sale) 21 C. W N 66 25 C. L J 524, P. C, 4 C. W. N. 153 27 I. A 58 P. C, *Dist.*, 11 C W N 400 6 C. L J 208, 2 I C 930, 26 Bom. 252, F. B., 46 A 173 79 I C. 626.

——in construing whether two documents one of sale and the other an agreement to reconvey, constitute a mortgage by conditional sale, the intention of the parties is the deciding factor. 1924 M. W. N. 643 : 1925 Mad. 37 47 M. L J. 385, 49 A. 405 104 I. C. 504;

S. 58. Cl. (c). Mortgage by conditional sale, distinction between such mortgage and out-and-out sale—*contd*

1927 All. 321 : 25 A L J. 261, 47 M. 729, 45 A 581, 42 M 407, 2 A. L. J. 810.

——where there is no intention to keep the relationship of debtor and creditor alive between them, the transaction is one of sale and not of mortgage. *above case.* (14 M. 170, 5 L. W. 141, 42 M. 407). *fol.*

——to constitute a mortgage by conditional sale there should be certain date of payment, within the meaning of sub sec. (c) s 58 Tr P Act. 11 C. W. N. 400 ; 6 C. L. J. 208.

——mere absence in the document of certain date within which the money w [illegible] that the deed was not a mortgage [illegible] 1151 P. C. (18 C. L. J. 228 : 1[illegible] 226 P. C.), *fol.*, 49 [illegible]

——when the document purports to be out-and-out sale with condition to re-purchase, but no date is fixed, and on the same date the vendor executes a *kabulyat* it is a mortgage 17 C. W. N 1053 : 18 C L J. 228, 22 A. 149 P. C , 35 A. 48 P. C.

——where there is covenant of reconveyance, it is mortgage by conditional sale. 45 A. 72.

——intention of the parties should be looked to ; no provision of interest or taking of accounts was construed to constitute the transaction an absolute sale with an option to repurchase 43 B. 378.

——where property is sold and on the same date the purchaser executes an agreement promising to reconvey the land to the vendor on re-payment of purchase money *with interest* within three years the stipulation as to payment of interest is conclusive to show that it is not an absolute sale but a mortgage. 6 C. W. N. 192

——when what purported to be an out-and-out sale was accompanied by a contemporaneous agreement giving the vendee a right of re-purchase within 5 years, it was construed to be out-and-out sale. 33 A. 337, 12 A. 387 P. C., 17 A. 451, 11 B. 462, 21 B 528, 2 B 21, 14 M. 170.

——stipulation to pay interest is an important test 1922 P. 3[illegible] 65 I. C. 673.

——whether a transaction is a mortgage by conditional sale or sale with an agreement to reconvey must be determined with reference to the intention of the parties. 67 I. C. 113 (c), 12 A 3[illegible], 38 A. 570, 22 A. 149.

[illegible] of immoveable property and a [illegible] [illegible] price [illegible] from [illegible] W. N.

——a stipulation for repurchase will not [illegible] [illegible] a sale into one of mortgage. There must be the right to repurchase. Whether it is a mortgage by conditional sale or sale with clause to reconvey, depends on the intention of the parties 38 A 337 :

S. 58, Cl. (c) Mortgage by conditional sale, distinction between such mortgage and out-and-out sale—*contd.*

9 I. C. 140, 31 B 528 *const*, 67 I. C 113, (C), 12 A 387, 38 A. 570, 22 A 149, 25 I C 93 (C), 42 M. 407 . 50 I C. 265

——where a document purported to be a deed of sale but there was a stipulation that if the executant paid half the price he would *get a return of half of the property of which he remained in possession*, it was a mortgage by conditional sale 24 A L. J 813 : 1926 All. 670 : 96 I. C 780

——when the sale deed and the agreement to reconvey are executed on the same date, an irresistible presumption arises that the transaction is a mortgage by conditional sale 33 A. 585 9 I. C. 1013, 39 B. 119 : 26 I C 751

——two distinct but simultaneous documents, one of sale and

there was no mention of any interest and the amount was described not as principal but as consideration and there was a clause for releasing the property on payment in one year, the document was out-and out-sale with a condition of repurchase. 21 I C. 19

——right of foreclosure is given in case of mortgage by conditional sale and English mortgage only 25 M 220, 237 F B.

——an unregistered agreement is not admissible as extrinsic evidence to show that the parties intended the sale deed to be only a mortgage. 1919 M W N 87 49 I C 699 26 M L T. 291, 45 C. 320 P. C

S 58 cl (d) Usufructuary mortgage.

476, 22 M L J 39) *Rel*

——In every contract of usufructuary mortgage there is an implied covenant for quiet possession which implies a contract to pay the Govt revenue 45 A 388 21 A L. J 294 . 1923 A 433

——It is impossible to lay down any general rule as to the effect of a zuripeshgi transaction Every case must depend upon its own circumstances 44 I C 153 4 Pat. L. W. 146

——the term "zuripeshgi" is an ambiguous one and the facts that no interest was proved for may give rise to the inference that there was a lease with a premium and not a usufructuary mortgage 19 C. W N. 794 : 28 I C. 383

——a usufructuary mortgagor is not personally liable 24 C 677

——a mortgage *for fixed term* as contradistinguished from one given *until payment of the purchase money* (as in the sec) can hardly be called a usufructuary mortgage, but it would rather partake of the character of anomalous mortgage. 21 A. 203, 21 M. 1, 26 B. 252 F. B.

S. 58 cl. (d) Usufructuary mortgage—*contd*

——where a due date has been fixed for payment of the mortgage ... mortgage and the

S. 58. cl. (e) English mortgage.

——the three essentials of an English mortgage are (1) that the mortgagor binds himself to repay the mortgage money on a certain day, (2) that the property mortgaged is transferred absolutely to the mortgagee, and (3) that such absolute transfer is made subject to the proviso that the mortgagee will reconvey the property to the mortgagor upon payment by him of the mortgage money on the day on which the mortgagor bound himself to repay the same 25 C. W. N. 920 : 1925 Cal. 77 : 81 I. C. 1025

——in an English mortgage the mortgagee is the owner of the property subject to the ownership being divested by repayment on the appointed day. The mortgagee can enter into possession immediately after this mortgage, the mortgagor has only the right to redeem 45 C. 653 : 22 C. W. N 793 : 47 I C 529

——this Act is not exhaustive There are many mortgages known to the English Law which it is difficult or impossible to bring within the terms of this Act. 3 Pat. L. W. 20 : 39 I. C 564 : 2 Pat. L J 293 ... sale or foreclosure ... 147 of the L Act ... that prescribed by ... 153.

——when property is situated in the muffissil and one of the parties is a Hindu a mortgage though styled English mortgage does not transfer an absolute interest to the mortgagee 1917 M W. N. 794 : 41 I. C. 770 : 7 C. 394 *Dist.*

S. 58 cl (f) Mortgage by deposit of title deeds, i e, equitable mortgage.

N.B.—*In the former Act this clause was placed under s 59, by the amendment this clause with necessary changes has been made cl (f) of s. 58 and this has been very properly done as s 58 describes all clases of mortgages.*

The following rulings relate to the last para of s 59.—

——an equitable mortgage requires three things, (1) a debt, (2) deposit of title deeds, (3) intention that the latter should be security for the former 38 B 372 It does not require registration. 33 C. 41? 4 C L. J. 102 · 10 C. W. N. 276, 38 B 372 : 23 I. C. 14?, 14 Bom. L. R. 1020, 17 I. C 722

——such mortgage by deposit of title deeds can only be effected in the Presidency and other towns mentioned in the sec. 97 I C 391 : 1927 Pat. 41 : 8 Pat. L. T. 85.

——where documents of title to immoveable property are handed over to the creditor with nothing said except that they are to be security, the law supposes that the scope of the security is

S. 58. Cl. (f) Mortgage by deposit of title deeds i.e., equitable mortgage—*contd*

the scope of the title. Where however, titles are handed over accompanied b[illegible]
C. W. N. 925: [illegible]

——deposi[illegible]
advance of mor[illegible]
W N. 599; 31 [illegible]

——there is no technical rule that all the title deeds must be deposited to create an equitable mortgage, it is merely a question of intention. 2 Pat L. J 293 39 I. C 564

——writing is essential to the creation of an equitable charge over moneys due under an Insurance Policy. 37 B. 198. 1912 M. W. N. 1247: 17 C. W. N. 209 17 C L. J. 162: 17 I C 627 **P. C.**

——an equitable mortgage may be established by deposit of the title deed. 31 C L J 375, no writing is required 38 B 372. 23 I.C 140

——s. 59 does not recognise the distinction between legal and equitable mortgage as in English Law 45 M L J 505: 21 A L. J. 784: 50 I A 283. 51 C 86: 28 C W N 470 39 C L. J 186 **P C.**

——the concluding words of s 59 actually use the word "mortgage" to denote the security effected by delivery of documents of title *above case*

——a memorandum merely evidencing a deposit of title deeds by way of equitable mortgage does not require registration 1923 M W. N. 57. 71 I C 130

——a letter evidencing the deposit of title deeds and which did not constitute the bargain between the parties but was simply a record of the transaction already accomplished does not require to be registered 29 C W. N 784 88 I. C 866 1925 Cal. 923

——a *patta* in respect of a land in the *muffussil* is a document of title by the deposit of which an equitable mortgage can be created in the Madras City 88 I C. 401 48 M 454: 1925 Mad 723.

——when memorandum or *chit* creates mortgage it must be registered, but when there is deposit of title deed it need not be registered. 25 C L. J 160: 37 I C 117.

——the test to find out whether a document is in itself an equitable mortgage and requires to be registered is, does the document constitute the bargain between the parties or is merely the record of an already completed transaction In the former case the document must be registered and is, if it affects immoveable property of the value Rs 100 or upwards, inadmissible in evidence, if unregistered 47 M 398 1924 Mad 547 46 M L J 295

[illegible] .ble mortgage and [illegible] e cannot prove the [illegible] eposit of title deeds [illegible] reported in 50 C. [illegible] annot be the law. *above case.*

——no equitable charge is created when one partner redeems a mortgage of partnership property entered into by another

S. 58, Cl. (f) Mortgage by deposit of title deeds, i e, equitable mortgage—*contd.*

partner and takes back the title deeds. He is to be paid out of the profits, 29 C. W. N. 12.

——a subsequent mortgagee does not by reason merely of the mortgage being created by registered deed and apart from the question of notice, acquire priority over previous sub-mortgagee created by a prior mortgagee by deposit of title deed 33 C 410 : 10 C. W. N 276.

——where a suit was brought on a mortgage by deposit of title deeds by the persons, some of whom had no properties in Presidency Town, held that fact could not affect the jurisdiction of the H C as all mortgagors had concurred in creating a liability. 38 C 821. 13 I C 429.

According to the provisions of the new sec. 96 the provisions relating to simple mortgage will apply to a mortgage by deposit of title deeds.

S. 58 Cl. (g), Anomalous mortgage.

N.B. *This clause formed part of the sec 98 of the former Act. In order to make the s. 58 a complete one defining all classes of mortgages cl. (g), which defines the anomalous mortgage has been added to s. 58 By the omission of the words "or a combination of the first and third or the second and third of such forms" the scope of the definition has been widened*

Rulings under s. 98 of the former Act ,—

——held on the construction of a mortgage deed that (1) it was an anomalous mortgage within s 98 and not a simple mortgage usufructuary In the case of a mortgage which is a combination of a simple and usufructuary mortgage, the right to sue under s 68 gives a right to sale under s. 67. But when it is found to be anomalous it is unsafe to say the least to rely upon s. 67 at all. 39 C. L. J 269 · 28 C W N. 532.

——the language of s. 98 is clear and precise and unless it is [illegible] of sale of the secured pro- [illegible] . 269 : 28 C. W. N. 532.

[illegible] a mortgagee after a lapse [illegible] o enter and take the rents of the property in satisfaction of interest, will be valid if it be not a clog on redemption. A hindering of such right of the mortgagee is invalid. 44 A. 185 : 35 C. L. J. 468 · 1922 M W. N 378 P. C.

——a mortgage for a fixed term without any possession for accounting is in the nature of an anomalous mortgage and it automatically redeems itself at the end of the period. 1923 Nag 61 · 19 N L. R 1

——in construting an anomalous mortgage the intention of the parties should be considered. If there was no provision of sale the mortgagee cannot have the rights to a judicial sale 56 I. C. 717 · 15 N L. R 134 P C.

——as between the parties to a mortgage deed the parties are bound by the recitals therein. 28 C. W. N. 79 : 44 A. 185 : 35 C. L. J 468 . 42 M. L J. 584 P. C.

S. 58. Cl. (g) Anomalous mortgage—*contd.*

——the rights and liabilities of the parties to a mortgage must depend on the terms of the instrument as controlled by the Tr P. Act. 44 A 185 35 C L. J. 468 : 24 Bom. L. R. 695 28 C. W N. 79 P. C.

——any stipulation in the deed which is likely to nullify the right of redemption might be treated as a clog on redemption. 60 I. C. 728 (A), 66 I C 853 · 35 C L J 468 28 C W N 79 20 A. L J 476 : 30 M. L T 220 : 24 Bom L. R 695 44 A. 185 P. C, 18 C. W. N 586 ; 36 A 195 · 19 C. L. J 477 15 M. L. T 389, 16 Bom. L. R. 344 P. C

——when a mortgage is stipulated to be at the outset a simple mortgage and then under certain condition an usufructuary mortgage, its original character as simple mortgage is not lost. 38 C 537 15 C W N 443 13 C L J 584

——a mortgage which is a combination of a simple mortgage and a usufructuary mortgage does not cease to be so and become an anomalous mortgage for the specification of certain rights of the mortgagee as usufructuary mortgagee 33 C. W N 693 1929 P C. 139 27 A L J 581, P C.

——in the case of an anomalous mortgage of agricultural land, where the mortgagee who was entitled to remain in possession for the period of the mortgage, continues to be in possession after its expiry, he becomes *a yearly tenant by implied tenancy* and is not ejectable without proper notice to quit. 87 I C 669 · 1925 Mad 881

S. 59 Mortgage when to be by assurance.

Note—The third para of this sec has been inserted under s. 58 as cl (f) of that sec. by the amendment

How mortgage is to be effected and proved

Registration.

——no writing was required to effect a mortgage before the Tr P Act 24 C L. J 504 P C

——a mortgage of moveables without delivery of possession is legal *28 C W N 116 n, 9 C W N 14, 22 C W. N. 758, 4 B L R* 577 8 Bom L R 344.

——a turn of worship in a temple is not an interest in immoveable property and s 59 does not apply to it 39 C 227 : 16 C W N 129 14 C L. J 369 11 I C 884 4 C 683 *Rel*

——the interest of a mortgagee in immoveable property is itself an immoveable property. 29 C 1 5 C W N 82 F. B

——mortgage debt is moveable property the land being considered as security 20 C W N 142 *contra.*, below

——mortgage debt is immoveable property and a transfer of it requires registration 22 C W N 641 23 C W. N 51 n.

——a deed of sale of mortgage decree is not compulsorily registrable 35 A 524

——a mortgage decree for Rs 100 or more is assignable without registration. 12 C. W. N 625, 23 C. 450, 6 C. W N. 5, 9 C 839, 9 A. 108, 13 A. 89

Registration—contd

—— [illegible] erty in a mortgage bond [illegible] icular registration office

Signature.

——s. 59 does *not require* that the document should be signed personally by the *mortgagor* or that the attesting witness should sign with their own hands, 33 C. 861 : 4 C. L. J. 41. use of pen and *ink is* not necessary for putting signature, it may be *done by type* or facsimile. 25 C 911 : 2 C. W. N. 642.

——thumb — [illegible]

—— [illegible] C. W. N. 329

—— [illegible] his signature [illegible] be explained

independ [illegible]

41 B. 384 [illegible]

——'signing' *means* the writing of the name of a person which may convey a distinct *idea to somebody else*, whereas 'mark' is a mere symbol and does not convey any idea to a person who noticed it, often even *to* the maker of it. 25 C. 911 : 2 C. W. N. 642.

Attestation and proof.

——the acknowled- [illegible] the Sub-Registrar [illegible] the endorsement on [illegible] the amended debal- [illegible] 15 I. C. 422. 47 C. [illegible] Cal. 154, 1929 Mad 1, *see also*, 1928 Bom. 267 : 30 Bom. L. R. 565.

——*to attest is to bear witness to a fact*, 33 C. 861 : 4 C. L. J. 41. 92 I. C 948 : 1926 Cal. 637, 16 C. W. N. 1009. 16 C. L. J. 596. 35 M. 607. *16 I. C. 250* : 23 M L. J. 321 *P. C.*

——"attesting witness" in s. 68 of the Evi. Act means the same thing as "attesting witness" in s. 59 T. P. Act, when the question [illegible] 2 I. C 97. [illegible] the document. 35 C. [illegible] 27 C. L. J. 518, 45 M [illegible] 32 M. L. T. 9.

——a *mortgage-bond* cannot operate as such unless it was signed by the mortgagor in the presence of at least two witnesses who *signed it as* attesting witnesses. 38 C. L. J. 114

——*witnesses* must sign their names after seeing the actual *execution* 66 I C. 589, 68 I. C. 198, 35 M. 607, 6 N. L. R. 152, 1922 M. W. N. 708 : 43 M. L. J. 745.

——attestation under s 59 of the Tr. P. Act. cannot be the attestation *of* the admission of having signed the document. So a Registrar before whom the *mortgagor* acknowledges the execution *of the deed*, cannot be an attesting witness. 26 C 78

——'attestation' under s. 59 of the Tr P. Act, is the attestation of the execution of the document and not of the admission of execution. 26 C. 246 : 3 C. W. N. 84 : 27 C. 190.

Attestation and proof—*contd.*

——where the attesting witnessess signed their names before mortgagor, the bond was invalid 32 C 729 9 C W. N. 697.

——the question of attestation is a question of fact. 26 C. 78.

——but the necessity of two attesting witnesses being a rule of law and not a rule of evidence where a mortgage deed was allowed to go in without objection its validity on the ground of want of attestation could be raised in appeal. 1927 Pat. 131. 101 I C 277 : 8 Pat. L. T. 7.

——if the sole executant admits execution by himself there is no necessity of calling an attesting witness under s 68 Evi Act 44 C. 345 ; 20 C. W N 1044 24 C. L J 175 34 I C. 862, 2 Pat. L. T. 752 : 63 I. C 540

——mere acknowledgement of signature by the executant is not sufficient. 16 C W N. 1009. 16 C L J 596 : 35 M 607, P. C, 30 C. W N 364 : 5 Pat 58 1925 P C. 203 P. C.

——where execution is admitted no attesting witness need be examined even if the deft sets up the plea of nonconception. 24 C W N 48 n

——s. 59 requires that the attesting witness must be able to make a statement on oath requiring the identity of the person performing the transfer as well as execution of the deed of such transfer by him. 22 C W N 697 · 27 C. L J. 548 20 Bom. L. R 587 45 C. 748 45 I C 1 P. C

——an attesting witness is a person in whose presence the instrument is executed, 'presence' means mental cognition of the act and physical contiguity, a party to a deed cannot be regarded as an attesting witness 11 C L. J 563 5 I C. 539 37 C 526

——attestation means that what is said to be attested, happened in the presence of the attesting witness 7 C W. N 160, 30 M. L J. 463. 60 I. C 354.

——a mortgage-deed is attested by witnesses within the meaning of s. 59 Tr P. Act only when they are present at the time of execution 31 M. 215 18 M. L. J 219 3 M L T 300

——where one of the witnesses saw the execution and the other put his signature on the document on receiving a personal acknowledgment from the executant of the execution, the mortgage deed was invalid as it was not duly attested 49 A. 25. 1927 All 1 : 99 I. C. 161 : 24 A. L. J 921 F. B. 35 M. 607 P. C. *Rel on*

——an attesting witness to a document is a witness in whose presence the document is executed. 34 C. L. J. 498 : 49 C. 438.

Admissibility of mortgage bond not registered or not attested.

——a mortgage bond properly attested but not proved in conformity with s 68 Evi Act is not receivable in evidence to prove the personal obligation thereby created. 27 C. W. N 134 : 35 C. L J. 473

——unregistered mortgage-bond may be used as a simple bond to get money decree. 66 I. C. 680, 92 I. C. 948 : 1926 Cal. 673, 29 I. C. 363 : 13 A L. J. 553, *contra*. 90 I. C. 792.

——when a mortgage-deed is not admissible in evidence as such for want of attesting witness, it may be enforced as simple money bond 4 C. L J 510, *but see*, 35 C. L J. 473 *above*.

——[illegible] attested cannot be admit- [illegible] without being properly pro- [illegible] objection, its admissibility [illegible] L. J. 473 : 27 C. W. N 134 :

[illegible] covenant to pay, [illegible] maintainable [illegible] 44 C. [illegible] J. 107 :

Non-passing of consideration of mortgage-bond, affect of.

——*where after the equity of redemption has been sold by the mortgagor the mortgagee sues on his bond he must prove by affirmative evidence the validity of the consideration and also that it had passed from the creditor to the debtor. The mere recital of receipt of consideration in the mortgage-bond does not shift the onus as it would have been in case if the suit had been brought against the mortgagor alone.* 89 I. C. 927.

——the validity of a bond is not affected by the fact that the *consideration recited was not paid in full, the bond being operative to the extent of the amount actually paid.* 25 C. W. N. 912 : 66 I. C. 694 : 34 C. L. J. 333.

——non-payment of consideration does not invalidate the document. 42 M. 20 : 48 I. C. 370 : 1918 M. W. N. 763

——*consideration paid even after the due date of payment stipulated in the bond, is also recoverable on the mortgage security.* 45 I C. 778 (c).

——*a decree for foreclosure may be passed in a suit by a mortgagee by conditional sale even if full consideration had not been paid by him.* 34 A. 273 : 13 I. C. 573 : 9 A. L. J. 193.

——*if the evidence shows that the payment of consideration stated in the mortgage-bond is false the mortgagee must prove it by some other cogent evidence.* 50 I. C. 71 (c).

——sub-registrar's note on the back of the document as to the *admission of the mortgagor of having received the consideration money is no evidence.* 1917 Pat. 49.

Distinction between mortgage and charge.

——a mortgage is a transfer of interest in specific immovable property while charge only secures repayment of money out of that property. A charge cannot be enforced against the property in the hands of a *bona fide* purchaser for value without notice. 42 C 625. 19 C W. N. 37 · 21 C L J. 177 27 I C. 261.

——if the document purports to treat an immoveable property as a security for a debt but no interest in the property transferred the whole thing amounts to a charge and not to a mortgage 1921 M. W. N 472 56 I C. 554

Distinction between mortgage and lease

——the test to find out whether a zuripeshgi is a martgage or lease is to find out whether there is a secured debt and is a right of redemption. 3 Pat L. T. 797 68 I C 394.

——a mortgage does, whereas a charge does not involve a transfer of an interest in specific immoveable property, a mortgagee can follow the mortgaged property in the hands of a transferee, [illegible] against transferee, only if it is the charge. 33 C 985 · 4 C 7 C. L. J. 492, 10 B 519.

——where the document does not contain any word such as 'hypothecate' or 'mortgage' but prohibits transfer until payment, it is disputed whether it is a charge or a mortgage 36 A 201.

——where there is both charge and mortgage of the same property the procedure to be adopted is to get a decree of charge upon the property 25 C. L. J 354 22 C. 813, 859, 903 *Fol*

——co-mortgagor paying off mortgage-debt, has a charge upon the share of other for his share of debt 14 C W. N 361

——mortgage not validly executed does not create a charge. 20 C. W N. 989 **P C**

Rights and liabilities of parties under different kinds of mortgage.

[illegible]

——in case of usufructuary mortgage for a term, there is no personal liability of the mortgagor 20 C W N 989, **P. C.** 17 C W N. 369, *reversed*

——when a mortgage becomes invalid, the mortgagor becomes personally liable for the debt. 21 C. W N 283. 25 C. L J. 125, **P. C.**, 20 C W. N. 989, *Ref* 42 C 801, 21 C L J 231, also in case of non-delivery of possession according to stipulation 21 C. W. N 283 · 25 C L J 121 **P. C**, 3 C. L. J 320 11 C. L J 136

——held on the construction of a mortgage deed that (1) it was an anomalous mortgage within s. 98 and not a simple mortgage usufructuary. In the case of a mortgage which is a combination of a

Rights and liabilities of parties under different kinds of mortgage—*contd.*

simple and usufructuar [illegible]
a right to sale under s [illegible]
is unsafe to say the le. [illegible]
28 C. W. N. 532 : 81 I [illegible]

——the language of s. 98 is clear and precise and unless it is provided in the document itself no power of sale of the secured property can be implied *aliuendo*. 39 C. L. J. 269, 28 C. W. N. 532. 81 I. C. 768 : 1924 Cal 592.

——the ordinary meaning of a mortgage deed ought to be taken without giving it a 'wide' or 'benevolent' meaning 39 C L J 269 28 C W. N. 532. 81 I. C. 768 - 1924 Cal. 592

——purchaser of equity of redemption is not personally liable. 17 C. W. N. 457.

——clause suspending right of redemption, effect of, 23 A. L. J. 476 P. C.

——a mortgagor cannot sue for the balance of the mortgage money 21 C. L. J. 532.

— [illegible] 570,
as wa [illegible]
35 M [illegible]
— [illegible]
of redo [illegible]
debt, which is primarily payable by the mortgagor. 16 C L J. 394, 15 C. L. J. 68 : 39 I A. 7 : 34 A. 63. P. C., *Ref.*

——every mortgage with a promise to pay, carries with it a personal liability. 4 C. L. J. 246, 510 - 5 C. L J. 287, it depends upon the stipulation. 6 C. L. J. 639, 22 C. 434 P. C., 16 C. 540, 3 C L. J 220, 22 A. 149, P. C.

——a prior mortgagee making a further advance shall not in respect of that advance, acquire any property as against the intermediate mortgage 16 C. L. J. 394

——the general rule is that the mortgagee, in the absence of any contract to the contrary, is entitled to treat the interest due under a mortgage as a charge on the estate 29 C W. N. 538 P. C.

——a mortgagee who has purchased some of the mortgaged properties in execution of another mortgage-decree is entitled to execute the whole decree, by the sale of any of the properties, any question of contribution that may arise must be worked out in regular suit in presence of all necessary parties and not in execution proceedings. 34 C. 13 : 4 C. L. J. 573

——a Co-Jt. Dr.-assignee of mortgage-decree can execute it 27 C. L J. 110, 14 C. L. J. 639.

——a purchase by a co-mortgagor of the mortgagee's interest does not entitle the other mortgagors to the apportionment of the debt. 27 C. L. J. 110.

——not only the right of the mortgagor but also that of mortgagee is extinguished by the adverse possession of third person 24 M 97, 23 M. 37, 5. A. 1, 9 I. A. 99 P. C.

Rights and liabilities of parties under different kinds of mortgage—*contd.*

——there cannot be adverse possession against the mortgagor till redemption. 45 B. 661, 68 I. C 883.

——dispossession of the mortgagee by the landlord or the taking of new title from the landlord by the mortgagee does not operate as adverse possession against the mortgagor 71 I. C. 1030 (c).

——an adverse possession against a mortgagor does not affect a simple mortgagee who is not entitled to permission. 35 C. L. J. 1, 68 I. C. 641, 33 M 811, 44 C. 425.

——adverse possession against mortgagor is not *per se* adverse also against the mortgagee in the case of a simple mortgage. 44 C 425, 33 C 1015 10 C W N 904, 35 M 231 : 21 M L. J. 467.

——when severance of the mortgagee's interest takes place by any lawful means, suit may be brought for a portion of the debt. 39 M. 17.

——a co-mortgagee cannot sue for the proportionate share of his debt unless the mortgagee's interest has been severed on the consent of the mortgagor and payment to one of several mortgagee's does not operate as a valid discharge of the entire mortgage debt. 31 C W. N 374 101 I C 530 . 1927 Cal 725

——a mortgage decree cannot be treated as money decree without exhausting the mortgaged property 17 C W. N. 1039

——where in an action on usufructuary mortgage under s. 68 the plff asked for a charge on certain moneys and also for a personal decree and the court decreed the charge, the second relief claimed must be deemed to have been disallowed. 5 Pat. L J 603 78 I. C. 774.

——a usufructuary mortgagee can sue for rent under the B. T. Act. 18 C W N 1016

——a mortgagee in possession can settle lands with tenants who can acquire non-occupancy right thereby 1935 Pat. 198 : 78 I. C 913

——when a creditor has two mortgages of the same property, he can bring the property to sale by enforcing the second mortgage, subject to the first mortgage 1917 Pat 194, (13 A 432, 26 A 14, 30 B. 156, 22 C 33, 29 A 365, 31 M 530 30 M 403, 24 A 429: 6 C. W. N. 889 P. C., 6 A. 269, 7 A. 102, 8 C. 51 P. C *Ref.*

——a mortgage security is not extinguished till the sale has taken place in execution of the mortgage-decree and the proceeds have been distributed. 16 C L. J. 156, 31 C 863 8 C W. N. 684, 2 C L. J 202, 7 C L. J 1 (1 C W. N 458, 9 C. W N. 670) Dist.

——an auction-purchaser in execution of a mortgage decree purchases the rights and the liabilities of the mortgagor and mortgagee at the date of the mortgage bond. 44 A 488.

——an order absolute extinguishes the security and the right of redemption. 45 A. 149.

——mortgagee's original rights are not lost by the failure of the mortgage suit. 1925 Cal. 77.

——before lending money, a mortgagee has a perfect right to insist upon the mortgagor to appoint a manager of the estate

Rights and liabilities of parties under different kinds of mortgage—*contd.*

——first mortgagee who has purchased the mortgaged property from the mortgagor, is entitled to use his prior mortgage as a shield against subsequent incumbrances. The same doctrine applies if the mortgagee has obtained a decree. 2 C. L. J. 202, 7 C. L. J. 1, 10 C. L. J. 150.

——oral evidence of contract that the mortgagee split up the mortgage debt amongst the mortgagors is not admissible. 21 C. W. N. 740.

——a mortgagee cannot by releasing a portion of the mortgaged property in favour of prior mortgagee, throw the whole burden of his own mortgage debt upon the remainder. 2 C. L. J. 202, 33 C. 613: 10 C. W. N 551: 3 C. L. J. 576, 6 C. L. J. 46, 85 I C 741: 1925 Cal 1048

——a third person cannot avoid the contract in a mortgage bond on the ground of undue influence 40 C L. J. 67.

——under s. 68 a mortgagee can, if the property mortgaged is diminished, insist on the mortgagor giving another security 45 A. 388.

... portion of the mortgaged property ... en of his debt must be ... satisfaction of the mortgage the difference between the ... and the price he paid 64 I. C. 453.

——a purchaser of a portion of the mortgaged property can question the mortgage to the extent of his share. 23 C. L. J 570.

... in whole or in part, the ... may be allowed 2 C. ... W. N. 83, 30 C 735 ... ption by the mortgagee 12 C L. J. 574

——a mortgagee may be estopped from enforcing his full rights if by representations he had altered the position of the mortgagor 27 C 1001: 4 C. W. N 565, P C.

——any accession or improvement made to the mortgaged property enures to the benefit of the mortgagee 30 B 250, 3 C. W. N 323, 20 C. 893, 33 C. 1212.

——although the mortgagee may treat the acquisition as an accretion to the mortgaged property he may choose to keep the same for his own benefit and distinct from the motrgaged property, it is a matter of intention. 2 Pat. L. T. 225: 1921 Pat. 93: 60 I. C. 3

——a simple mortgagor may lease out the mortgaged property beneficially without imparing the value. 20 C. W. N. 250, 17 C. L. J 384. but see 21 C. W. N. 88.

Rights and liabilities of parties under different kinds of mortgage—*contd.*

——mortgagor has very limited power of granting leases after the execution of mortgage. 29 C W. N 94 · 40 C. L J. 500

——a lease of mortgaged preperty pending mortgage suit is affected by *lis pendens* 40 C. L J. 500 29 C W N. 94.

——it is costomary to allow 10 P. C on the gross receipts as [illegible] to the contrary. 27 [illegible] 252 : 1 A 518 F. B.

[illegible] mortgaged property [illegible]

——when the mortgaged property is sold for arrears of revenue [illegible] sale proceeds, but he is [illegible] ds, and the existence of [illegible] ng a decree against the [illegible] to mortgage decree. 19 C. W. N. 1001

——a mortgagee cannot dispute the title of the mortgagor. 20 C. W. N. 1231

——the mortgagor is also estopped from pleading that he had no title to the property he has mortgaged 50 M. 800 105 I. C. 424 : 1927 Mad. 863 1927 M W N. 595

——when co-proprietor being mortgagee brought in some of the raiyati holdings it was accession to the mortgaged property and the mortgagor on redemption was entitled to proportionate share 17 C. W N 586, 5 C 198, *Ref.*

——whenever mortgagee is in possession the profits must go towards the satisfaction of the debt. 35 C. L J 560.

——an usufructuary mortgagee is not entitled to salary or maintenance for the management of the property. 26 C. 1 ; 2 C. W N. 655, P. C

——an usufructuary mortgagee is entitled to sue for money when the mortgagor fails to deliver or secure to him possession. 2 C. L. J. 493, 16 A 318, F B

——parties may come to arrangement qualifying the right to redeem. 17 C W N. 1, P. C, but see 17 C. W. N. 233 P. C.

——unregistered agreement varying the mortgage deed is not admissible in evidence 17 C W N. 233 P. C

——mortgagee of several properties belonging to different per- [illegible] the burden upon others [illegible] 10 C. W. N. 551 : 33 C. [illegible] . 120, 25 A. 79, 98 I. C. [illegible] ortion of the mortgaged property of a mortgagor so as to impose upon the latter a personal liability to which he would not otherwise be subject. 10 C. W. N. 862 . 33 C. 890 ; 25 A. 79 *Diss.*

Rights and liabilities of parties under different kinds of mortgage *-contd.*

——but it is the undisputable right of the mortgagee to realise his dues, by proceeding against any portion of the property mortgaged in as much as his mortgage debt extends to every one of the property mortgaged. 85 I. C. 742 : 1925 Cal. 1048, (34 C. 13 : 4 C. L. R. 156) *Fol.*

——a *mortgagee* cannot be required to apportion his mortgage debts among *several* parts into which the property has been divided unless the *security* has been severed by the action of the mortgagee as *for instance* by the acquisition of the mortgagee a share of the *mortgagor* in the equity of redemption. 98 I. C. 963, 1927 Pat 117 : 8 Pat. L. R. 255

——a mortgagee may *foreclose* his mortgage by proceeding against a part of the mortgaged property. 28 A. 174 F. B.

S. 60. Right of the mortgagor to redeem

——*one* of the elementary rules of equity is "once a mortgage always a mortgage" and a mortgagee should not be allowed to *obtain* any undue advantage by his mortgage except the amount *of the* principal, interest and costs due on his mortgage S. 60 applies to anomalous mortgages also. 40 I. C. 894 (C)

——the law does not prevent the parties to a mortgage from coming to any arrangement subsequently qualifying the right to redeem. 34 A. 620 : 17 C W. N. 1 : 17 C. L J. 9 . 14 Bom. L. R 1098 : 16 I. C. 78 P. C, 58 I C. 384 : 22 Bom L. R 965

——this sec. only defines the right to redeem and does not lay down that *tender* of mortgage money is required before the institution of suit for redemption 97 I. C. 348 : 1926 Pat. 512 : 1926 P. H C. C 286

——the English law regarding clog on the equity of redemption does not obtain in India, 45 B. 117 : 59 I. C. 258.

... if the amount ... to redeem ... of no effect ... conferred ... P C., 27 A.

... mortgager

——in the absence of a special condition ... is created, the to redeem during the term for which the mortgage right of redemption can only arise on the expiration of the specified period 36 A. 195 : 18 C. W. N. 568 : 23 I. C. 355 : 19 C. L J. 477 : 16 Bom. L R. 344 P. C.

——the mere fact of the period of a mortgage being twenty years cannot be a clog on the equity of redemption. 96 I C 467. 1926 Lah. 457 : 8 L. L. J. 235.

——one of the several *mortgagors* can redeem the whole of the mortgaged property. 48 C. 22 : 25 C. W. N 241 : 57 I. C 235 : 22 Bom. L. R 1315 P. C., 50 B. 331 : 96 I. C 361 : 1926 Bom. 303 : 28 Bom. L. R. 588.

S. 60. Right of the mortgagor to redeem—*contd.*

——one of the mortgagors has the right only to redeem the share which he owns in the mortgaged property only where the integrity of a mortgagee has been broken. 39 A. 618 · 40 I. C. 345 : 15 A. L J 625, (2 A 565 29 A 262) *Fol.* 10 B. 656 *not Fol*

——partial redemption is allowed only in exceptional cases *e. g* when a severance has been effected at the instance or with the consent of the mortgagee 35 C. L. J 332, 96 I. C. 362 1926 Lah. 601, 27 A. L. J 217 · 1929 All 260 114 I. C 876

——if the mortgagee has become entitled to the equity of redemption by purchase, one of the mortgagors can redeem all the remaining properties 50 B. 331 96 I. C. 361 . 1926 Bom. 303 : 28 Bom L R. 588

——when the mortgagee becomes an heir to the mortgagor and inherits a portion of the mortgage it cannot be said that the integrity of the mortgage has not been broken 1929 All. 604, 31 A. 335 *Rel. on*

——on splitting up of the integrity of a mortgage, acquisition of the mortgagor's interest by prior and subsequent mortgagors does not necessitate the redemption of the whole by the former or renunciation of interest by the latter 44 A 708 20 A L J 583 · 1923 All. 405

——a purchase by some mortgagors of the interest of a mortgagee does not entitle the other co-mortgagors to claim apportionment of their debt or redemption of their share of the property 27 C. L. J 110 : 41 I. C 263, 50 I C7 43 (c)

——the transferee of mortgagee's interest must enquire from the mortgagor if he had made any payment 1928 Mad 382 107 I. C. 808 27 L W 47

——when a mortgagor has expressly stipulated that he would not be entitled to redeem without paying other debts due to the mortgagee, he cannot redeem the property without paying such other debts 96 I. C 844 1926 Lah. 633, (37 A 634, 1906 A W. N. 278) *Dist*, 32 A 651 *Ref*, similar case, 27 Punj L R 463 96 I C 630 · 1926 Lah. 494, (65 I C 642, 31 A 482) *Rel on*

——the mere dismissal of a redemption suit for default without going in any way into the merits of the case or perhaps even appreciating that the suit was one for redemption could not be said to be an order extinguishing the right of redemption 52 B 111, 108 I. C 22 · 1928 Bom. 67 . 30 Bom L. R 34, 16 Bom L R 687, 22 Bom. L R. 919 *Rel on*

——the purchaser of a share of a mortgaged property not impleaded in the mortgage suit has the right to redeem the entire property in the hands of the auction purchaser in execution of the mortgage decree 97 I C 386 1927 Pat 25 1926 P. H C. C. 323

——the right of redemption and the right of foreclosure are always coextensive. 28 Punj L R 150 1927 Lah 226 ; 100 I. C. 625, 20 B 677, 27 B. 375, *fol*, 1929 Mad 339.

——fifteen years' time allowed to discharge the mortgage debt in a document means before the expiration of 15 years and hence

S. 60. Right of the mortgagor to redeem—*contd.*

a suit for redemption before the expiry of 15 years is not premature 1929 Mad. 339, 1924 P. C. 36, (27 M. L J. 483) *Dist* 39 C. 823 *Ref*

tation t [illegible]
extinguis [illegible]
Court. [illegible]
R. 56 F [illegible]
211) *Ref.*

——in a suit by the mortgagee for the possession of the mortgaged property under the terms of the mortgage deed the mortgagor cannot ask for redemption. 1928 Lab. 668 : 111 I C 519, 44 A. 185 P C. Expled. (66 P. R. 1912, 4 Lah. 76, 56 I C. 349) *Rel. on*, 78 I. C. 232, *not fol.*

For other cases, see, "S. 91 Redemption"

S. 61. Right to redeem one of two properties separately mortgaged.

——consolidation of several mortgage amounts against different properties is illegal in the absence of any contract to that effect 5 Pat. L T. 646 : 80 I C. 34 : 1925 Pat. 59.

——there can be no consolidation of two mortgages if the properties mortgaged are different The rule is applicable to Indian mortgages provided the mortgagee and mortgagor of both the mortgages sought to be consolidated are the same and the mortgaged property is also the same. 1927 Mad. 1039.

[illegible] does not arise under s 61 [illegible] another [illegible] erty and

——assuming that all the mortgages [illegible] in favour of one and the same person ought to be simultaneously redeemed, the rule should be *confined to the cases* where the mortgages insisted on being redeemed, are enforcible and are not such as are barred by limitation or by any other cause from being enforced by suit. 43 I. C 286 : 1918 M. W. N. 75, 32 M L. J. 317 . 19 A 436

S. 6. Right of usufructuary mortgagor to recover possession.

——an usufructuary mortgage may be redeemed by cash payment 17 C W. N. 369, 25 C. L. J. 115

——the words "when such money is paid" in cl (a) mean when money is paid out of rents and profits and do not include cash payment. 16 M. 466.

——where the mortgagee of an usufructuary mortgage by a lease executed on the same date leased part of the mortgaged property to mortgagor by which, in default of payment of rent so reserved, the same was to be a charge on the land mortgaged, the mortgage was something more than an usufructuary mortgage on account of the covenants, it was an anomalous mortgage or at least a combination of a simple mortgage and an usufructuary mortgage, and the mortgagor was in a redemption suit bound to have the arrears

S. 62. Right of usufructuary mortgagor to recover possession—*contd*

of rent included in the sum to be paid as a condition to possession, 50 M 180 31 C. W. N 670 : 45 C L J 395 29 Bom. L. R. 805 : 100 I C. 86 1927 P C 32 ; 8 Pat L T 307 P. C.

——this sec applies only to usufructuary mortgages pure and simple and is not inconsistent with the provision of s. 61. *above case.*

S. 63. Accession to mortgaged properties.

——tenancy lands acquired by the mortgagee in possession by virtue of an ejectment decree form accession to the mortgaged property and the mortgagor is, on redemption entitled to them but should pay the expenses of acquiring them. 78 I C 466 . 1925 Pat 336.

——when the mortgagee plants trees they are to be considered as an accession But when they are capable of separate possession or enjoyment without detriment to the principal property, e. g, by being cut down and removed, the mortgagor will not be entitled to them unless he pays for them. 86 I. C 929 ; 1925 All 748 · 85 I. C 690 : 1925 All. 794

——a grove of mango trees planted by the mortgagee is an accession and the mortgagor is entitled to it after redemption without paying any compensation 88 I C 908 : 1926 All 67 23 A. L J. 915

——a mortgagor's right to accession under s 63 does not depend upon whether the mortgagee had any special advantage by reason of his position as mortgagee in making the acquisition Every acquisition does not enure to the benefit of the mortgagor. 17 C. W. N. 586 19 I. C. 90

——if the mortgagor never treats the lands as accession or makes any claim and allow the mortgagee to remain in possession as occupancy raiyat he cannot subsequently claim the accessions. 1926 Pat 572 97 I C 159

——Ss 63 and 70 must be read together and the accession must be received during the continuance of mortgage. Accession after decree for sale, belongs to the mortgagor as the mortgage interest had ceased to exist at the time of accession. 1921 M W N. 510 ; 70 I. C. 367

——though generally accretions to the mortgaged properties are subject to redemption, mortgagee may, if he chooses, keep them for his benefit and distinct from the mortgaged property. 2 Pat L. T. 225 : 1921 Pat 93 60 I C. 308.

——where the *kachcha* house which stood on the site mortgaged fell and a valuable building was constructed by the mortgagee the accession was capable of separate enjoyment without detriment to the principal property. 1928 All. 381 : 26 A. L J. 837, 43 A. 638, 23 A. L. J. 307 *Rel on.*

S. 65. Implied contracts by mortgagor.

——provisions of s 65 (a) are not applicable to a mortgage before the T P. Act. If there is a defect of title as regards the portion of a mortgaged property and the mortgagee is aware of the fact, he

S. 65. Implied contracts by mortgagor—*contd.*

has no right to get compensation 35 A. 49 : 17 C. L. J. 312 : 17 C. W. N. 233 : 17 I. C. 737 : 13 M. L. T. 182 : 15 Bom L. R. 432 P. C

—the estoppel referred to in cl. (a) operates not only personally against the mortgagor but also against a subsequent . 483.

throw the entire burden upon because by reason of their dy against the remainder. 33 576. (30 C. 755, 2 C. L. J. 10)

rey). 1 C. L. J. 337.

—a mortgagee can sue on his mortgage to enforce his charge on lands belonging to mortgagor who had by mistake included in the deed some lands which he had no power to mortgage. 19 I. C. 423. (33 C 613, 1 C. L. J. 337) *Dist*

—a mortgage deed executed by a manager appointed under the Guardians and Wards Act limits the ordinary rights of a mortgagor in possession 1 Pat L. J 563 : 2 Pat L. W 341 : 39 I. C. 37.

—the statutory right given on the breach of covenant for express release of such a very long duration 989 : 28 M. L. J. 184.

—the duty to pay public charges cast on the mortgagor in possession, is in the nature of a personal covenant, not running with the land. 39 M. 959 . 33 I. C. 326 : 1916 M. W. N. 239

S. 66. Waste by mortgagor in possession.

—unlike the legal mortgage in England the mortgagor of a simple mortgage may lease out the mortgaged property in the ordinary course of management but not so as to impair the value or impede the operation of mortgage. 20 C W. N. 330 · 37 I. C. 195, 1 Pat. L. T 392 , 56 I. C. 805 1 Pat. L. J. 563. 17 C. L. J. 351.

—the mortgagor in possession can deal with the property in the usual and customary way, without prejudicially affecting the property as security for the debt, 1 Pat. L. J. 563 ; 33 I C. 37 ; 2 Pat. L. W. 341.

lease which is usual u year , so as e in a

manner different from that in which he was using it. 17 C. L. J. 384 ; 17 I. C 1, 47 I C. 99 ; 14 L. L. R. 117.

For other cases, see, "Rights and liabilities of parties under different kinds of mortgages."

S. 67. Right to foreclosure or sale.

tangible property and a mortgage the mortgage like a pledgee C. 455 : 19 C. W. N. 203 : 23

S. 67. Right to foreclosure or sale—*contd*

——the mortgagee has the right to bring properties to sale in any order he pleases 92 I C 593, 1925 Mad 1214.

——ordinarily the mortgagee may proceed against any of the properties mortgaged unless there is a special case 1929 All. 380, (44 B. 224, 33 C. 613) *expld* 35 A. 441 *Rel on*

——the mortgagee's right of suit for his debt and realisation of his security within the time allowed by law is not lost by a person enforcing a title by adverse possession against the mortgagor. 44 C 425 21 C W N 177 27 C L. J 212. 37 I C. 277.

——a decree for sale must be made in favour of the mortgagee of an English mortgage 26 C W N 318 1922 Cal 52

——apart from s 60 a mortgagee may abandon a part of his claim releasing one of the mortgagors and sue others on the mortgage bond to recover their proportionate share of the mortgage debt and

——a simple mortgagee is entitled to a decree for a sale as a matter of course though under the terms of the bond he could on the mortgagor's default in payment of interest take possession of the mortgaged property and enjoy the same as in case of usufructuary mortgage 13 C. L J 584, 15 C W N 441 8 A L J 594 13 Bom. L. R. 447: 10 I C 272 **P C**

——a usufructuary mortgagee cannot sell or foreclose but he can protect himself by adding the personal covenant and charge 2 Pat. L. T. 229 63 I C 297

——when a due date is fixed the mortgage is not a pure usufructuary mortgage and the mortgagee is entitled to sell immediately after the due date has passed even though he still remains in possession. 1922 Pat 167. 3 P L T 332: 1 Pat 350.

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I. C. 131 **P. C**, 1928 Mad. 933

——right of the mortgagee when simple and usufructuary mortgages are combined 1929 P. C. 139. 32 C. W. N. 693: 27 A L. J 581 **P. C**

——a usufructuary mortgagee cannot ordinarily sue for sale but he can do so if the terms of the bond so provides. 33 C. W. N. 279. 1929 Cal. 304.

——in a mortgage by conditional sale no decree for sale can be passed. 1929 All 421: 27 A. L. J. 448.

S. 68. Right to sue for mortgage money.

——even if the mortgagor be in the first instance under no personal liability, such liability may arise under s 68 (b) or (c). The right of a mortgagee to sue the mortgagor personally arising

S. 68. Right to sue for mortgage money—*contd.*

out of any of the circumstances specified in s. 68 of the Tr. P Act is unaffected by the fact that the mortgage being unattested is unenforcible as a mortgage 44 C 388 : 21 C. W. N. 383 · 25 C. L J. 121 38 I C 932 21 M L. T. 12 P C

——cl (c) of s 68 is wide enough to include every instance of failure by a mortgagor to secure the mortgagee in undisturbed possession at any time during the period for which the mortgagee is entitled to remain in possession 6 C. L. J 143.

——the mortgagee has a cause of action under cl (c) s 68 whe the mortgagor on being called upon to give additional or substitute security, has entered into occupation and deprived the mortgagee o his possession 6 C. L J. 143, (2 C. L J. 493 25 C. 450 : 21 M 242; *Ref* 24 C 627 *Dist*

——in the case of a usufructuary mortgage, where the mort gagee is entitled to possession of the property, if the mortgago fails to deliver possession, or to secure quiet possession thereof th mortgagee would be entitled to sue for the mortgage money. 2 C L. J 493

——when the mortgage is found to be invalid owing to th deceitful act of the mortgagor the mortgagee is entitled to recove the money 25 A L J. 37 1927 All. 190 : 101 I C 257.

——it is well settled that when an instrument of mortgage give a right to possession and also contains a covenant to pay, thu presenting combination of a usufructuary and a simple mortgage the two rights are independent and the mortgagee may sue for sal although he may have given up possession 6 I. C. 153.

——where a due date has been fixed for payment the mortgage i not a pure usufructuary mortgage and the mortgagee is entitled t sell immediately after the due date even though he still remained in possession. 1 Pat 350 : 65 I. A 666, 6 C L. J. 143, 34 B 462 *Fol*

——where a usufructuary mortgage is void as effecting a transfer of occupancy holding the personal covenant in the mortgage is also void and unenforcible, 44 A. 486 , 20 A. L. J 318 · 1923 A. 134

——if the claim under the mortgage deed is unenforcible a sale of the mortgaged property can be held in execution of a decree for money obtained under s 68 39 A. 36 : 36 I C. 907

——where the mortgagee is deprived of a part of the mortgaged property by the act of the mortgagor he is entitled to recover the mortgage money from the mortgagor 54 I. C. 785.

——a usufructuary mortgagee who has been dispossessed has no remedy by way of foreclosure or sale but he can only get a money decree if he sued only for that relief. 41 I. C. 406 (C)

——a usufructuary mortgagee can sue for the sale of the property mortgaged when the mortgagor fails to deliver possession. 41 M 259 33 M L. J. 623 : 43 I C 4 F. B . 33 M. 1910 *not approved* *Contra* 24 C. 677, 13 I. C. 336.

——a usufructuary mortgagee, who fails to take a defence to a suit by a subsequent mortgagee which would have preserved the

S 68. Right to sue for mortgage money—*contd.*

security, is not entitled to sue for the mortgage money under s. 68, 2 Pat. L J. 490 41 I C, 806.

by a person holding a es and the mortgagee is the mortgagor. 43 A.

——the dispossession of a usufructuary mortgagee is a failure on the part of the mortgagor to secure him an undisturbed possession under s 68 (c) which applies to such a case. 2 Pat L T. 229 : 63 I. C 297.

——s 68 contains provisions of an exacting nature and they do not preclude any mortgagee who has been disturbed by a person claiming without title from suing the trespasser according to general law, claiming as against him a declaration of title and recovery of possession 3 Pat L J 162 · 43 I C 917.

——where a mortgagee though out of possession pays rent in order to avert a rent sale by the landlord he can add the money to the principal and claim reasonable interest thereon. 46 C. 448 52 I C 433.

——if the mortgaged property is sold for arrears of rent owing to the default of the mortgagee in possession he cannot sue for the mortgage money. 1929 Pat 209,

S. 69. Power of sale when valid.

——where there is no time fixed for the repayment of the principal amount, before there can be said to be a "default" there should be a demand 94 I. C. 860 23 L W. 476 1926 Mad. 841

——if interest amounting to Rs 500 is in arrears and unpaid for 3 months the mortgagee can under s 69, exercise the power of sale without notice to the mortgagor. 94 I. C. 860 : 23 L W 476 1926 Mad. 841.

——it is possible in India to put a clause into a mortgage deed allowing sale except through the medium of the court, at least there is no positive enactment prohibiting such a stipulation being annexed to a mortgage where s 69 does not apply 45 M. L. J. 497 : 33 M L T 349 75 I C 7 : 1923 P. C 114 P. C

— power of sale as it nable him the better that power *bona fide* baser, the court will not interfere even though the sale be very disadvantageous, unless the price is so low as it is itself to be evidence of fraud. 10 M. L. T 554 : 12 I. C 261 P. C.

S. 70. Accession to mortgaged property.

——unless there is a contrary intention, a mortgage of land or buildings passes the right to the fixtures then upon the premises, and fixtures attached by the mortgagor to the property after the date of the mortgage will also, except under an agreement to the

Subrogation—*contd*

creditor that he should receive and hold an assignment of the debt as security, or he must stand in such a relation to the mortgaged premises that his interest cannot otherwise be adequately protected. 5 C L. J 611 . 36 C 193, (10 C. 1035 : 11 I. A. 126 P. C., 33 C 1133, 29 I A 9 . 29 C 154, P C) *Ref.*

——it is open to the puisne mortgagee making the payment to abandon his lien under the mortgage and bring a simple suit for the recovery of the money. A puisne mortgagee will be entitled to reimbursement under s 69 Contract Act. 54 C. 424 . 101 I. C. 130 : 1927 Cal 393 · 45 C L. J. 191

——where the security is otherwise precarious the Court may presume that the intention of the party making the payment was to keep the prior charge alive. 1928 Pat. 195 : 9 Pat. L. T. 148 . 108 I C 95.

——subrogation is effected by redemption and unless there is redemption, subrogation cannot take place. 5 C. L J. 611 : 36 C 193.

——a purchaser of the equity of redemption is entitled to stand in the shoes of a prior incumbrancer where the purchaser has, with the consent of that incumbrancer, partially discharged the liability. 38 A 502, 36 C 193

——where a purchaser of an equity of redemption of a property which was subject to the charge of three prior mortgages pays up the first mortgage, he cannot exercise the right of subrogation as he was bound to pay that 20 C W N. 601, 2 C. L J. 218, *f.l.*, the person who is not bound to pay such debt may claim such right, but if the purchaser of equity of redemption is deceived by the act of the mortgagee (by misrepresentation or otherwise) then he can claim such right 20 C W N 6 1 (9 C. 961, 10 C. 1335, 6 C W. N. 209 : 29 C 154 : 29 I A 9 · 4 Bom. L. R. 238 : 12 M. L J. 73 P C., 33 C. 527, 16 C. W N 505, 19 C. L. J 200), *Fol* , 10 C. L. J. 364, 32 A. 400 : 14 C. W N 865 P. C , 41 C. 137 : 17 C. W. N. 1143, 6 C L J. 131, 2 C. L J 288.

——a mortgagee of undivided share in a property who redeems a prior mortgage on the property is subrogated to the rights of the prior mortgagee and is entitled to enforce his right against the whole property, contribution not being his sole remedy 103 I. C. 703 : 1927 Pat. 379 · 9 Pat. L T. 313

——to claim the right of subrogation prior debts are to be fully discharged. 1928 M. 713 : 109 I. C 872.; F. B., 35 M. 183, *fol.* 29 I. C 583 *Dist.*

——where there are two mortgages of a single property and a person advances money for the payment of the first mortgage, he cannot claim priority unless the first mortgage is entirely discharged 35 M. 183.

——a mortgagee making payment towards the discharge of prior mortgage is entitled to priority over an intermediate mortgage to the extent of the money advanced. 38 M. 548, 96 I. C 1054 : 1925 All. 744, 1922 P. C. 11. *Rel.*

Subrogation—*contd*

——where a purchaser of property pays off the mortgages on the property but subsequently his purchase is found to be invalid, he is entitled to stand in the shoes of the mortgagee whom he has paid off. 1926 P. C 109 : 1926 M W. N. 812 97 I. C 543 . 31 C. W N. 538 : 25 A. L. J. 20 P C

of this sec by mortgagor to the mortgagee. 80 *contra* 1928

——a stranger cannot claim the right of payment of the mortgage-money. 1926 Cal. 231

——a person who advances money to pay off a part of the first mortgage cannot have priority over the second mortgage without being either a purchaser or a mortgagee 35 M 183 10 M L. T. 380. 12 I. C 412

——to sustain a claim for priority under s 74 there must be a complete discharge of the prior debt. 8 N L J 157, 95 I. C. 689, 35 M. 183 *Fol.*, 38 A. 502 *Dist*, 36 C 193, 48 I C 779, 41 M. L. J. 309

——s. 74 covers independent acts of subsequent mortgagee paying off a prior mortgagee and has no application where the mortgegor of his own volition makes a secret mortgage to pay off a prior mortgage 1925 Mad 1219 22 L W 238, 9C 961, P. C. *Fol.* 34 M L J 443 *Expl*

——a decision of the question whether a mortgage has been extinguished by payment or not depends upon the intention of the parties 9 C 961 P C.

——auction purchaser in execution of a money decree is entitled to subrogation of the rights of mortgagees subject to which the property is sold. 39 C L J 204 P C

——when a puisne mortgagee obtains a decree for sale on his mortgage without making a prior mortgagee a party, he is entitled to redeem the prior mortgage in a subsequent suit 33 C. W N. 1067 . 1929 Cal 609 119 I C 135 . 50 C L J. 152 F. B

——when equity of redemption of the mortgagor is vested by purchase in the prior mortgagee, and the prior mortgagor wants to redeem the puisne mortgagee while at the same time the puisne mortgagee sues to redeem the prior mortgagee, the claim of the prior mortgagee to redeem as owner of the equity of redemption will be preferred 47 A 751 89 I. C. 295 1925 All. 804, but see 86 I. C. 193 1925 Cal. 59

——where a suit on a prior mortgage is brought without impleading the puisne mortgagees and a decree and a sale follow, the latter's right to redeem etc,, remains unaffected 39 C. 527 16 C. W. N. 505 5 C L 411 . 94 I C. 426 22 M L J 468 P C , 7 Pat L.T. 88 : 7 Pat. 513 : 1126 Pat. 337 . 14 I. C 284 and the fact that the purchaser in execution of the decree of the prior mortgage has been in possession for more than 20 years does not affect the rights of the

brogation—contd

ond mortgagee to redeem the first mortgage 7 Pat L T. 783; Pat 513. 1926 Pat 337; 94 I. C. 84

——the rights acquired by a puisne mortgagee paying off a prior tgage decree are enforcible by separate suit and not in execution ceeding which comes to an end on payment 9 C. W. N. 577, 27 125, 2 C L J 173 2 P. L. J 336, 7 Bom L. R 227 - 33 I A 113. W L J 191 P. C, 1925 Mad. 122, 1925 Mad 80; 47 M L. J. 316, tra, 9 M. L J 177, 28 B. 153

——a second mortgagee is entitled to the sale of the property ired by his mortgage, subject to the rights of the mortgagee, after the sale of the property in execution of a decree on the mortgage, to which the second mortgagee was not a party 30 99 7 C W N 766, F.B, 11 C. W. N. 314, 18 C. 164, P C, 8 M 22 C 33, 1 C L J 337, 350, *contra* 13 A. 232 F. B

——a puisne mortgagee is not bound by the decree passed behind back 18 C 164 P C, 21 C. 70 P C, 30 C 599 I 7 C. W. N. 766, and the purchaser in execution of such decree stands in the of prior mortgagee 21 C 70 P. C., 30 C 599, 8 B 183, 28 B and prior mortgagee becoming such purchaser acquires the right deem the subsequent mortgage, 26 M 484, 28 B. 153.

——prior mortgagee purchasing the mortgaged property in ution of his mortgage without making the subsequent mortgagee rty, but having notice of his mortgage, cannot sue for possession but must sue for sale against the subsequent mortgagee within years from the date of notice. 11 C. W. N. 314, 19 A. 541, 21 A

——where a right of contribution exists it comes into play only a payment is made and time runs under Art 132 of the L only from that time 50 A. 569 - 1928 All 241 : 26 A. L. J. 293

5 Right of mesne mortgagee against prior and subsequent mortgagees.

——right to redeem prior and subsequent mortgagee 1926 101

——a puisne mortgagee has the right to redeem a prior mortgage but a prior mortgagee cannot redeem a puisne mortgagee ut his consent, but if he acquires the equity of redemption, he s entitled to redeem the puisne mortgagee. 90 I. C. 410.

——where a first mortgagee brings a suit on the mortgage uding the second mortgagee as party and a decree for sale is d and the surplus sale-proceeds are withdrawn by the first agee in execution of a decree on a third mortgage, the second agee has a right to recover the amount in satisfaction of his age as the surplus sale-proceeds represent the security. 41 C 18 C W N 345. 19 C. L. J. 132; 16 Bom. L. R 69; 21 I C C

——where a fourth mortgagee in satisfaction of his decree with the surplus sale-proceeds deposited in court after discharging cond mortgage the third mortgagee cannot sue for the money

S. 75. Right of mesne mortgagee against prior and subsequent mortgagees—*contd.*

as his own but may in equity regard it as part of the security and follow it in the hands of the fourth mortgagee 19 C W N. 535 : 19 I C. 226.

——where a puisne mortgagee who has also a prior mortgage is added as a party to a martgage suit, he must set up both the mortgages. But if he is only a prior mortgagee he need not appear. 19 C. W. N 942 26 I C. 673, 39 C 527 *Dist*

——if the prior mortgagee is in possession as lessee subsequent to the puisne mortgage and if the property is sold for default of payment of revenue and he then purchases it, he does so subject to the burden of the puisne mortgage 5 Pat L. J 492 1 P L. T. 711 : 58 I. C. 291 · 1920 Pat. 277

[illegible]

469) *Ref.*

S. 76 Liabilities of mortgagee in possession

——a mortgagee in possession of immoveable property under a mortgage made before this Act came into force was under the ordinary law then in force bound to pay out of the income of the property, the Govt revenue and such charges of public nature as might accrue due in respect of the properties and be payable by the person in possession of the rents and profits, and was not entitled to charge such payments against the mortgagor in the accounts. 29 C W. N 214 46 A 269 22 A L. J 284 . 80 I C 1019 34 M L T 78 **P. C.**

——a mortgagee is bound to pay enhanced assessment levied on the property in his possession in the absence of a contract to the contrary 91 I C 943 1926 Mad. 405.

——a mortgagee in possession cannot encroach on the land of the mortgagor during the subsistence of the mortgage and lay any claim to it on the ground that the mortgagor acquiesced in it by silence 87 I C 15 . 1925 All. 576 L R 6 All 252.

——a mortgagee in possession is entitled to cut down the trees he planted after entering into possession, unless his act is destructive or permanently injurious to the property. 50 B. 692 1926 Bom 595 ; 28 Bom L R 1258 · 99 I. C. 400

——where a mortgagee takes possession of mortgaged property with consent of mortgagor according to agreement between the parties the mortgage does not become usufructuary mortgage but the mortgagee's liability arises under s 76. 25 C L. J 560 ; 40 I. C 371

——it is the incident of the duty of the mortgagee to manage the property with ordinary prudence. 91 I C 943; 1926 Mad. 405

——the mortgagee in possession is bound to account for rents and profits of the land No question of limitation can arise so long as the relation of mortgagor and mortgagee continues. 90 I. C. 138 : 1925 Mad. 825 : 48 M. L. J. 363.

S. 76. Liabilities of mortgagee in possession—contd.

——a mortgagee in possession ... not liable to pay interest ... the institution of the suit ... not apply. 80 I. C. 63 : 22 ...

——a mortgage by the lessee creates privity of estate and the mortgagee is liable to the lessor on all covenants that run with the land including that of paying rent. 88 I. C. 79 : 1925 Bom. 330 : 27 Bom. L. R. 553.

——mortgagee in possession is estopped from denying the title of the mortgagor. 29 I. C. 746.

——mortgagee in possession under an invalid agreement for sale may be called upon to account for the rents and profits as if he were the mortgagee in possession. 35 C. L. J. 58 : 1922 Cal 114.

... ortgagee who was entitled unde... collected cesses also he was bei... received 16 C W. N 137 : 14 C ... L. J. 507 : 11 I. C. 113.

——a mortgagee is to manage the land in his possession as a man of ordinary prudence would have managed if it were his own. So mortgagee making *bonafide* settlement of *raiyati* lands with tenants is binding on the mortgagor but in the case of *zerat* lands where the owner has the right of *khas* possession settlement with the tenant is not valid. 97 I. C. 852 : 1926 P. H. C. C. 3. C.

——where the mortgagee in possession has kept no accounts it ... in the equity of redemption to ... balance left of the mortgage ... e with a fair occupation rent ... ng the mortgagee with simple interest on the mortgage debt. 48 C. 22 : 25 C. W. N. 241 : 57 I. C. 535 : 39 M. L. J. 147 P. C.

... that all reasonable presumption ... he fails to keep any ... were covered by the ...

——a mortgagee must sue for both principal and interest due, otherwise he cannot sue subsequently for the other. 1918 P. R. 69 : 47 I. C. 364.

——where a usufructuary mortgagee was placed in possession of property, the income and the area of which were fluctuating and the deed provided that the net profit of the property would be Rs 110 out of which Rs 80 would be set off against interest, and the balance against the principal held that the parties did not ... the figures mea... he was liable to ...

... the mortgagee ... time of redemp...

S. 76. Liabilities of mortgagee in possession—*contd.*

——a mortgagee in possession ought to be charged with interest on the surplus profits received by him 57 I. C. 294.

——mortgagee in possession as lessee, obligations under different aspects. 5 Pat. L J. 492 . 1920 Pat 277 . 58 I. C. 291.

S. 77. Receipts in lieu of interest.

——a contract, that a definite portion of the income of the

suit for redemption, remedy of the mortgagor is not confined to a separate suit for the arrears of malikana. 46 A. 633 22 A L J. 579 · 82 I C. 25 : 1924 All. 591.

S. 78 Postponement of prior mortgagee.

——fraud is not necessary to bring a case under this sec. The words "fraud, misrepresentation or gross negligence," which postpone the prior mortgagee to the subsequent mortgagee under sec. 78, are three different kinds of conduct and not co-extensive. 43 C. 1052, 1080, 2 C. W N. 750, *Discussed,* 12 M. 424, 429, *contra* 18 M. 444.

—— when the first mortgagee helped the mortgagor to induce the second mortgagee to advance money by declaring that the property was free from incumbrances, he cannot then turn round and claim priority over that mortgage in his own favour 15 C W N 813 : 13 Bom L R. 542 . 14 C L J 79 . 11 I C 503 P C

——where the first mortgagees of two villages did not contest by appeal a decree which erroneously subordinated their rights to those of a second mortgagee with respect to one of the villages mortgaged and they subsequently sued to enforce their entire mortgage against the other village in the hands of the auction-purchasers from the mortgagors, held that the first mortgagees were not precluded from fully enforcing their security against the auction purchasers. 37 A 474 19 C W N. 991 22 C L. J 165 30 I. C 366 1915 M. W. N. 709 P C

——a pliff can put forward, in a suit by himself, the priority which he could claim by way of defence, in the suit against him. 34 A 102 12 I C 607.

——where the landlord mortgagee of the holding sues a mortgagee, he is estopped from questioning the validity of the prior mortgage on the ground of non-transferability. 33 I C 112 (C)

S. 79 Mortgage to secure uncertain amount when maximum is expressed.

——s 79 engrafts an exception to the general rule laid down in s 80 and provides that the intermediate mortgagee who has notice of the prior mortgage is postponed in respect of all advances subsequently made on the security of the mortgage, provided it expresses the maximum to be secured thereby and that the maxi-

S 79. Mortgage to secure uncertain amount when maximum is expressed—*contd.*

mum is not *exceeded*. *1 Pat. L. T.* 582 : 58 I. C. 489, 16 C. L. J. 394. 17 I. C. 927.

——the words of this sec. mean that the mortgagees referred to must express a *maximum*. The words "to secure future advances etc." denominate the different classes of mortgages, but to bring them *under s. 79 they* must have common feature of a maximum expressed. *51 C.* 86 . *33 C. L. J.* 186 : 28 C. W. N. 470 : 33 M L T. *395 : 21 A. L. J. 784 : 25 Bom. L. R* 1279 : 45 M. L J. 505 : 21 A. L J. 784 : 1923 P. C. 211

S 80. Tacking abolished.

——the general rule as provided in this sec. is that a mortgagee ... does not acquire any ... [illegible] sequent advance as ... [illegible] ngrafts an exception ... [illegible] at 261 : 58 I C. 489.

——the words "in the case mentioned in s. 78" do not really mean mortgages to secure future advances or the balance of a running account. The word "subsequent" must mean subsequent to the intermediate mortgage ; if that is so, then in the sense of the sec an advance when made after another mortgage is granted, becomes a subsequent advance. 51 C. 86 : 28 C. W. R. 470 : 39 C. L. J. 186 1923 M. W. N. 609 : 25 Bom. L R 1279

S. 81 Marshalling securities.

[illegible] circumstances, pass ... 118 ... [illegible] ous mortgage or of ... [illegible] ortgagor to have the ... than those mort- ... [illegible] the second mort ... [illegible] the interest ... [illegible]

——a purchaser of a portion of a mortgaged property ... right to marshal 31 M. 419 F. B.

——s. 81 does not apply to the case of a purchaser and s. 56 does not apply to the case of purchaser and purchaser 31 C 95, 101. 8 C. W. N. 30.

[illegible] the subsequent mortgagee ... [illegible] atisfy the debt ... [illegible] of some other ... [illegible] tinguished by ... [illegible] rtgage. He ... [illegible] tgage decree is ... [illegible] rior mortgage.

S. 81. Marshalling securities—*contd*

——where some out of several properties mortgaged were subsequently leased for mining purposes to another who had notice of the
on the marshalling of
of the mortgage. 30

otice of the plff's mort-
nother property C were
of the first mortgage and
that the plff should get
under due but deft can
the deft would fail to
rt, the properties would
1 then C, if necessary.
38 I. C. 542 (b)

——this sec. does not entitle the subsequent mortgagee of a portion of a mortgage *security purchasing under his decree to set* up the plea that the property in the hands of the mortgagor alone is responsible for the payment of the full claim of the prior mortgagee but both of them must proportionately pay the debt. 27 A L. J. 419 1929 All 309, 22 A 284 *fol.*

S. 82 Contribution.

his debt rateably
M 217, 18 C 320,
5, 1 C. L. J. 337,

——but where the mortgaged properties belong to different
burden upon some pro-
W. N. 551 3 C L. J. 576,
nd where the mortgagee
mortgaged properties the
enforce his claims upon
other properties and partial redemption may be allowed 30 C. 755 : 7 C. W N. 723, 2 C L J 202, 5 C. L J. 315 11 C. W N. 403, 31 M.
by mortgagee his debt
22 B 304 F B, 26 C.
92, 4 C L. J 317 *contra*

liable to contribute rateably
contract to the contrary.
8 M. L T 410 : 101 I. C.
the value of each property
which it was subject at the
L J. 193 78 I. C. 243, 36 A.
312, ref.

S. 82 Contribution—*contd.*

... interpreted to mean
..." should
payable
: 109 I.

——the right to claim contribution is the same whether the mortgage *is* redeemed in the ordinary way or the *debt* is realised by *forced sale.* 21 C. L. J. 104.

——properties *are liable* to contribute rateably according to their value *at the date of* the mortgage and not at a future date. 27 A 549, 12 C W. N. 107: 6 C. L. J. 612, 36 A. 272, 36 I. C. 208, 1 Pat. L. J. 228.

——the question of contribution must be worked out not in *execution proceedings but by* separate suit in presence of all concerned, 34 C. 13: 4 C. L. J. 573, the procedure to be adopted is laid down in 36 A. 272, 4 Pat L. T. 91: 71 I. C. 940.

... the mortgage amount in a ...y sues the others for con... ...seeks to sell their interest ... application is maintainable and *fresh* suit need not be brought under Or. 34 Rr. 14 and 15 47 C L. J. 107. 1928 Cal. 191: 107 I. C. 724.

... holder can proceed against any of the ...n of apportionment can ...hould have been raised

——where the amount due on the prior mortgage exceeds the value of the property comprised in that mortgage, the amount of the second mortgage is to be recovered *from other* properties 33 A. 387: 8 A. L. J. 195.

——*purchaser* of one only of several properties given in mortgage, *cannot divide* the liability for it between the properties *He can* redeem the property on payment of the whole charge 27 C. W. N. 8.

——the position of the person redeeming a mortgage is that of an *assignee* of the original security as regards limitation also, therefore a suit brought more than 12 *years* after the due date of the original mortgage is barred by *Art.* 132 L. A, 25 C W. N. 253

——the expression "contract to the contrary" in s. 82 means contract between the mortgagor and the mortgagee and not a *contract* between the mortgagor and his vendee 94 I. C. 1018: 1925 *All.* 352: 24 A L J. 401, 96 I. C. 765: 24 A L. J. 714, (24 M 65: 1926 A. 353, 34 A. 63 P. C) *fol*, 9 A. L. J. 499 *Dist*

——*where* a mortgage is split up and the right of the mortgagor vests partly in a prior mortgagee and partly in a subsequent mortgagee the former cannot be compelled to redeem the whole nor the latter to give up his interest in the share of the mortgage 44 A. 708: 1922 A. 405.

S. 82. Contribution—*contd.*

——where a property belongs to different owners and is subject to a common mortgage, the liability of each of the properties subject to the mortgage is proportionate to its value as compared with the value of all the properties mortgaged 43 A 589 . 63 I C. 209 : *19 A. L. J. 584.*

——properties sold in execution of a decree on a prior mortgage are not liable for contribution towards puisne mortgage. 43 A, 42 : 58 I. C. 414

——a first mortgagee cannot release part of the mortgaged property for less than its due proportion of the mortgage money and recover the whole of the balance of the mortgage money out of the remainder of the property 34 A 606 . 16 I C. 401. (15 C W N 800. 30 C. 755, 31 M. 333) *Ref.* (28 A 174, 25 A 79, 28 A. 19, 29 A 369) *Dist*

——when the amount due under the first mortgage exceeds the value of the property comprised in that mortgage, the whole burden of the second mortgage falls on the other property comprised therein. 33 A 387 9 I. C 933 8 A L J. 195.

——this sec. defines the relation of the mortgagors *inter se* 20 Bom. L. R 175 . 45 I C 862

——it is contrary to the principles of equity that the plff mortgagee who by his own negligence had lost his remedy against the owner of half the equity of redemption should seek to throw the whole burden of the mortgage on the owner of the other half 44 B 223.

——a mortgagee voluntarily releasing a portion of the mortgaged property is not bound to abate a proportionate part of the debt but the action of the mortgagee in so releasing does not affect the right of the part owners of the equity of redemption to contribution. 40 M 968 33 M L. J 211 42 I C 532 F B. (20 M. 217, 31 M 333, 30 C. 755, I. C. L. J 337) *Diss*

——if a person interested in the mortgaged property pays off the decree on the prior mortgage in order to save the property from sale he can make the subsequent mortgagee liable for contribution but if on this date the claim upon the prior mortgage is barred by limitation the subsequent mortgagee cannot be proceeded against 1929 Pat 94 115 I. C 552, 20 B. 615, 2 A 807, 1922 P C 11 *dist* 39 C. 527 P C , 1926 All 480. *Rel on*

——a mortgagee must not release the properties of one of the mortgagors to the detriment of the others. If the mortgagee relinquishes a valuable property for an inadequate consideration, he would not be allowed to throw the burden of the balance upon the other properties 16 C L J 401 17 I. C 931.

——the mortgagee's rights to proceed against any one of several mortgaged properties for the entire debt is not affected by the principle of contribution among the several mortgagors or their representatives. 23 C. W. N 308 ; 29 C. L J 297 : 50 I. C 790

——where property over which the plffs held two mortgages was sold and purchased by them in execution of a decree on the second mortgage and subsequently plffs. allowed the sale to be set

S. 82. Contribution—*contd.*

aside by being present at and ratifying a sale of a portion of the property to third person and by receiving consideration thereof, it is not open to the plffs. to proceed in their suit on the first mortgage against that portion of the property in the hands of the third parties. 19 C. L. J 590 : 23 I C 426

Ss. 83, 84. Deposit in court.

——where a deposit has been made under s 83 of the full amount due under the mortgage, and due notice given and the mortgagee appears in court, but definitely refuses to accept the money, and subsequently mortgagor withdraws it from court, the interest ceased to run from the date of deposit 44 A. 198, 4 Pat L. T. 720, 73 I. C. 1053.

——service of notice of deposit, duty of Court. 35 C L. J 202 60 I C. 454 (C).

——notice of deposit without appointing guardian *ad litem* when the mortgagee is a minor is not effective 44 A 64, 103, 48 A 611 : 96 I. C. 1 . 24 A L. J. 769 . 1926 All 665, guardian *ad-litem* should be appointed. 45 A. 592

——unless a guardian *ad-litem* is appointed it cannot be said that the mortgagors had done all that was necessary for them to enable the mortgagee to draw the money. 90 I. C. 754 : 1925 Mad 1017 : 1925 M W. N. 547 (1923 All. 183, 27 B. 23, 44 A. 641, *Rel.* 30 C 1021 **P. C.** *Dist.*

——the mortgagor should after tender keep the money ready for payment. 3 Pat. L T. 332 . 65 I. C 666

——where money is deposited by the mortgagor but owing to dispute between the heirs of mortgagee it is not drawn, interest [illegible] 354 [illegible] nortgagee [illegible] n order to claim the benefit of the sec the mortgagor must come [illegible]ly within the provision of the sec , 50 A 655, 1928 All 311 : 26 A. L. J 394 101 I C. 570.

——mortgagees remaining in possession after a lawful deposit are entitled to credit for amounts which they paid after the tender to meet the revenue demands and for necessary repairs and collection charges. 44 M. L. J. 534 : 72 I. C. 292.

——it is not the practice of the court to require a party to make a formal tender where from the facts stated in the plaint or from the evidence it appears that the tender would have been a mere form and that the party to whom it was made would have refused to accept the money. 46 M. 108 : 28 C W N. 25 : 38 C L J 34 : 25 Bom. L. R. 541 *P.* C.

—— [illegible] of the mortgagee to receive payment [illegible] or from the duty of [illegible] over interest subse- [illegible] of notice and gave [illegible] correct address but it was not served till after a long time but for as

Ss. 83, 84. Deposit in court—*contd.*

fault of the mortgagor, there would be a cessation of interest 1923 A. 24 : 70 I C. 811

——after the mortgagor deposits the money the court must see that notice is served on the mortgagee. The mortgagor is not bound to see that the notice is so served. 60 I C. 454 (C).

——mere agreement to sell in favour of a person does not create any interest in the property and he cannot sue for redemption nor he can deposit money under s. 83 1926 M W N. 459 : 92 I C. 715 : 1926 Mad. 597.

——the deposit under s 84 is a special kind of tender Where the mortgagee refuses to accept the amount and thereupon the mortgagor withdraws the amount, his liability to pay interest depends on the question whether, notwithstanding the withdrawal he remained ready and willing to pay throughout 1926 M W N. 423 49 M. 609 : 95 I. C. 108, 1926 Mad 601 : 50 M L J 468

——where in execution of a redemption decree the mortgagor deposits in court an amount sufficient to satisfy the decree and the mortgagor is let into possession although an appeal against the decree by the mortgagee is pending, held that the mortgagee ought to take the amount deposited out of court, without prejudice to his pending appeal either by arrangement or with the sanction of the court which would be given as a matter of course, and that if he fails to do so and the amount lapses to the Govt the mortgagee must bear the loss 16 C. W N 793 17 C L. J 14 · 16 I. C 830 10 A L J 379

——a tender is valid when made to party direct and the payment need not be made into court. If it is refused interest will cease to run. 1917 M W N. 308 38 I C 295

——tender of principal amount only is not valid tender. 33 C. W. N. 279 1929 Cal. 304.

——it is only the actual payment of the full mortgage amount into court that makes interest on the mortgage amount cease to run under s 84 and not a mere presentation of a petition under s 83. 29 I. C. 145 2 L W 408, 55 I. C 991 : 18 A L J 440, 36 A 139 22 I. C 659 . 12 A. L J. 111

——when money is deposited under sec 83 by the mortgagor he cannot object to the mortgagee drawing the same 22 I C. 369.

——on receiving a petition under s 83 the court should give notice to the mortgagee, and it is the mortgagee's duty upon receipt of such notice to state the amount due on his mortgage and his willingness to accept the money deposited in full discharge of that debt [illegible] eive the mon[illegible] the deceased [illegible] the deposit. 1 [illegible]

——the money which a mortgagee has paid under sec. 171 B T. Act, as arrears of rent, cannot be added to the mortgage debt under s. 83 though it has priority over the mortgage 21 C. L. J. 429.

Ss. 83, 84. Deposit in court—*contd*

——the deposit ...

14 M. 49, 22 B 761, 6 A. W. N. 216, 24 A 461.

...ney should be paid to the ... N. 745 P. C., it must ... 291, 23 M. 510.

...d. 16 C. 307 P C., 13 A.

...e smaller. 29 C L. J.

——withdrawal by the agent binds the mortgagee. 36 C 840: 10 C. L. J. 1, 13 C. W. N. 1102, P C.

——the court can only compel the mortgagee to deliver up the mortgage deed. 13 M. 316

——interest for the de... money is borrowed and on ...llowed. 8 C. W. N. 215.

... deposit and not from the

... the running of interest, otherwise not. 1922 Pat.

——"deposit in court" in s. 84 contemplates a case of continuing deposit and interest does not cease to run if the mortgagor subsequently withdraws it and tender the same in court before suit. 25 I C 96 · 16 M. L. T. 131 : 1 L W. 595.

——deposit in court before due date is not valid tender. 31 C 183.

——'certain date' of payment in s. 58, cl (c) means only the last date, it does not imply that the mortgagor cannot make the tender before that date. 25 I. C. 93

——if the mortgagee makes a demand within term and the mortgagor complies, the mortgagee cannot insist upon payment of interest for the whole term. 19 C. W N. 389 : 42 C. 1146.

——*bona fide* payment to one of the mortgagees is sufficient 20 M 461, 36 M. 544, F. B. *contra*. 21 C. L. J. 570, 38 C. 342: 13 C. L. J. 3, 32 A. 164, 25 A. 155.

——if the mortgagor disregarding the notice pays the whole amount to one of several mortgagees he cannot get a refund of the amount. 24 I. C. 88.

——payment out of court cannot be recognised in making mortgage decree final. 25 C. L. J 553 : 21 C. W. N. 920.

——payment may be made before final decree. 36 C. 122 · 8 C. L. J. 547.

——a deposit is invalid if made after the institution of the suit by the mortgagee. 48 I. C. 693 : 35 M. L. J. 605, 35 M. 209 : 10 I C. 333 · 1911 M. W. N. 126.

——a person denying a tender cannot question its sufficiency or validity 25 I. C. 93.

——interest accruing due up to the date of deposit should be included 34 I. C. 825 : 30 M. L. J. 607.

Ss. 83, 84 Deposit in court—*contd.*

——time of payment may be extended 36 C 122, 28 B 102, 22 B. 771, 22 M. 133, 25 M 244, 25 M 300, F. B, but not in the case of decree for sale 24 B. 300.

——deposit does not *ipso facto* extinguish the mortgage when the mortgagee refuses to accept the deposit 45 A 592

——there is no valid deposit under s 83 T P Act, so as to stop running of interest where one of the mortgagees is a minor and no guardian *ad litem* has been appointed for the minor. 96 I C 1, 24 A. L. J. 769

——liability of mortgagee in possession after deposit. 44 M. L J. 534 72 I C. 292

S. 85 Or 34 R. 1 Parties to suits for foreclosure, sale and redemption.

——under s 85 all persons interested in the mortgage property must be made party, provided the plff has notice. 32 C L J 479 P C.

——when puisne mortgagee is not made party that part of the claim which concerns him is to be totally dismissed 35 A 484, see also 24 I. C 25 (redemption suit)

——where a person having a share in the equity of redemption has not been made deft, there should be proportionate decree. The suit is not to be dismissed for defect of parties 29 C W. N 51, 25 C. W. N. 594 *Rel*

——when prior mortgagee being made party does not appear after filing written statement and the court does not make any order against him, he is not affected 18 C W N 1013 24 I C 42.

——a prior mortgagee need not appear unless he has got subsequent mortgage also 19 C W. N 942, 947, 10 C. W N 991 P C., 39 C. 527 16 C W N 505 P. C, 35 A 111

——but when a person is both a prior and subsequent mortgagee and is made a party being described as subsequent mortgagee only, he must appear and set up his prior mortgage 2 C L. J 574, 31 C. 428, 16 C W. N. 505; 15 C L. J 411, P C, it is so also when the prior mortgage is renewed by subsequent mortgage 9 C L J 78

——when prior mortgagee does not make puisne mortgagee a party and the property is purchased by third person, the puisne mortgagee may sue the prior mortgagee and the purchaser for redemption. 40 M. 77 F. B.

——where a purchaser of equity of redemption is not impleaded as party it is not essential for him first to proceed to get the mortgage sale set aside before he can bring a suit for redemption 1927 Cal. 559; 101 I. C. 15.

——where the legal representative of a deceased mortgagor being substituted made hostile claim, the court was right in refusing to hear the claim leaving it for the decision of a separate suit appropriately framed for the purpose 25 C. W N. 192

S. 85. Or. 34 R. 1. Parties to suits for foreclosure, sale and redemption—*contd.*

——person not claiming under the mortgagor, *i. e* who does not claim the equity of redemption but sets up paramount title, is not
J. 205 : 33 C. 425, 24 C.
95 20 C. W. N. 1273, 38
12 C. 414 : 12 I A 171,
such person, in whose
e decree. 35 C 701 12
C. W. N. 533, 24 I. A.
and cannot ask for a
reversal on the *ground* that the issue was extraneous 33 C. 425 .
3 C. L. J 205

——a *question* of paramount title can be investigated in a

——the landlord of non-transferable occupancy holding taking *possession of* the property by collusion is *necessary party*, 16 C W. N 920.

——an *attaching creditor* is a necessary party. *37 M. 418, contra.* 17 C. W N. 871 : 17 I. C. 432

of equity of redemp-
W. N 276.
also should be made

——non-compliance with Or. 34 r. 1 C. P. C. is not fatal. Or. 1 r 9, *applies* to mortgage suit and when a person having a share in the *equity of* redemption is not made party there should be a decree *proportionate* to the shares of the persons actually made defts 29 C. W. N. 51, (25 C. W. N. 594, 30 C. 755 : 7 C. W. N. 723) *Ref* 35 A. 441 *Diss*

relinquished by the mortgagee
A. L. J 630, F. B.
rtgagee need not make the
137, but the sub-mortgagee
realise dues from him 19

——sub-mortgagee also can sell the right of his mortgage. 23 A. 385 F B. (18 A. 113, 22 A. 511), *overruled*, 20 M. 35, 9 C. L. J. 427, 13 Bom L. R. 90, 15 B. 692, 20 B. 519.

——*when a* necessary party to a suit being made party does not claim all *prior rights* he becomes estopped. 39 A. 527 P. C., but made party and no relief
need not set it up
ntra. 31 C. 428. 21

——*where the subsequent usufructuary mortgagee* is not made party *in the suit by* the prior simple mortgagee the auction purchaser in execution of the decree acquires no title against the usufructuary

S. 85. Or. 34. R. 1. Parties to suits for foreclosure, sale and redemption—*contd.*

mortgagee and neither the original simple mortgagee nor the plff. could fall back on the original mortgagee after the sale is set aside, 33 C. W N. 100 : 1929 Cal 233

Ss 86-90, 92-94, 96, 97, 99, Or. 34, rr 1—15 C. P C, Procedure in mortgage suits.

Procedure.

——in the case of a mortgage what is a mere combination of a simple mortgage and an usufructuary mortgage, the right to sue under s 68 would give a right to sell under s 67 That is because the statute has elaborately defined the contract in that case The moment one finds that the mortgage is an anomalous mortgage, and that it purports to deal with the question now in point, it is unsafe, *to say the least, to rely upon s 67 at all 39 C. L. J. 269*

——when a mortgage is stipulated to be at the outset a simple mortgage and then under certain condition an usufructuary mortgage, its original character as simple mortgage is not lost 38 C. 537, 15 C. W N 413 13 C. L J 584

——equitable mortgage by deposit of title deed, when no maximum is fixed. 39 C. L J. 186

——s 89 does not debar a mortgagee to prove that the description of the property mentioned in the Schedule to the decree is erroneous. 39 C L J. 222.

——a m. gagee of chattel is entitled to foreclosure decree like a mortgagee of immoveable property 42 C 455 19 C. W N 208 20 C. L J. 183

——when an order absolute is made *ex-parte* without giving notice to the mortgagor, he has inherent power to set aside the order 32 C 253, F B

——a sale in contravention of s 99 Tr P. Act (Or 34 r 1-15 [illegible] egular one liable to be avoided, [illegible] idable 35 C 61 11 C W. N [illegible] 32 1 A 23 1 C L. J. 584 [illegible] L J. 71 P C

——if the persons claiming to redeem through the Jt Dr. take no objection before confirmation of the sale, they cannot bring a suit for redemption against the purchaser in execution whether the latter is the D. Hr or a stranger. 32 I C. 611 32 M. L J. 525, 19 M L T. 121, 37 A 165 *fol.*

——decree may be amended when the description is erroneous. 39 C L. J. 222

——no fresh suit will lie by the mortgagor for over-payments made by him 26 B. 661, 30 A. 36, 30 A 225, 34 C. 223, 31 B. 527

——the scope of a mortgage suit is to cut off the equity of redemption and to bar the rights of the mortgagor and all persons claiming under him. 21 C. W N. 177, 44 C 425 : 37 I. C. 277 ; 27 C. L J. 212.

Procedure—*contd.*

——where the first mortgagee obtains a decree without
[illegible] puisne mortgagee suing on his
amount of the decree on the
due under the mortgage deed,
[illegible]2 C. L. J. 121 : 55 I. C. 969 :
[illegible] C., 40 A. 407 : 45 I. C. 798 P. C.
with the prelimi-
decree is passed
[illegible] 959 : 8 Pat L. T.

——a preliminary decree in a mortgage suit is not capable of execution. 80 I C. 716 (c).

decree is passed can be heard even after the final decree is passed So also a second appeal from the first appeal can be heard though a final decree has been passed pending the appeal. 1927 Cal. 559 . 101 I. C. 15.

[illegible] entire
half

form

——in view of the provisions of s 67 a decree for sale may be made in favour of the mortgagee when the mortgage is an English mortgage 26 C. W. N. 318.

——it is not incumbent on the mortgagee, first of all, to proceed against the moveable property which has, rightly and wrongly, been formally included amongst the mortgaged subjects. 95 I C. 563.

Priority.

——a mortgagor purchasing the mortgaged property in execution of prior mortgage decree in which the mortgagor and the 2nd mortgagee were made defts acquires the property subject to the 2nd mortgage. 11 C W. N. 264, 3 C. W. N. 323, 17 C. 23 , 16 I A 189 P. C., 5 C. 252, 25 A. 46, 23 C. 397, 5 C. L. R. 227, 5 C. 198 6 I. A. 145 P. C.

——the holder of two independent mortgages over the same property, who is not restrained by any covenant, is competent to [illegible] separate decrees for sale ; but he
[illegible]ject to the first 33 C. L.
98 I. C 968 : 8 Pat L. T.
353, 2 P. L. J. 118, 33 C

——the proper course is to sell the property free of both mortgages, whether in execution of the decree on the first mortgage or of the decree on the second mortgage and after the payment of the dues ca[illegible] incidental expenses to apply the balance in discharge of the dues [illegible]

Priority—*contd.*

the first and second mortgage one after the other. 1927 Pat. 117 · 98 I. C. 968 : 8 Pat L. T. 255

——a subsequent mortgagee can question the validity of the prior mortgage. 19 C W. N. 24 n.

——when the consideration of the subsequent mortgage is the debt under the first mortgage, it will have priority like the first mortgage. 10 C L J. 150 : 1 I. C. 264, 2 C. L J. 202, 10 C. 1035 : 11 I. A. 126, **P. C** 29 C. 154 29 I. A 9 **P. C.**

——the first mortgage-purchaser is entitled to call upon the second mortgage-purchaser to redeem him, and upon failure to do so to get possession 32 C 891 : 1 C L J 371 : 9 C. W N. 728 7 C. W. N. 11 *Fol*, 5 C. L. J. 315 : 11 C. W. N. 403, 6 C. L J. 612 . 12 C. W. N. 107, *Ref.*

——priority must be determined not by reference to the dates of the mortgage document but according to the dates of the sales and recovery of possession under them. 26 M 486

——when the mortgagee in court-sale purchases the equity of redemption and afterwards the sale is partly held invalid the security is extinguished to that extent 45 M L J. 719 1923 M. W. N. 781.

——a puisne mortgagee discharging two prior mortgages can sue on three mortgages 1923 Mad. 349 70 I C 286, 4 A. L J 349, 6 A. L J. 549, 69 I. C 651.

——a sale under the prior mortgage sweeps away the subsequent encumbrances 33 C. L. J 7.

——suit on prior mortgage without impleading subsequent *mortgagee*, *right* of the purchaser of a portion of the *mortgaged* property in execution sale, 41 M L J 399, and the position of the puisne mortgagee, 43 A. 204, **F. B.** and that of purchaser paying up puisne mortgage. 43 A. 268.

——a mortgage decree holder can proceed against any of the properties mortgaged to him and no question of apportionment can be raised before the executing court as it should have been raised in the suit itself 85 I C 742 1923 Cal 1048

[illegible]

was executed before the other neither can claim priority and both must rank *pari passu.* 14 L. W. 422 · 1921 M W. N 703

——where a subsequent usufructuary mortgagee is dispossessed by the purchaser in execution of the prior simple mortgage decree he may sue the mortgagor for money if there was personal covenant. 63 I. C 252.

Sale of property subject to prior mortgage.

[illegible]

Sale of property subject to prior mortgage—*contd.*

P C 5 *C.* 252, 25 A. 46, 23 C. 397 : 5 C. L R. 227, 5 *C.* 199 : 6 *I. A.* 145 P. C.

——the holder of two independent mortgages over the same [illegible] ...tent to [illegible] ; but he [illegible] 33 C. [illegible] 103 and

——a *subsequent* mortgagee can question the validity of the prior mortgage. 19 C. W. N. 24n

——when the [illegible] subsequent mortgage is the [illegible] have priority like the first [illegible] C. L. J. 202, 10 C. 1035 [illegible] P. C.

——[illegible] post- [illegible] 78, [illegible] 1052,

——the first mortgagee-purchaser is entitled to call upon the *second* mortgagee-purchaser to redeem him, and upon failure to do so to get possession 32 C. 891 : *1 C. L J.* 371 : 9 C. W. N. 718 : 7 C. W. N. 11 *Fol.*, 5 C. L. J. 315 : 11 C. W. N. 403, 6 C. L J 612 : 12 C W. N 107, *Ref.*

——priority must be determined not by *reference* to the dates *of the* mortgage document but according to the dates of the sales *and recovery* of possession under them. 26 M. 486

——when the mortgagee in court sale purchases the equity of *redemption* and afterwards the sale is partly held invalid the security is extinguished to that extent. 45 M. L. J. 719 . 1923 M. W. N. 781.

——a puisne mortgagee discharging two prior mortgages can sue on three mortgages. 1923 *Mad.* 349 : *70 I. C.* 286, 4 A. L J. 349, 6 A. L. J. 549, 69 I. C. 651.

——*a sale* under the prior mortgage sweeps away the subsequent encumbrances 33 C. L. J. 7.

——of any number of mortgages the later can always redeem the earlier but the earlier cannot redeem the later except *by* consent. 41 M. L. J. 54 : 1921 M. W N. 437 : 63 I. C. 730.

——where it is impossible to decide which of the two mortgages *was executed* before the other neither can claim priority *and both* must rank *pari passu.* 14 L. W. 422 : 1921 M. W. N. 703.

——where a subsequent usufructuary mortgagee is dispossessed by the purchaser in execution of the *prior* simple mortgage *decree* he may sue the mortgagor for money, if there was personal covenant. 63 I. C 252

——the rights acquired by a puisne mortgagee paying off a *prior mortgage-decree* are enforcible by separate suit and not in execution

Sale of property subject to prior mortgage—*contd*

proceeding which comes to an end on payment 9 C W. N 577, 27 A 325 : 2 C. L. J. 173 2 A. L J 336, 7 Bom. L R. 427 . 32 I. A. 113 : 15 M. L J. 191, **P. C.** *contra*, 9 M. L. J 177 . 28 B. 153

of the property
e first mortgagee,
vas not a party,
C. 164, **P. C.**, 8
F B.

——when a mortgage decree is obtained on a prior mortgage a subsequent mortgagee is to pay only the decretal amount and need not pay what would be due if no suit was brought 1927 All 619 . 102 I. C 891

——a puisne mortgagee is not bound by the decree passed behind his back 18 C 164 **P. C.** 21 C. 70 **P. C** 30 C 599 · 7 C. W N. 766. **F. B** and the purchaser in execution of such decree stands in the shoes of prior mortgagee. 21 C 70, **P C**, 30 C. 599, 8 B 188, 28 B 153, and prior mortgagee becoming such purchaser acquires the right to redeem the subsequent mortgage 26 M. 484 28 B. 153.

property in exe-
ent mortgagee a
e for possession,
tgagee within 12
. 19 A 541, 21
A. 235

Limitation in mortgage suit.

——acknowledgment by the mortgagee extends the period of limitation of suit for redemption 17 C. W. N 573, **P C**, but acknowledgment by widow does not bind the reversioner 17 C W. N 605, **P. C.**

——in redemption suit time runs from the date of satisfaction. 18 C W. N. 586, **P C.**

——application for making a decree absolute is 3 years from the date of preliminary decree 18 C W N. 740, **P. C**, 19 C W N 561, 19 C W. N 649, but if once made absolute out of time it cannot be questioned. 1917 Pat. 194, and the period may be suspended 25 C W N 376, 35 C 209, 43 C 660, 12 M. I. A 244 **P C.** 7 M I A 323 **P C.**

——Art 179 is applicable to an application for an order absolute 33 A. 264 : 13 C L J 351 . 15 C W. N 370 **P C**

——in case of usufructuary mortgage, when term is given for
there is no personal
W N 369 *Reversed.*
piration of the term.
L. Act, may extend
to personal decree

——compromise of mortgage suit, mortgage decree or money decree. 28 C. W. N. 550.

Limitation in mortgage suit—*contd.*

——part payment by mortgagor after transfer of portion of the mortgaged property saves the period against transferee also 11 C W. N. 107, 9 C. W. N. 868 : 32 C. 1077.

——an aplpication for the recovery of unsatisfied amount under s 9, Tr. P. Act : Or. 34, r. 6, C. P. C. will be governed by Art 181 L. Act. (12 years), 34 C. 672 : 11 C W. N. 674 : 6 C L. J. 119, 33 C 867, 21 A. 453, 24 I. C. 35.

ount under Or. 34 ixed by Or. 20 r. 6, N. 145, P C. 31 ing from the title

——a suit on a simple mortgage bond is governed by Art 132 and not Art. 147 which applies to English mortgage only : 11 C W. N. 1005 : 6 C. L J. 379, 30 M. 426 P. C., 14 C. 731. F. B.

——when the mortgagee is deprived of the security or possession, limitation for a suit for personal decree is 6 years 25 C 450

——a suit by mortgagee to recover sale-proceeds drawn by money-decree-holders is governed by Art. 132 L. Act (12 years) 5 C. W. N. 356, 3 C L. J 52, 31 C 745

——fresh suit on the mortgage-bond by the mortgagee against one who has already purchased the equity of redemption, before the

eeing 379. otice

——after a conditional decree for sale is passed, the suit as such is at an end ; so application for substitution need not be made within 6 months. 11 C. W. N. 156, 21 C. 818, 22 C. 931.

a conditional by the general

determination first are different.

final is governed 20 : 73 I C 187 pealed against the ne runs from the J. 526 · 74 I C 03, 40 M. 714

——when the preliminary mortgage decree was amended by correcting a clerical mistake as to the amount it did not extend the period of limitation. 1923 A. 22 : 69 I. C. 190.

sale deed by receiver appointed by right to apply for personal cution of the conveyance

Limitation in mortgage suit—*contd.*

——an application for final decree in a redemption suit being stayed by means of an injunction, saves limitation 1923 M W. N 670

Money decree for unsatisfied amount.

——a preliminary decree is not a composite decree to proceed against other properties of the J. Dr under Or. 34, r. 6, C P. C 23 C. W. N 924

——the original decree should reserve to the mortgagee liberty to apply for a personal decree, 22 A. 404, 31 A 373, 33 C 891, 18 C. L. J. 133, 17 C W N 1039, 31 B. 244, the essential elements have been laid down 16 C L J 318

——a mortgagee cannot after releasing some mortgage property ask for personal decree. 33 C. 890 : 10 C. W N 862. *contra* 29 A. 369, 28 A. 660, 674, 24 A 606

——mortgage properties must be exhausted before asking for personal decree 15 C L. J 684. 18 C L J. 133, 18 C W. N 1039.

——an instalment personal decree may be passed 15 C W. N. 1083.

——if some property is lost in claim under Or 21 r. 100, the mortgagee cannot claim compensation under sec 47 C P C 25 C. W. N. 756

——under s 90 T P. Act (Or 34, r 6, C. P. C) it is not a condition precedent to the making of a personal decree for the balance of the mortgage money that the mortgaged properties should have been sold and the proceeds found insufficient to satisfy the debt In a decree for sale it is open to the court to provide that if the proceeds of the sale are not sufficient to cover the amount of the mortgage debt together with interest the deft shall pay the balance personally 23 C W. N. 490 29 C L. J 443 21 Bom L. R 589 ; 49 I C 620 **P C**

Rights of mortgagee on the change of Mortgaged Property :—

——the rights of the mortgagee are not destroyed by the mere transmutation of the subject-matter of the security 10 C L J 150 when the property is converted into money under the Land Acquisition proceedings mortgagee's lien will follow the compensation money. 6 C L. J 745

——when some of the mortgaged property is purchased by the mortgagee himself in execution of a rent-decree, the charge on such property is extinguished and transferred to the balance of sale proceeds. 8 C. W N. 332, 3 C. L. J 52.

——this principle applies whenever the mortgage lien is in jeopardy 9 C. W. N. 117, 24 C 746, 15 C 546

——when mortgaged property is converted into money the mortgage-decree must be modified. 19 C W. N 537.

——a second mortgagee may sue for the surplus sale proceeds of the first mortgage in the hands of the person who is both first and third mortgagee as surplus sale proceeds represent the security

Rights of mortgagee on the change of mortgaged property —*contd.*

Limitation is 12 years (Art 132) and not six years (Art 120). 18 C W N. 345 : 41 C. 654 ; 19 C. L. J. 132 : 16 Bom. L. R. 89 : 1914 M. W. N. 38 · 21 I. C. 961 : 26 M. L. J. 243 : 12 A. L. J. 62, P. C. appeal from 33 C. 92 · 9 C W. M. 989.

——but one co-mortgagee cannot sue the other for the refund of money *erroneously* paid to him by the Collector. 21 A 137.

——*subsequent* mortgagee must get a decree before proceeding ... C. W N. 535, 32 C. 92 *Ref* ... follow the estate alloted to the ... 20 C. 533, 21 W. R 233 P. C

——*where in the case of mortgage of an undivided share a clause was inserted in the bond that after partition the whole of* ... for the property

Ss. 91. Redemption.

——there is nothing in s 60 to debar the owner of a part of the equity of redemption from offering to redeem the whole mortgage. There can be no objection to a suit by a part owner of the equity of redemption to redeem the whole. 3 Pat. 818 : 1925 Pat 57, 48 C 82

——one mortgagor can redeem the whole mortgage, unless he is estopped by his conduct, subject to the safeguarding of the right to redeem, of the other mortgagors. 97 I. C. 386 : 1927 Pat 25 1926 P. H. C. C. 323, 48 C. 22 P. C. *Fol.*

... redeem the whole mortgage 22 C W. N ... 09, 5 B. 23), *Fol.* 84 I. C. 293 ; 6 F ... 143 · 1925 Mad. 351 ... a portion of the equity of red ... tled to redeem the whole 38 M 310.

——a mortgagor has a right to redeem a usufructuary mortgage and get possession of the mortgaged property without paying off a prior simple mortgage 44 M 301 : 28 M. L. T. 234 : 61 I. C 612

——the proper valuation in redemption suit is the amount admitted by the mortgagor-plff. and not set up by the mortgagee deft. 37 M. 420.

——a purchaser *pendente lite* from the mortgagor can redeem 26 C 966 · 4 C. W. N 317.

——a sub-mortgagee *may* redeem. 27 A. 472, 20 M. 35, 2 A. L. J. 609.

... lessee can redeem. 23 A 679, but a tenant ... 17 ... the mortgagor may redeem 37 M. 446, 26 A. 72, 23 A. 467. 37 M.

410, 67 I. C. 446.

S. 91. Redemption—*contd*

——when prior mortgagee does not make puisne mortgagee a party and the property is purchased by a third person, the puisne mortgagee may sue the prior mortgagee and the purchaser for redemption. 40 M. 77, **F. B**

——puisne mortgagee is not bound by the decree in which he is not party. 28 C L J. 188 **P C**

——a prior mortgagee made party to suit may redeem. 14 C. W N. 672

——a mere right of maintenance cannot give a right of redemption 18 A 253, 22 A. 191 **P C**

——conditions constituting clog on redemption are invalid. 80 I. C 944: L. R. 5 A. 542, 1925 All 34, 47 A 582. 1925 All. 427 87 I C. 477.

——conditions which prevent or impede the right of redemption even after redemption, if such conditions are entered into at the time when a mortgage is made, must be taken to be a clog on the equity of redemption 47 A 582 : 87 I C 477 : 1925 All 427.

——period of redemption being 50 years it was held to be a clog. 1925 Cal. 105

——s 60 is imperative and no mortgagor could lose his right to redeem even in the case of an anomalous mortgage 82 I C. 809 1925 Mad 366, 42 M. L J. 584

——the word interest in sec 91, cl. (b) is very wide 19 M. 151, 27 A 472.

——third person purchaser of mortgaged property applying to be made deft and plff. objecting, redemption can be claimed by the former in defence to a subsequent suit for possession by the plff 28 C. L J. 256

——a person having raiyati interest only cannot redeem 5 C. W. N. 83

——consolidation of three debts in a mortgage decree impedes the right of redemption of the mortgagors and is contray to Or 34, r. 2 C P. C. and sec. 61 T. P Act, and in the absence of specific contract to the contrary, the consolidation is illegal. 3 Pat 829: 5 Pat. L. T 646 · 1925 Pat 59

——any stipulation in the deed which is likely to nullify the right of redemption might be treated as a clog on redemption 80 I C. 728 (A), 66 I. C. 853; 35 C L. J. 468: 28 C. W. N. 79: 20

S. 91. Redemption—*contd.*

L. J. 476 : 30 M. L. T. 220 : 24 Bom. L R 695 : 44 A 185 P. C. 18 C. W. N. 586 : 36 A. 195 : 19 C. L. J. 477 : 15 M. L T 389 · 16 Bom. L. R. 344 P. C.

——a mortgage cannot be redeemed before term 80 I. C. 728. (A).

——where nothing *more* than a period is specified the onus lies on the mortgagor *to prove* that he can redeem before that period 72 I. C 931.

——partial redemption. 44 A. 708.

——right of *redemption* put off under certain circumstances 28 C W N. 79.

——the general *principle as to* redemption and foreclosure is that *in* the absence of any stipulation, express or *implied*, the right to [illegible] co-extensive and this principle [illegible] 273 (c), 5 B. 22, 8 A. 95, 29 A. 75, 28 Punj L. R. 150 : 100 I. C.

[illegible]

——where under the terms of a mortgage, if the amount was not paid at a certain *time* the right of the mortgagor to redeem would be suspended *for a further* fixed period, the provision offended against the *statutory* right of redemption conferred by s. 60 and hence was *of no effect.* 44 A. 185 : 35 C. L. J. 468 : 24 Bom L. R. 695 : 68 I. C. 853 P. C

——where the mortgagee by his own *act of* purchase of one of the *mortgaged* properties has split up the integrity of the mortgage, any person interested in the share of the mortgaged property may *redeem* that share by payment of the proportionate amount of *the balance* of the mortgage debt. 5 Pat. L T. 312 . 75 I. C. 821 : 1925 *Pat.* 31, 48 A, 171 : 24 A. L. J. 88 : 1926 All 46.

[illegible] is broken, a mortgagor who [illegible] can redeem his own part [illegible] C 866 . 20 A. L J. 258, 1925 [illegible] Bom L. R. 1443.

——where a *mortgagee* gives up or *releases* any person interested in the equity of redemption in respect of portion of the mortgaged *properties*, or where such release is caused by conduct, there ought to be *an* apportionment of the mortgage debt and the mortgagee cannot *recover* more than what falls to the share of the properties not *released* 85 I. C 742 : 1925 Cal. 1048.

——*simple* and usufructuary mortgage on the same day, tacking 65 I. C. 819 : 1922 A. 41.

——*jurisdiction* in redemption suit depends on the amount ultimately found to be due. 28 C. W. N 710.

——mortgagee in possession is bound to restore the mortgaged *property when* redemption takes place 63 I. C. 114, and liability of the *mortgage* should be determined in the redemption suit 23 Bom L. R. 979.

——when by stipulation in the mortgage deed the mortgagor is given the *option* of suing for the whole of the mortgage money *in* default of *payment* of interest annually, the mortgagee is not bound

S. 91. Redemption—*contd.*

to do so and may sue at his option after the expiry of the period fixed for redemption 63 I C. 477

——the mortgagee has perfect right to insist upon mortgagor to appoint a manager in whom the mortgagee has confidence and the mortgagee is not liable for any default or waste or mismanagement. 25 C. W. N. 265 : 28 M. L T 351 P C

——a mortgagee is not a trustee except in a very special and modified sense A mortgagee may renew a lease for himself which a trustee cannot 62 I. C 692 (c)

——where a usufructuary mortgagee commits a breach of contract by making a default in payment of rent and the holding is sold for arrears of rent and the mortgagee purchases the same, the mortgagor's right to redeem is not affected thereby 25 A. L. J 658 : 103 I C. 370, (20 B 492, 21 B 296) *Rel on*

——a purchaser of the mortgaged premises, not under a covenant to pay, who pays off incumbrances on the property, is also entitled to the benefit of the securities, the purchase may afterwards be set aside. 1922 Pat 331

——in a suit by the puisne mortgagee for redemption of prior mortgage he must prove due execution of his mortgage deed though the mortgagor admits it 96 I C 775 1926 All 725

S. 95. Charge of one of several co-mortgagors who redeems

——co-mortgagor making the payment has a charge on the mortgaged properties 11 C. L J 226 14 C W N 617

——where one of several mortgagors redeems a mortgage, the other mortgagors can bring a suit for rdemption against him 20 A L J. 611 1922 A. 410

[illegible] es assignee of [illegible] or his suit for [illegible] in the mort- [illegible] 57 *I. C* 868 :

——s. 95 applies also to a case where property is not in the hands of the mortgagee and so is incapable of being transferred to the person releasing the security 3 Pat L J 490 5 P L W 144 46 I. C. 479.

——where one of several mortgagors redeems the mortgaged property and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors for the proportionate expenses properly incurred in so redeeming and obtaining possession but he is not entitled to interest on such expenses unless he has given expenses notice thereof. 49 B 591 88 I C 658 . 1925 Bom. 484 27 Bom L. R 629.

——when one of the several mortgagors redeems the whole mortgage he acquires a charge on the share of his co-mortgagors for his proportion of the expenses properly incurred in redeeming the property and the purchaser of a portion of the mortgaged property is in the same position 21 C L. J. 104 : 21 I. C 780.

S. 95. Charge of one of several co-mortgagors who redeems *—contd.*

——*the right* to claim contribution is the same whether the mortgage is *redeemed* in the usual way or whether the debt is realised by a forced sale of the property of one of several owners *of the equity* of redemption. 21 C. L. J. 104 . 27 I. C. 780.

——the right to contribution arises when the person has paid *in excess of* his share for joint liability of all whether he has *voluntarily made* the payment or has been compelled to pay by coercive *process e. g* execution of decree. 57 I. C. 884 (C) 38 A 92 : 32 I. C. 177 : 14 A. L. J. 18.

——in the absence of an open disclaimer of the hostile title by *a co-mortgagor* against the others he cannot acquire an adverse possession *by redeeming* the whole property. *14 Bom L. R 314*: 15 I C 500.

——*the principle* of s 95 is applicable to case where part of the mortgaged property is purchased by the mortgagee. In such case the mortgagee's right to possession as mortgagee is equally determined by the tender or deposit and transferred to the redeeming mortgagor. 1923 *M. W. N.* 533 : 44 *M. L. J.* 534

——a mortgagee who has purchased some of the mortgaged properties in execution of another mortgage decree is entitled to execute the whole decree, by the sale of any of the properties; any question of contribution *that may arise must* be worked out in regular suit in presence of all necessary parties and not in execution proceedings 34 C. 13 : 4 C. L J. 573.

——a Co-Jt Dr. assignee of mortgage decree can execute it. 27 *C. L. J.* 110 : 14 *C L. J* 639.

——a purchase by a co-mortgagor of the mortgagee's interest does not entitle the other mortgagors to the apportionment of the debt 27 *C. L. J* 110.

Subrogation.

——subrogation is the right of one creditor to stand in the shoes of another and to avail himself of the latter's security. *35 I. C 647 : 14 A. L J. 953.*

[illegible] of redemption is entitled *to stand* [illegible] when he has *with his consent* [illegible] A. 502 : 35 I. C. 73? : 14 A. L [illegible]

——a mortgagee who pays off an earlier mortgage is entitled to be subrogated not only to the rights of that mortgagee, but *also* to the rights of the mortgagee who was paid off that mortgage amount 55 I. C 658 · 27 M. L. T. 92 : 1920 *M. W. N.* 143.

[illegible] money towards the charge *in* [illegible] [illegible]itled to priority over an [illegible] e discharged debt. 38 M. [illegible] 998 : 1926 *All.* 633 : 24 A. L. J. 570.

Subrogation—*contd.*

——a purchaser of land who, while in possession, pays off an encumbrance, is, when the purchase is found to be invalid, entitled to stand in the shoes of the mortgagee paid off. 9 I C. 789 1911 M. W. N. 197 : 9 M. L T. 358, 21 M 143, 31 M. 439 *fol.*

——the owner of a property mortgaged to several persons may keep alive an earlier mortgage for his own benefit by paying it off. 7 Lah 212 : 94 I C 152 . 1926 Lah. 430.

——a co-mortgagor discharging a prior mortgage has a prior charge against those who discharge a subsequent mortgage. 37 A. 101 26 I. C 417 . 13 A L. J. 34.

——where a person purchased property subject to two mortgages to his knowledge and retained a part of the consideration to [illegible] he cannot treat [illegible] aid mortgage, as [illegible] feat the ends of [illegible] 31 I. C 22

——where the money raised on a third mortgage is applied by agreement of the parties to discharge the first mortgage over the same properties for the same amount and the first mortgage deed is handed over to the third mortgagee, although no assignment is made, *the first mortgage is kept alive for the benefit of the third* mortgagee who thereby obtains priority over the second mortgagee 39 C. 527 16 C W. N 505, 15 C. L. J 411 22 M. L. J 468 · 1912 M. W. N 367 : 14 Bom L R. 280 P. C.

——the mere fact that money borrowed is spent in paying a previous charge, does not entitle the lender to the benefit of the discharged security There must be agreement between the lender and borrower to the effect, but the agreement may be presumed from the circumstances of the transaction 41 A 372 17 A. L. J. 357 . 50 I. C. 375, 35 I. C 647 14 A L. J 953, 1922 M. W. N 15 · 41 M L J. 399 1922 Mad 249

——The right of a prior mortgagee obtained by subrogation by a puisne mortgagee paying him off can be enforced by suit. 35 M L J 467 1918 M W N. 505 : 47 I. C 882

——subrogation will arise only in those cases where the party claiming to advance the money to pay a debt which, in the event of default by the debtor, he would be bound to pay or where he paid some interest to protect or where he advanced the money under an agreement, express or implied, made either with the debtor or creditor, that he would be subrogated to the rights and remedies of the creditor. 35 M 426 . 11 M L. T 174 : 15 I C 206.

S 98. (Anomalous mortgage).

——where a document containing an anomalous mortgage provided that the mortgagee was to be in possession for interest till the mortgage was discharged, the mortgagee had no right to bring the property to sale. 39 M. L. T. 614.

For what is anomalous mortgage, see s "58, cl (g)"

Ss. 100-104. Charges.

——charge *cannot* be enforced against a *bona-fide* purchaser of property for value *without notice* but a mortgagee can always follow the property. 42 C. 625: 21 C. L. J. 177, 33 C. 985: 12 C. W. N. 819, *distinction* between charge and mortgage shown 35 C. 837: 7 C. L. J 492: 12 C. W. N. 849, 33 C 985: 4 C L J. 219, 31 M. 337, 1 C. W. N. 81, 26 C 78, 32 C. 723 16 C. W N. 1075, 20 C. W. N. 989 P. C.

——a charge which does not amount to a mortgage can be *enforced* against a subsequent transferee for value without notice of the charge. The position is not affected by s. 40 22 A L J. 887 1925 All. 60.

——*the* charge of landlord for rent does not come under this sec. 22 C. W. N 131.

——*an arbitrator* for the partition of a property can create a charge upon the properties allotted to one of the parties for the payment of certain amount to the other party. 21 A. L J. 649: 96 I. C. 39: 1926 All 527.

——if attestation is necessary to create a charge. 66 I. C. 551

——it must be effectual immediately. 67 I. C 939

——where a usufructuary mortgage deed contained the provision that if the mortgagee were in any way dispossessed from the mortgaged property he will be entitled to relaise his dues from the ...

——creation of charge is a question of intention. 22 C W. N. 226

——co-mortgagor making the payment has a charge on the mortgaged properties 14 C. W. N. 617: 11 C. L J. 226

——an invalid mortgage cannot be a charge 9 C. W. N. 697, 20 C. W. N 999: 25 C. L J. 115: 18 Bom. L R. 862 P. C

——making an annuity a charge on a property if offends the rule against perpetuity. 29 C. L. J. 551: 23 C. W. N. 549.

——procedure in case there is both charge and mortgage of the same property 25 C. L. J. 354.

——the costs awarded to the mortgagee in a redemption suit is a charge on the mortgaged property and if the mortgagor plff does not deposit it within the time fixed he is not entitled to the possession of the property. 94 I. C. 872: 24 A. L. J. 424: 48 A 425: 1926 All. 424.

——the revenue paid by the mortgagee is a charge on the mortgaged property. 1 P. L. T. 225 · 57 I. C. 653.

——a Hindu widow has no charge of maintenance under this sec. 22 M L T. 336: 42 I. C 975.

——where the Hinu widow by way of compromise with the reversioner surrendered the property in favour of the latter but she was to receive certain sums annually as maintenance from the income of the property, it was a charge on the property. 16 C. W. N 99: 14 C. L J. 303: 11 I. C. 301.

Ss 100-104. Charges—*contd.*

——there is a presumption that a person intends to keep alive a security when it is for his benefit to do so. 36 C. L J 186 : 64 I. C. 266

——cases of keeping alive mortgages and charges 20 A. L J 596. 44 A. 659, 24 Bom L. R. 720 1922 Bom 211, 1922 Pat 171, 4 Pat L T 525 : 75 I C 305, 70 I C 912, 1923 M 349 : 70 I. C 296, 10 O L J 112, 73 I C. 704, 45 M L J. 693, 19 C W. N 200 : 20 I. C. 864, 16 C W N 505 : 39 C 527. 15 C L J 411 P. C

——where a new mortgage taken in supersession of the old mortgage proves invalid the mortgagee has a right to fall back on the old mortgage 39 A 178, 21 C. W. N 765. 25 C L. J 316 39 I. C 343. 15 A. L J. 223 P C., 35 A. 211. 17 C L J 555. 17 C. W N 853 P. C

——where some villages were granted by the talukdar for the maintenance of junior member and the talukdar undertook to pay the Govt revenue, held that the obligation to pay the revenue was personal and no charge was created on the estate 24 C W. N 929. 28 M L T 319 : 1920 M W N 447 P C

——where under a document executed by a person in whose favour a lady released her claim to certain property, the lady was to get an annuity from the said property to be recovered by suit if necessary, held that the annuity was made a charge on the share even though there was no specification of the property 40 I. C 865 (c).

——a mere covenant not to alienate property is insufficient to create a charge 19 I C. 478. 1913 M W N. 337

——the special provisions of T P Act relating to attestation of mortgage deeds and the method of proving them are not applicable to the deeds creating charges 1921 M W. N. 472 66 I C. 554 14 L W 99

——owner of property paying off a prior mortgage, purchase of a portion of property,—subrogation 28 C W N 1025 : 39 C L J 204 26 Bom. L. R 204 79 I C 592 P C

——where a borrower agrees to pay the lender a fixed amount as commission on the gross returns of his business in perpetuity, even after the repayment of the debt, and the lender is entitled under certain circumstance to recover his amount out of the machinery and properties belonging to the borrower, it is a charge. 28 Bom. L. R 939 1926 Bom 495.

——the procedure mentioned in s. 103 is consequent upon the deposit and not precedent to it 50 A 655 · 1928 All 311. 108 I. C. 570. 26 A. L J. 394

Distinction between mortgage and charge.

——the test to find out whether a zuripishgi is a mortgage or lease is to find out whether there is a secured debt and a right of redemption. 3 Pat. L. T. 797 : 68 I C 394.

——a mortgage does, whereas a charge does not, involve a transfer of an interest in specific immoveable property : a mortgagee

Distinction between mortgage and charge—*contd.*

can follow the mortgaged property in the hands of a transferee, whereas a charge can be enforced against transferee, only if it is shown that the has taken with notice of the charge. 33 C. 985: 4 C L J 219, 35 C 837: 12 C. W. N. 849: 7 C. L. J 492. 10 B. 519 13 B 90, 20 B. 408, F. B., 1 Pat. 387.

——where the document does not contain any word such as 'hypothecate' or 'mortgage' but prohibits transfer until payment, it is disputed whether it is a charge or a mortgage. 33 A. 201.

——where there is both charge and mortgage of the same property the procedure to be adopted is to get a decree of charge upon the property. 25 C. L J. 354 : 22 C. 813, 859, 903, *Fol.*

——co-mortgagor paying off mortgage debt, has a charge upon the share of other for his share of debt, 14 C. W. N 361.

——a stranger who pays off the mortgage stands in the shoes of mortgagee and can enforce sale of the property. 40 B 646: 15 I. C. 794: 18 Bom. L R. 700, 44 I. C. 726. 1918 Pat. 76, 10 C. 1035 P C.

——mortgage not validly executed does not create a charg 20 C W. N. 989 P. C.

——charge only secures payment out of the property whi mortgage creats an interest in the property. A person holding charge cannot follow the *bona fide* purchaser for value withou notice but a mortgagee can. 42 C. 625 : 19 C. W. N. 37 : 21 C. L. 177 27 I. C 261.

——a charge in the nature of a mortgage cannot be created b implication. 40 C. 514 : 18 I. C. 80.

——a charge not amounting to mortgage operates agains *bona-fide* purchaser without notice. 47 A. 90: 1925 All. 60, 85 I. C 855· 47 M. L. J. 622.

S. 105. Lease defined.

——prima facie all leases are governed by the T P. Act unles exempted by it. An agricultural lease is that the object of whic is agricultural or allied 1927 All 78 : 98 I. C. 92.

——the mere fact that the land was shown as a bagan in the record of rights is not sufficient to show that it was used for horticultural purposes. 31 C. W. N. 282 : 1927 Cal. 279: 100 I C. 614

——the word *raiyati* does not necessarily indicate a Jote within the meaning of the B. T. Act 31 C. W. N. 282 ; 100 I. C 614: 1927. Cal. 297.

——the T. P. Act uses the word lease not merely for interests which can be created only by registered instrument but for all interests of the character defined in this sec 54 C. 815 · 31 C. W. N. 973 . 1927 Cal 725 : 104 I. C. 484.

——in case of lease there is transfer of interest where as in case of license there is no such transfer although the licensee acquires a right to occupy the land. The stall-holder and other persons attending a *mella* for selling articles of merchants are licensees and not tenants. 35 C. 82 ; 11 C W. N. 1053, 6 C. L. J. 342 ; F. B 11

S. 105. Lease defined—*contd.*

C. W. N. 166, 7 C. L J. 152, 29 M. 152, 48 M. 368 . 86 I. C 688 48 M. L. J. 161 F B.

——there is no such thing as tenancy by sufferance in India 69 I C 504 (C)

——where a *mirasdar* permitted a person to occupy a certain [illegible] he was a licensee

23 B 397.

[illegible] grant lease does

——whether any given words import a lease or an inchoate agreement is one of construction and intention 17 C 686 P C.

——the leasehold property being destroyed the lease becomes void. 17 M. 98, 7 I C 201, 19 C W N. 1019

——a lease for an immoral object is void 9 B L. R (Ap) 37, 18 W. R 445

——possession under a void lease is that of a trespasser 25 M 507, 9 C W N 292, 27 B 505.

——a kabuliat by one on behalf of others is binding against others. 16 C. L J 271

——a patta not delivered is not operative 24 C W. N 28 n

——a registered kabulyat signed by the lessee and accepted by the lessor is sufficient to constitute a lease 39 C. 1016 · 16 C W. N 606 15 C L J. 665 14 C W. N 73 *Dist* 21 M L. J 202 F B *contra* 30 M. 322, 26 A 368, 27 A 136 The tenant may be sued at least for the use and occupation of land, 31 A 276

——a registered kabulyat executed by the lessee and accepted by the owner of the premises is not sufficient to bestow title upon [illegible] 303 78 I. C

[illegible] se will not [illegible] ts thereof [illegible] *enefit* The [illegible] aking of the [illegible] 27 A 136, [illegible] 95 F. B [illegible] is binding

——*kabulyat* which is only an undertaking by the prospective tenant to take the tenancy is not a lease When the executant of the kabuliyat never obtained possession and the tenancy never commenced, he cannot recover possession on the basis of the *Kabuliyat*. 10 C L J 555 14 C. W. N 73 · 2 I C 992

——where no lease is executed by the owner of premises a *kabuliyat* does not confer on the executant of it the right of a lessee 104 I. C 410, 46 A. 303 *fol*

——where a *kabuliyat* read as a whole is good evidence that the tenancy was raiyati and not a tenure, the mere fact that the person who executed the *kabuliyat* did not belong to the cultivating

S. 105 Lease defined—*contd.*

class is not enough to prove that he was tenure-holder. 87 I C. 903. 1923 Cal 1086.

——a *kabuliyat* recited that the tenants were to plant 1000 betel-nut-trees per *kani* of *bhiti* land appurtaining to the raiyati within 5 years and thereby reclaim the lands, held it was a raiyati and not a tenure. The mere fact that the person who executed it

prove that

position to

abuliyat 13

——where the *kabuliyat* mentions a less area the tenant cannot get reduction of rent if the area is found to be less. 1925 Cal. 426.

——whether an agreement to lease amounts to a "present demise" or not depends on the intention of the parties which is to be gathered from the language in which the agreement is couched. Although the term under a lease is to commence at a future date or a formal document is to be executed it does not necessarily follow that the agreement will not operate as a present demise of the premises 52 C 695 : 1925 Cal. 1087.

——the rights between the parties to a lease deed must be determined on a construction of the lease itself and the conduct of the parties after the lease should not be taken into account. 42 C. L. J. 520

——the court should look to the intrinsic evidence in the document itself. 1925 Cal 181.

——if no definite period is fixed, a lease for the purpose of

can be construed

52 C

sidential

——a document purporting to be a lease for a limited number of years is reqired to be properly stamped and registered 43 C. L. J. 71 . 90 I. C. 98 ; 1925 Cal. 1171.

——in the absence of express words of grant, a lessee under a *mokurari* lease is not entitled to minerals. 29 C W. N. 725 : 86 I. C. 289 27 Bom. L. R. 753 : 4 Pat. 244 : 48 M. L. J. 328 P. C.

——when a lease for a term contained a covenant for renewal but before the term expired the lessee mortgaged his interest, the mortgagee cannot demand a renewal of the term. He is not an assignee of the term and there is no privity between him and the lessor 19 I. C. 501 (c).

——a tenant can prove tenancy without proving the lease if any. 8 C W. N. 434, 1 C. W. N. 248, 6 C W. N. 916.

——when there is conflicting description of the subject matter, that which is more certain and stable and the least liable to be mistaken must prevail. 37 C. 293; when description is given by

S. 105. Lease defined—*contd*

area and boundaries, the land within the boundaries passes having regard to the intention of the parties 13 C. W N 702, if the boundaries are uncertain the specific quantities pass. 14 C. W N 268 : 37 C. 293

——where the tenants take possession under a document which clearly purports to be a lease for a term of years, but the lease is not duly stamped nor registered, the tenants are only tenants at will. 42 C L. J. 71 · 90 I. C 98 : 1925 Cal. 1171

S 106. Duration of leases.

——the question whether a case is governed by the B T. Act or by the Tr. P Act depends upon the nature of the original tenancy and not on the character of the parcels under sub-tenancy. 40 C L J 307.

——mere name of the document is immaterial The question as to what the transaction really is, must be determined on that basis 1925 Cal 370 . 82 I C. 949

——under the law before the Tr P Act, tenancies whether of homestead or of agricultural lands were not transferable in the absence of custom to the contrary or of an express contract 25 C. W N. 420, 2 C W N. 122, 4 C W N 574, 32 C 1023 9 C W N 595, 7 C L. J 107, 12 W R 495 7 B. L. R. 152, 7 B L R. 159 12 W. R 274

——before the Tr. P Act a *patta* was not necessary to create a permanent lease 14 C L J. 614

——a permanent tenancy created before the Tr P Act, for the purpose of habitation and on which no *pacca* building has been erected, cannot be transferred, when the document does not confer such right and when there is no evidence of local customs 39 C. L. J. 585.

——the fact that a portion of a holding used for residential purposes is planted with fruit-bearing trees does not alter the character of the holding, as the case is governed by the Tr P Act 25 C W. N. 378

——where by the term of the lease the lessees were to enjoy [illegible] from the trees [illegible] trees and the [illegible] any time the [illegible] lessee should [illegible]es planted by [illegible] of cultivation [illegible]e for residen- [illegible] ant trees and [illegible]to a horticul- [illegible] 520.

——a lease does not cease to be a perpetual lease, because there is a forfeiture clause. 34 C. 358

——where the lease is for 10 years from the mutwalli of a mosque with a covenant for renewal the lessee holding over must be

Notice—*contd.*

——when service is sufficient 23 C. W N. 77 : 29 C L J 117, 46 C. 458; 16 A. L. J. 969 P. C., 23 C. W. N. 319.

——in *Assam* neither B T. Act nor Tr. P. Act applies. 33 C. L. J. 299.

——tenant of *homestead* land in town is entitled to reasonable notice and not six months' notice. 23 C. W. N. 596.

——when the notice ... tenant's liability to pay damages in case ... option of paying enhanced ...

——, ... holding over on the expiration of the terms of a ten years' lease, is not entitled to a six months' notice. 23 C. W. N. 596 : 53 I. C. 180.

——in cases not governed by this Act there is no fixed period of notice and the question has to be decided according to justice, equity and good conscience, reasonable notice is sufficient. 23 C W. N. 641 : 29 C L. J 394 : 51 I. C. 415, 42 I. C 375 (C).

——notice by some of the owners determining the lease is sufficient if others have assented by conduct. 34 I C. 56 (C). *contra* Notice of some is bad 15 C W. N. 239 : 13 C. L J 225 : 9 I. C. 110.

——s 106 does not apply to a tenancy created prior to this Act. 22 C. L. J. 74 : 30 I. C. 886, 17 C. W. N 1073 : 20 I. C. 363

S. 107. Leases how to be made.

——this sec. does not apply to any leases made by or on behalf of the Crown in favour of any person. 1927 Pat. 319: 104 I C 209: 6 Pat. 446.

——after the passing of the tenancy there can be no tenancy reserving a yearly rent without a registered instrument. 53 I. C. 768 (C).

——a registered kabulyat signed by the lessee and accepted by the lessor is sufficiet to constitute a lease. 55 C. 435: 110 I. C. 368 · 1928 Cal. 392, 39 C. 1016: 16 C. W. N. 606 · 15 C. L. J. 665, 14 C. W N. 73 *Dist.* 21 M. L J. 202 F. B *contra* 30 M 322 26 A. 368; 27 A. 136. The tenant may be sued at least for the use and occupation of land 31 A 276 ... lease,

——before the ... ce of a the execution of a ... *kubulyat* was suffic... a docu-

——the letting ... of the ment only, it may ... parties. 1923 Cal. 432.

——where it is found that though a lease was executed there was no payment of consideration, nor delivery of possession and no delivery of the lease itself, the transaction was not effective 53 I. C. 210 (C).

——there is no presumption that the landlord is in a position to dominate the will of the tenant. 13 C. W. N. 167: 8 C L. J 135.

S. 105. Lease defined—*contd.*

area and boundaries, the land within the boundaries passes having regard to the intention of the parties 13 C. W N 702, if the boundaries are uncertain the specific quantities pass. 14 C W. N. 268 37 C. 293.

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——*mere name of the document is immaterial* The *question* as to what the transaction really is, must be determined on that basis 1925 Cal 370 82 I C. 949

——under the law before the Tr P Act, tenancies whether of homestead or of agricultural lands were not transferable in the absence of custom to the contrary or of an express contract. 25 C. W. N. 420, 2 C W N. 122, 4 C W N 574, 32 C 1023 9 C W N 595, 7 C L. J 107, 12 W R 495 . 7 B. L. R 152, 7 B L. R 159 · 12 W R 274

——before the Tr P Act a *patta* was not necessary to create a permanent lease 14 C L J. 614

——a permanent tenancy created before the Tr. P Act, for the purpose of habitation and on which no *pacca* building has been erected, cannot be transferred, when the document does not confer such right and when there is no evidence of local customs 39 C L J 585

——the fact that a portion of a holding used for residential purposes is planted with fruit-bearing trees does not alter the character of the holding, as the case is governed by the Tr. P. Act. 25 C W N. 378

——where by the term of the lease the lessees were to enjoy the land by erecting houses on it taking the fruits from the trees on the land and planting, if they liked, other fruit trees and the lease was to continue to the deft's heirs, but if at any time the lessor should require the land, on receipt of notice, the lessee should give up the land on receipt of the value of the trees planted by them, held that the lease was not one for the purpose of cultivation so as to attract the provisions of the B T. Act, but one for residential purposes and the mere fact of the right to plant trees and pluck fruits of trees would not by itself convert it into a horticultural lease bringing it under the B. T. Act 42 C. L. J. 520.

——a lease does not cease to be a perpetual lease, because there is a forfeiture clause. 34 C. 358

——where the lease is for 10 years from the mutwalli of a mosque with a covenant for renewal the lessee holding must be

S 106 Duration of leases—*contd.*

deemed to be holding on a monthly tenancy. 27 C. W. N. 159 : 36 C L. J 48

——on the expiration of the term of an agricultural lease the tenancy becomes a tenancy from year to year 1923 Pat. 122 : 71 I. C 1023

——reserving yearly rent does not necessarily create tenancy from year to year. 6 Pat L. T. 577 : 85 I. C. 77 : 1925 Pat. 256

——when the tenancy is regulated by the Bengali year a six months' notice calculated according to Bengali calendar is good 11 C W N 1124, 22 C L J 78, 27 C. 570 : 4 C. W. N. 210.

——presumption of yearly tenancy from the rent being paid yearly does not apply to the case of lodgings. 19 C. W. N 515 20 C L J 448, 20 C L J 455, 51 I C 44 (c), 50 I C 918, (11 C. W N. 1124) *Ref*

——a lease of immoveable property securing an annual rent will be deemed to be a lease from month to month when the contract has not been put into writing and registered. 44 C 403 : 20 C. W. N 1005 : 33 I C 899.

——when the land is let for other than agricultural or manufacturing purposes without a written lease, the tenant is only a monthly tenant although the rent is payable annually. 11 C. W. N. 1124 20 C. W. N 1005, 19 C. W. N. 525 : 20 C. L. J. 443 - 24 I C. 183, 30 C 883.

——a lease for *bashabari* is a lease for month to month. 13 C W N. 513 9 C. L. J. 362, so also a lease held over. 32 C. 125 : 8 C. W N 901, 19 C. W. N 489 : 20 C. L. J 455.

——a lease where no time is fixed is ordinarily deemed to be one from year to year. 30 C 20

——where the lessee of a house agrees to vacate the same whenever wanted s 106 cannot be made applicable and no notice to quit is necessary 1924 All 726, 110 I. C. 393 : 1928 Mad. 697, 1924 All. 726 *fol* 9 M. L T. 198 *approved*, 2 M. 316 *dist*. 34 C. 57 *consd*.

——where a lease reserved a yearly rent which was payable according to monthly instalments and the tenant held over for a considerable number of years, the tenancy could be presumed to be a yearly tenancy. 23 C. W N. 641 : 29 C. L. J. 394 . 51 I C 415

——where a tenant took a lease for 10 years from the matwali of a mosque with a covenant for renewal and it was found that the covenant for renewal was beyond the power of the trustees, the lessee holding over must be deemed to be holding on a monthly tenancy 27 C W N. 159 : 36 C. L. J. 48 : 1925 Cal 130.

——burden of proof lies on the person who claims permanent right 12 W. R 6 P C 4 C. W. N. 119 n., but it may be shifted by long possession. 6 C W. N. 105, 11 C. L R. 476, 20 W. R. 421, 3 C. W N 763

——a grant of land for building purposes is presumed to be perpetual 27 C. 570 23 W. R. 399, 32 C. 648, 21 A. 496 P C 29 C 804 12 W R. 495, 3 C W. N. 255 6 C. W. N. 131, 21 A. 496 P. C.

S. 106. Duration of leases—*contd.*

for upward 60 years, is by permanency 15 B 647, 25 om time to time and erection V. N 846, 28 C 738, 8 C. W.

——in order that the presumption of permanency may be drawn e tenancy is unknown and built without objection C. W N 567 15 C L J.

For other cases, see "*Permanent Tenancy*"

Notice.

——a notice must be reasonable 17 C. W. N. 1023.

——fifteen days' notice means 15 clear days 28 C 118 8 C L. J. 34 10 C. W. N. 841 29 C 203 . 5 C W N 69 · 20 C L J. 455

——the notice to quit must end on the day of the tenancy 27 C. 570 4 C W N 210 24 C. 720

——in case of monthly tenancy a notice to quit on the last day of the tenancy is a valid notice. 27 Bom L R 102 : 1925 Bom 167 : 22 B. 241 *Fol.*

——a notice is valid if it is signed by the Ammukhtear of the landlord 19 C W. N. 489 20 C L J 455 26 I C 962

——addressee may be described as a trespasser 7 C L J 107

——notice may be served by post 15 C. 681 · 4 C W. N. 572, 28 C 118, 6 C W N 132

——if the notice is refused, ignorance of its contents cannot be pleaded. 17 C W N 1073, 6 C W N 132, 15 C 681.

——the presumption that a notice sent by post was duly served is not conclusive 7 C L J 251.

——in the absence of contract or local usage the lessee may transfer his interest and the transferee is entitled to notice 5 C. L. J. 205.

——where in a case of joint tenants there is a tender or delivery of the notice to quit to the heads of their respective families the service is sufficient. 37 C L J 478 . 1923 Cal 682

——when there were several joint tenants and no notice to quit not bound by must be addres- in s 106 (t).

— days of ... excluded and the day of delivery of notice is inc

— N 489 . 20 C. L. ...

——reasonable notice, what is 8 C W N. 774 F. B , 17 C. W N. 1073, 33 C L. J. 299.

——s 106 is not complied with unless there is tender or delivery. 23 C. W. N. 80n

——fifteen days means clear fifteen days. 19 C. W. N. 489

Notice—*contd.*

——when service is sufficient 23 C. W. N. 77 : 29 C. L. J 117 46 C 458 · 16 A L. J 969 P. C., 23 C. W. N 319.

——in Assam neither B. T. Act nor Tr. P. Act applies. 33 C L. J 299.

——tenant of homestead land in town is entitled to reasonable notice and not six months' notice 23 C. W. N. 596.

——when the notice announces tenant's liability to pay damages in case of non-compliance with the notice, no option of paying enhanced rent is given 1925 All. 199, 78 I. C. 651.

——a tenant of homestead land within a town holding over on the expiration of the terms of a ten years' lease, is not entitled to a six months' notice 23 C. W. N. 596 : 52 I. C. 180.

——in cases not governed by this Act there is no fixed period of notice and the question has to be decided according to justice, equity and good conscience, reasonable notice is sufficient 23 C W. N 641 . 29 C L. J 394 : 51 I C. 415, 42 I C 375 (C).

——notice by some of the owners determining the lease is sufficient if others have assented by conduct 34 I. C. 56 (C) *contra* Notice of some is bad. 15 C. W. N 239 : 13 C. L J. 228 : 9 I C 110

——s. 106 does not apply to a tenancy created prior to this Act. 22 C L J. 74 30 I C. 886, 17 C. W. N. 1073 : 20 I. C. 363

S 107 Leases how to be made.

——this sec does not apply to any leases made by or on behalf of the Crown in favour of any person. 1927 Pat. 319 : 101 I C 209. 6 Pat 446.

——after the passing of the tenancy there can be no tenancy reserving a yearly rent without a registered instrument. 59 I. C. 768 (C)

——a registered kabulyat signed by the lessee and accepted by the lessor is sufficiet to constitute a lease. 55 C. 435 . 110 I. C 368 1928 Cal. 392, 39 C. 1016 : 16 C. W. N. 606 : 15 C L. J. 665 14 C. W N 73 *Dist.* 21 M L J. 202 F. B *contra.* 30 M. 322 26 A 368 : 27 A. 136 The tenant may be sued at least for the use and occupation of land. 31 A. 276.

——before the T. P. Act, for the execution of a permanent lease, the execution of a *patta* was not necessary, the acceptance of a *kabulyat* was sufficient 14 C. L. J. 614 : 10 I. C. 489

——the letting out of agricultural land need not be by a document only, it may be by *oral agreement* or even by conduct of the parties. 1923 Cal. 432.

——where it is found that though a lease was executed there was no payment of consideration, nor delivery of possession and no delivery of the lease itself, the transaction was not effective 33 I C 210 (C)

——there is no presumption that the landlord is in a position to dominate the will of the tenant. 33 C. W. N. 167 : 8 C L. J.

S. 107. Leases how to be made—*contd.*

——where the tenants take possession under a document purporting to be a lease which is neither duly stamped nor registered the tenants are only tenants at will. 42 C L. J. 71 : 90 I. C. 98 : *1925 Cal 1171.*

——a tenancy may be created impliedly by act of parties without any registered document when the term does not exceed one year. 6 P L T. 12: 1925 Pat. 216 84 I. C. 586

——thoug a Hindu *Sambat* year is more than one year according to the British Calendar, a lease for one *Sambat* year is not required to be registered. 1914 Nag. 216

——when in pursuance of an agreement to transfer property the intended transferee has taken possession though the requisite document has not been executed and registered the transfer is valid provided specific performance can be obtained 27 C. W. N 159 36 C L J. 48, 1923 Cal. 130

——there can be verbal creation of a tenancy at will and oral evidence is admissible in proof of leases other than those coming under the first part, of s 107 44 C. 214 21 C W N 206. 27 C L. J 198 · 37 I. C 956.

——in India a lease can be created by a registered deed only without delivery of possession and the lessee being out of possession can sue for mesne profits. The English Common Law practice that a lessee is not regarded as tenant unless he is actually put into possession and so he cannot, unless put into possession, maintain a suit for infringement of his right based on actual possession applies only to leases for term of years 96 I. C 558 1926 Pat 508.

——a tenancy for one year coupled with an agreement to renew it from year to year cannot be created except by a registered instrument, 19 C W N 489 20 C. L J. 455: 26 I C 962

——a verbal lease for more than one year is valid for one year if it is accompanied by delivery of possession. 20 I C 715

——the position of lessee under an unregistered lease for 15 years who continued in occupation upon payment of rent is no better than that of a lessee for one year who held over at the end of the year. 17 C. L. J 167 18 I. C. 844

——successive leases under oral leases for one year each to a person already in possession are quite different from leases from year to year, as the former are terminable without notice and are not registrable, while the latter are terminable only by 6 months' notice and are required to be registered 18 C W N. 858: 23 I. C. 318.

——an oral agreement to lease which contemplates specifically the formal execution of a deed can be specifically enforced and this sec is no bar. 45 C L J 32. 1927 Cal 275. 100 I C. 404.

S. 108. Rights and liabilities of lessor and lessee.

——this sec. deals with the ordinary rights of a lessee under an ordinary lease and cannot be held to cut down the right to work a mineral expressly conveyed 29 C. W. N. 725: 27 Bom. L R. 753: 86 I C 712: 48 M. L. J. 328. 4 Pat. 244 P. C.

S 108 Rights and liabilities of lessor and lessee—*contd.*

——the obligation of the lessor to deliver possession to the lessee is absolute 25 M 587.

——when the lessee is to get rent, giving of notice to the tenants by the lessor requiring them to attorn and pay rents to the lessee is sufficient delivery. 33 M. 102

——where the lessor is reluctant to take possession he is liable to pay rent to the lessor. 33 M 499.

——the landlord is not bound to put the recalcitrant tenant into possession before suing for rent 9 C. L. J. 595.

——when the trespasser acts under the instruction of landlord the latter is not entitled to get rent. 25 I. C. 812.

——the lessor cannot during the pendency of the lease, let the demised property to a tenant 2 P. L. J. 713.

——on the termination of a tenancy the right of the landlord to re-enter accruing, the landlord is entitled not only to take possession of the land but also of the standing crops on it. 11 C. L J. 87.

——the landlord is entitled to special damages where a tenant holds over, either for breach of contract to yield possession or for possession 50 C 667

——no clause in s 108 entitles the lessee to call upon the lessor to repair the property 38 C. L J 177 : 72 I. C. 98 : 1923 Cal 524

——on a breach of quiet enjoyment the lessee is entitled to recover damages 21 B. 175

——s 108 cl (c) of the T. P. Act secures for the lessee the benefit of an unqualified covenant for quiet enjoyment. 36 C. L J. 28

——suspension of rent only follows eviction. 9 C. W N. 871.

——where a lessee holding over without the consent of the landlord is dispossessed by a person claiming under landlord he cannot sue for declaration of title based on previous possession 4 Pat L T 696

——where a tenant holds over on payment of rent he must be deemed to be a tenant from year to year or month to month according to the object for which the property was leased. 38 C. L. J 177, 1923 Pat 54

——where the tenant holds over, the landlord is entitled to special damages either for breach of contract to yield possession or for possession 83 I. C 757 : 1924 Cal. 240 : 50 C. 667.

——when the lessee is evicted from land by the lessor the latter is not entitled to rent 24 C. 296, 304, 28 C. 388, 9 C. L. J. 578 : 13 C. W N 853 but it does not extend to eviction by stranger. 11 C L J 585 or the Government. 33 C W. N. 106 : 43 C. L. J 252 : 1929 Cal 272, nor to eviction by another lessee. 34 C. 191

——there will be suspension of rent when it is unascertained or disputed. 27 M. 143 P C.

——the lessee is entitled to abatement of rent for decrease in area. 21 C. 1005, 1016 P. C., 12 C. W. N. 767.

——if the tenant has encroached upon dry land and made it part of his tenancy, he is bound to give up those lands at the determination of the lease. 42 C. L J. 276 : 1925 Cal. 1114.

S. 108. Rights and liabilities of lessor and lessee—*contd.*

——this Act imposes no obligation on the landlord to repair, rather it imposes a qualified obligation on the tenant by s 108 (m) to repair 51 B. 274 : 1927 Bom. 115 . 101 I. C. 210 · 29 Bom L. R. 78

——a lessor is not bound to make structural repairs during the continuance of the lease, either by any law or equity. The lessee can avoid the lease but cannot claim any damages 2 C W. N 34

——expenses of repairs are in the nature of payment to landlord. 12 C. L. J 351 · 6 I. C 131

——lessee can deduct from rent, expenses of only those repairs which the landlord was bound to execute 3 A L J. 134 · A. W. N (1906) 56.

[illegible] buildings [illegible] erected [illegible] C 86

[illegible] do not [illegible] R. 595,

[illegible] cted on [illegible] M. 211. [illegible] 38 B.

——the tenant is to pay or tender rent at the proper time and [illegible] 530

[illegible] the law on the subject as [illegible] prudence 37 C 815 12

——a lessee may transfer 5 C. L J 205, 30 M 410.

——but a lessor is not bound to recognise lessee's transferee. 1925 Cal 423.

——a lease for a definite term for general purposes is heritable and when the conduct of the parties shows it to be transferable, it must be treated as such 19 C. L. J. 448 25 I. C 530, 6 W. R 48 P C *Ref*

——leases from year to year before the Tr. P Act are not transferable 20 C W. N. 322, 4 C W N 574, 2 C. W N 122, 32 C. 10, 23 9 C. W N. 895, 7 C L J 106

——but the liability of the lessee does not cease. 22 C 494, 12 C. W. N 724, mortgagees with possession from lessees are not liable for rent 32 M. L. J. 442 40 M 1211, the transferee is not liable for

S. 108. Rights and liabilities of lessor and lessee—*contd.*

rent but the leased property is liable. 4 C. W. N. 590, 14 C. W. N. 331 : 32 C. 683, 31 B. 159.

——permanent leases for purposes of habitation created before the passing of the T. P. Act are not transferable 29 C. W. N. 428 : 84 I. C 28 : 1924 Cal. 1012 : 39 C. L J. 585.

——where a lessee assigns his lease his own liability to pay rent is not extinguished. The lessor has a remedy for realising rent both against the lessee and against the assignee but he cannot take out one execution, but this principle does not apply to agricultural lands or to the B. T. Act, 79 I. C 557 (c).

——a lessee by assignment does not escape personal liability on the covenant of the lease. 88 I. C. 79 : 27 Bom L. R 553 : 1925. Bom. 330.

——s 108 clearly contemplates that a lessee should not be responsible for the consequences of fire unless he has taken such responsibility by his covenant. 51 M. 994 : 1928 Mad. 1140 : 55 M. L J. 663

S. 109. Rights of lessor's transferee.

——a lessor cannot eject the lessee from a part only of the holding but an assignee of the reversion in part of the demised premises is entitled to eject the lessee for due cause from such part on payment of the value of the improvements on that part 42 M 603 : 1919 M. W. N. 401 : 51 I. C. 286 F. B

——the words 'transferee of any interest" in this sec. include lessee. 53 I. C. 865.

——when a landlord sues a person as trespasser and the latter [illegible] he must prove the tenancy and [illegible] Tenancy of homestead land created [illegible] Pat. L. J. 253 : 20 [illegible] The only exception [illegible] quiescence of land- [illegible] L. J. 253

S. 110. Exclusion of day on which term commences

——unless otherwise provided in the lease, a lease takes effect from the date of its execution. 22 C. W. N. 190 : 50 I C 177.

S 111. Determination of lease

Cl (d) Merger.

——cl (d) applies only to a case where the interests of the *lessee* and the lessor in the whole of property become vested at *the same* time in one person in the same right. 6 P. L T. 805 : 83 I. C. 495 : 1925 Pat. 530, 1928 Pat. 273 : 107 I. C 819

——apart from status a tenure does not *necessarily merge* in the proprietory right upon the union of the two *interests* Under s. 111 cl (d) there must be a union of the entire *interest of the* lessor and the lessee 1922 Cal. 284 : 65 I. C. 469. 18 C. W. N 560, 29 C. L J. 427 *Ref.*

Cl. (d) Merger—*contd.*

——this sec. does not say anything about intention and when an owner of property purchases subsequently certain lease-hold rights the latter are merged in his ownership. 89 I. C. 780 · 1925. Nag. 406.

——this sec. applies to leases created prior to the passing of this Act, when the superior and lease-hold interests vest in the same person subsequent to the Act. 23 I C 612 (c).

S. 111 Cls (e) & (f) Surrender.

——an implied condition of surrender of a lease by operation of law is that a new lease should be a vaild one ; where the new lease [illegible] the contract the acceptance [illegible] f the former lease 71 I C. [illegible]

[illegible] lease, under-leases or other interests created by the lessee are not extinguished as is the case when the lease is forfeited 21 C. W. N 117 : 24 C L J. 40 34 I. C 833

——no writing is necessary to surrender a tenancy, unless the original lease is registered in which case registered surrender is necessary. 63 I C 483 (c), 53 I C 17 (c).

——surrender for the consideration of arrears of rent is valid. 53 I C. 17 (c).

Cl. (g) Forfeiture.

——usufructuary mortgage of non-transferable occupancy holding with delivery of possession does not *per se* amount to forfeiture. 40 C. 870, (20 C 590, 33 C. 1219, 13 C W. N 590) *Ref*

——by virtue of s 117 this sec does not apply to non-agricultural leases 50 B. 450 : 1926 Bom 304 94 I C. 1054, 28 Bom. L. R 527.

——mere non-payment of rent is not forfeiture To constitute forfeiture denial of landlord's title must be unequivocal and unambiguous 35 A 145, 9 C W N. 928 2 C. L J 389

——denial must be in clear and unmistakeable terms, when a tenant disputes the terms of the tenancy, setting up terms more favourable to himself, but does not deny the title of the landlord, there is no forfeiture 23 C W N 889, P C, 20 B 354, F B, 17 M 218, 27 M 23

——a permanent tenure is liable to forfeiture on the ground of disclaimer of landlord's title, to constitute a disclaimer it must be renunciation by a party of his character as tenant by setting up title in third person or by claiming title in himself. 26 C L J 261

——when the *gomosta* of a landlord sues for rent saying that he is a jotedar and the deft is an under-raiyat, and the deft denies the plff's title saying that he is direct tenant under the landlord and the suit is dismissed, plff's subsequent suit for ejectment without notice is not maintainable as the deft. does not deny tenancy though claiming on a higher basis. 18 C W N. 140n.

——neither parting with possession of a portion of a holding, nor denying the title of the person under whom a non-occupancy

Cl. (g) forfeiture—contd.

raiyat holds is one of the grounds of forfeiture under s 44 B. T. Act. 1 C. W. N. 158.

——denial of pltf.'s title in the written statement does not operate as forfeiture. 9 C. W. N. 928 : 2 C. L. J. 389.

——there is no disclaimer of the relationship of landlord and tenant, where in a suit for rent, the tenant merely puts the landlord to the proof of his alleged title 9 C. W. N. 928 ; 2 C. L. J. 389, 32 C W. N

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lessor ... the part of the
I C. 1 ... 47 A 349 : 85

not ... landlord does
... cution of a kobulyat

... it setting up title in
... stitute forfeiture. 32

... title is given
... landlord is
... W. N. 339.

——it is only in case of tenant being inducted on the land by a landlord that the tenant cannot deny the title of the landlord at the inception of the tenancy. But where the pltf becomes the landlord by derivative title the tenant may without incurring any ... the proof of his title. Courts
... ground of
... have been

... tinst party

... between a condition of forfeiture and a clause of nullity has not been recognised in this Act which is supposed to have given effect to the existing law in the country. 1 Pat. 363 · 1922 Pat 528.

Cl. (h). Notice to quit.

——notice to quit before the end of the year of the tenancy is bad. 29 C 203 ; 6 C. W. N. 69.

——where the lease was not determined by a notice to quit a tenant who took his right under the decree was given by the H. C. 3 months' time to remove the buildings erected by him. 19 C. W. N 361 ; 23 I. C 762.

S. 112 Waiver of forfeiture.

... after forfeiture from the lessee with
1923 Cal 663
... of condition against

S. 112. Waiver of forfeiture—*contd.*

——claim of rent subsequent to the default in payment which gave rise to the cause of action for ejectment operates as waiver of the right to eject. 42 I C 614 (c).

——acceptance of rent accruing due before forfeiture does not operate as waiver. 22 C. L. J. 546 : 33 I C 331.

——subsequent recognition may *estop the landlord* 17 B 736 as well as the tenant, 13 M. L. J 429, and there may be estoppel by acquiescence. 28 C. 738, 21 A 496 P C, 7 C. W N. 130, 16 W R. 97, 6 B L. R 92, 6 C. W N 134

——whether the acceptance of an overdue instalment operates as waiver of the delay in payment is to be determined on the circumstances of each case. 23 I. C 391

S. 113. Waiver of notice to quit.

——where rent is accepted after the notice to quit whether before or after a suit has been instituted, the landlord thereby shows an intention to treat the lease as subsisting 43 C L. J. 272 94 I. C. 156 : 1926 Cal. 763.

——the doctrine of waiver of notice to quit does not apply where the landlord treats the tenant as a tenant from year to year and the tenant asserts a permanent tenancy 8 Pat. L. T. 633 1927 Pat 305 102 I. C. 821 1925 Pat 357 . 6 Pat. L. T 98 *Ref*

S. 114. Relief against forfeiture for non-payment of rent.

——relief against forfeiture should be given where rent is not paid owing to dispute as to the plff s share when the lease was held by the lessees on behalf of the joint family and the plff. being one of its members purchased the landlord's right 85 I. C 964 . 1925 Mad 919

S. 115 Effect of surrender and forfeiture on under-leases.

——a mere repudation of the lessor's title by the lessee will not operate as forfeiture against the assignee of the lessee's interest, 42 B. 734 20 Bom L R 830 47 I C 635

——an implied surrender is more analogous to the case of a forfeiture than to the case of a surrender and therefore extinguishes the rights of person deriving the title through the tenants 14 N. L R 107 : 46 I. C. 244

S. 116. Effect of holdingover

——this sec is self contained 49 I C 974 (c)

——"an agreement to the contrary" within this sec means an agreement as to terms of the holding over 19 C W N 489 20 C. L J 455 · 26 I. C 962

——on the expiration of the term of an agricultural lease the tenancy becomes a tenancy from year to year 1923 Pat 122 71 I. C. 1023.

——when the lease expires and the deft sets up new holding over, he must prove that. 24 C. W. N 103 n

S. 116 Effect of holding-over—*contd.*

——a lessee holding after the expiry of the term is, without the *express* or implied consent of the landlord, only a trespasser. 6 Pat. L. T. 142, 4 Pat L. T 696

——a tenant on sufferance is a person who entered by a lawful *demise or title*, and after that has ceased, wrongfully continues in *possession* without the consent or dissent of the person next entitled 1927 Pat 305: 102 I. C. 821 : 8 Pat L. T. 633.

——this sec has no reference to the position of the heirs or

from the lessee or under-lessee or otherwise assents to his continuing in possession, the lease is in the absence of an agreement to the contrary renewed from year to year or for month to month according to the purposes for which the property is leased 88 I. C 387: 6 P L. T. 98: 1905 Pat. 357 affirmed by the P C in 7 Pat. 619: 109 I C 663: 30 Bom L. R. 1361: 32 C. W. N. 897: 48 C. L. J. 69: 1928 P. C. 146

——the intention of this section is that the lessee holding over with the landlord's mere consent has still a lease but only from mont

who

or ass

mere consent to convert such representative into a monthly . Such a person, in the absence of agreement, is a trespasser, but where the original tenant holds over with the consent of the landlord his interest is assignable. 54 C. 813. 31 C W. N 973: 104 I C. 434: 1927 Cal. 725

——assent to hold over is not itself sufficient to create yearly tenancy. 84 I. C. 586: 4 Pat. 139: 6 Pat. L. T. 12.

——the option of giving an assent which will convert the *holding* over into a tenancy is one that is conferred on the *lessor* and not on the lessee 48 B. 341 : 80 I. C. 507, 31 M. 163, *Ref* 94 I. C. 308: 1926 M. W. N. 236. 1926 Mad. 565.

——where a tenant holds over after the expiry of the lease on paym ... tenant from year to year

38 C.

C. L.

——when after the expiry of a lease the lessee holds ... must be considered to hold on the terms stipulated in the lease. 97 I. C. 412 : 1926 Cal. 1239.

... original area was

he ... the lease

it ... ed to quit

on ... : 1927 Cal.

279 : 47 C. L. J. 27.

See other cases under the heading "holding over" B. T. Act.

S. 117. Exemption of leases for agricultural purposes

——a liberal interpretation should be given to the words of this sec., 4 Pat 404 : 6 Pat L. T 331 . 86 I C 597 1925 Pat 421

——a lease of land for growing *casuarina* trees to be used as fuel is a lease for agricultural purposes within s. 117. 45 M. 710 43 M. L. J 191 1922 Mad 351 : 70 I C 657, 24 M. 421, 13 C L. J 318 *Ref.*

——a lease of tank for preservation or rearing of fish, is not an agricultural lease. 8 C. W N 804

——in the case of a lease of zerait lands as well as lands settled with raiyats where the lease contemplates direct cultivation of the former by the tenants the lease is for agricultural purpose 6 Pat L. T 331 · 4 Pat. 404 : 86 I. C 597 1925 Pat. 421

——the letting out of agricultural land need not be by a document only, it may be by oral agreement or conduct of parties. 69 I C 57, 1923 Cal 432 (c)

——unless the primary object of the lease is cultivation or [illegible] r agricultural purposes. [illegible] [. C. 1048 [illegible] of money rent is not [illegible]

——the general rights between the lessor and lessee as laid down in English Law govern cases not falling within this Act unless the B T Act contains anything to the contrary. 53 I C. 545.

Ss. 118-121 Exchange

——an exchange implies an interchange of property with another and except in so far as the price may not be payable in money, the rights and obligation attaching to an exchange are analogous to those of sale, so far as the parties are concerned. 46 A 359 · 76 I C 495 · 22 A L J 292 : 1924 All 390.

——where some of the co-owners possessing an undivided share in several properties took by arrangement a specific property in lieu [illegible] xchange within [illegible] artition which [illegible] 25 C 210 [illegible] 923 Lah. 456 : [illegible]

——the special provisions of sec 119 do not exclude the operation of sec 43 and hence for s 43 an exchange stands on the same footing as a sale 33 C L J 184 60 I C 819.

——where a house worth Rs. 1500 is exchanged for land worth Rs 500 as well as cash Rs 500 the transaction is exchange and not sale 86 I C. 266 1925 Lah 326 7 Lah L J 18.

——in case of Hindu joint family if any property is alloted to the share of a stranger a registered instrument is required 90 I. C. 131 1925 Mad 1174 : 49 M. L J 150

——the grant of an easement is not a transfer of ownership, consequently where a small strip of land below Rs 100 in value was given in exchange for a grant of an easement right, no registered document was necessary 1926 Mad. 548 · 92 I. C 672

Ss 118-121. Exchange—contd

——where pltf has parted with the possession of land on the representation of the deft. that he would give other land in exchange but the former actually received no land or consideration, he is entitled to sue for a declaration of title and possession his remedy is not by suit to enforce specific performance of the alleged agreement 20 C. W. N 657 : 33 I C. 762.

Ss 122-129. Gifts.

——gift of shares in company can be made only by entry in the books of the company 48 C. 956 : 66 I. C. 568

——attesting witness must see the actual execution 1922 P 514, 66 I C 383, 2 Pat. 52, 35 M 607, 45 C. 748, 35 C. L. J 473.

——under the Hindu Law delivery of possession is not necessary to the validity of a gift 1922 A. 44 : 66 I C. 480 · 20 A L. J 741; 45 A 115, 27 A 169, 25 A 353, 14 C 446, 31 C. 853, 24 M 513, 313, 287, 16 A 185

——gift in lieu of dower if registration is required 64 I C. 126

——s 123 does not purport to legislate that the registration of a deed of gift of an immoveable property is sufficient transfer of the property This sec follows s. 122 which lays down the requisite essentials of a complete gift. 5 Pat. L T. 305 : 3 Pat 842 : 1924 Pat 657 · 80 I. C 950.

——when a deed of gift of immoveable property has been duly executed and attested by the donor and accepted by the donee it cannot be revoked by the donor though the deed may not have actually been registered at the time. 50 M. 193 · 1927 M W. N 149 : 31 C W. N 509 45 C. L. J. 435 : 100 I C. 105 : 8 Pat L T. 527 : 29 Bom L. R 833 1927 P C 42 · 25 A. L. J. 113 P. C, 52 B 313 · 32 C. W. N. 708 30 Bom L. R. 827 : 1928 P. C. 86 : 108 I C. 367 : 47 C. L J 500 26 A L J. 598 . 1928 P. C. 86, 49 B. 388 : 27 Bom. L R. 290 87 I C 490 1925 Bom. 210 F. B., 48 B. 435 : 1924 Bom 431 overruled, 73 I C. 206 , 1923 Mad. 282.

——a deed of gift is more than a mere contract as it is a conveyance. Where there was only a qualified transfer, the legal representatives of the donor can avoid the gift by exercising a power which the donor could have exercised. 47 A 619 : 88 I. C. 411 , 23 A. L J 376

——where in pursuance of an ante-nuptial agreement a father made a gift of his house to his wife and put her in possession and no registered deed was executed and subsequently he sued for the recovery of the house, held that the contract was valid and for consideration and the claim could be resisted on the principle of part performance 52 C. 425 : 29 C. W. N. 889, : 1925 Cal 556 : 85 I C 799

——when husband makes a gift in favour of his wife by a registered deed all that is required in such a case is an unequivocal intention to make a gift and the gift is complete though they live in the house after the gift as before. 1928 Lah. 3 : 111 I. C. 231

——under this sec. a gift of moveables may be made by doing anything which has the effect of putting them in the possession of

Ss. 122-129. Gifts—*contd*

the donee or of any person authorised to hold them on his behalf 67 I C 451

——releasing a security without any consideration though may be said to be a gift it does not come under Chap VII, of the T. P. Act which deals only with gifts of tangible property. 42 C. L. J. 582 · 1926 Cal 170

——a gift of a house can be made only by registered document 28 Bom. L. R 421 1926 Bom 261 94 I C 609

he local area to which
of Mahamedan Law as
which the Legislature
unaffected by the Act
6 25 A L. J. 69 · 29
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Ss. 130-137. Transfer of actionable claim

——in the absence of a valid notice of assignment under s 131
im is not main-
in s 130 there
s. 131. 41 C

Act. may be
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in action in equity no particular form is necessary An assignment of chose in action, must be made by writing under the Indian Law, signed by either the transferor or his duly authorised agent, but no particular words are necessary An order for payment of money is not the same thing as an assignment of the debt but a direction in writing to pay the amount due on an instrument endorsed on such instruments by the payee, coupled with delivery of the instru-
ment is directed is a
89 I. C 735
the property to the
C W N. 850 51 M
A. L J 1211 · 1928

——in construing ss. 130 and 131 it must be remembered that they contain a very special scheme which must be regarded as a whole in itself. 41 C L J 176 : 1923 Cal 719 27 C W N 733

——where the assignment of the debt consists merely of a letter from assignor to the assignee and another letter from the assignor to the debtor intended to be notice under s 130 and where *the letter of assignment not proved to be stamped is lost*, no secondary evidence can be given of the transfer. 87 I C. 352 1925 Mad. 753 : 1925 M. W. N 180, 29 M 49 **P. C.** *Ref*

Ss. 130-137. Transfer of actionable claim—*contd.*

——where a certain person executes a mortgage in favour of another and the latter person transfers the same to another person with the consent of the mortgagor but the instrument of transfer is not attested properly to constitute it a fresh mortgage, the instrument could be treated as a transfer of the earlier mortgage 31 C. W. N. 179 : 1926 M. W. N. 828 ; 1926 P. C. 129

——s 130 is not exhaustive, prescribing only certain condition for the assignment. 90 I. C. 111.

——the transfer of right to arrears of rent and current dues can be made only by an instrument in writing under this sec 67 I C. 451.

——a promissory note can be transferred by an assignment in writing in places where this Act has been extended but it would not render the transferee a "holder in due course." 66 I. C. 501

——sale of immoveable property out of possession is not actionable claim 13 C. 297.

——the benefit of an executory contract is actionable claim 11 C. W. N. 566.

——the mere right to recover mesne profits or damages for breach of contract, is not transferable. 13 C. W. N. 384 : 36 C. 345. 2 C W. N. 42 : 18 C. W. N. 450, but when the claim merges in judgment, it can be transferred before assessment. 18 C. W. N. 450

——the transfer of a right to arrears of rent and current dues can only be made by an instrument in writing. 1923 P. 165.

——the right to arrears of rent purchased by a pleader is an actionable claim. 17 C. W. N. 679 : 17 C. L. J. 438 : 40 C. 650 F B.

——the mere sale of arrears of rent by a legal practitioner is not invalid. 97 I. C. 373 : 1927 Pat. 2 : 8 Pat. L T. 201.

——a decree is not an actionable claim and hence the transfer of it in favour of a pleader is not invalid. 62 I C. 255 : 40 M. L J. 129 : 1921 M. W. N. 98

——s. 136 is controlled by sec. 2 sub. cl. (d) and therefore a purchase in execution of a claim under a life insurance policy by a legal practitioner entitles him to claim the sum from the Insurance Company. 46 C L. J. 225 : 1927 cal. 691 ; 104 I. C. 729, 28 C 744 *Expl.*

——a mukhtear who purchases from an Honarary Magistrate the right to arrear of rent is barred by s. 136 from enforcing his claim in court 4 Pat. 43 ; 83 I. C. 81 : 1925 Pat. 310.

——a pleader is guilty of unprofessional conduct for purchasing actionable claim specially when it is speculative 37 M. 238 : 23 M. L. J. 447 : 17 I. C 544

——in the case of an assignment of the decree debt, the assignment is not valid as against the debtor until the debtor has in fact notice of the assignment and any payment to the original decree-holder is valid against the assignee if made before notice of assignment 2 Pat. 754.

Ss. 130-137. Transfer of actionable claim—*contd*

——under the Contract Act, s. 108 and this Act, s. 137 there is now a statutory recognition of a delivery-order as a document of title and under it the transferee acquires a title to goods. 38 C. 127 . 10 I. C. 859.

TREES *See* "*B. T. Act. s 28*"

USE AND OCCUPATION *see* "*B T. Act. rent and rent suit*"

VALUATION *see*, "*Jurisdiction*"

USURIOUS LOANS ACT (X OF 1918.).

S 2.

——the Act does not apply to mortgage deeds executed before the commencement of the Act. 1927 Nag 338 : 104 I C 191.

S. 3.

——in order to bring the case within the statute it must be proved that the settled rate of interest is unusual and therefore excessive. The stipulation to pay interest at 12 p c p a. is not unusual or excessive. 1927 Lah. 158 ; 8 Lah 205 99 I. C 822 : 28 Punj L. R. 483, 1927 Lah. 621 . 103 I C 531

——[illegible]

which the accounts have remained outstanding. 1927 Lah 621. 103 I. C 531,

——a contract to pay interest at the end of the year and in the [illegible] nnot [illegible] not [illegible] 05 [illegible] but [illegible] sec.

——where the rate of interest is high the Court may proceed to give relief under s 3 (1) (a) (b) and proviso to cl. (d). It is unnecessary in such a case to consider whether the lender was in a position to dominate the will of the borrower. 107 I. C 742 (c), 1928 Oudh. 396 F. B.

——stipulation to pay interest of 12 p c. with yearly rests is not unfair if there is no evidence that the rate of interest prevailing at the time was lower 33 C W. N. 388

VOID AND VOIDABLE

——where a deed is void it need not be set aside 17 C L J 233.

——a deft. can by his defence avoid a transfer which is voidable only under s. 53 T. P. Act. 16 C. W N. 717 : 15 C. L. J. 649 : 14 I. C. 715

WAIVER.

——what is waiver, 19 C W. N 1172, 23 C. L. J. 82, 6 C. L J. 62, 19 C. W. N. 882 · 21 C. L. J 557.

Waiver—*contd.*

——it is a mixed question of law and fact. 4 C. L. J. 198, 14 C. L. J. 346, 13 C. L. J 192.

——irregularity can be waived but illegality cannot be waived 24 C. W. N. 791, if it can be waived it is irregularity and not nullity. 27 C. W. N. 765.

——receipt of rent of prior period after the service of notice to eject under sec 49, B. T. Act, does not amount to waiver. 37 C. L. J. 548

——payment and acceptance of overdue instalments of a mortgage bond constituted a waiver and the mortgagee was entitled to recover the subsequent instalments. 27 C W. N. 893, 7 W. R. 21 F. B., 15 C. 502 *fol.* 31 C. 83 : 8 C W. N. 66, *Dist.* 25 W. R. 278, 24 C. 281 *Ref.*

——mere abstinence on the part of the creditor from bringing a suit for the recovery of the whole amount on the failure of payment of the specified instalment, does not amount to waiver. 13 C. W. N. 1004 : 36 C. 394 : 9 C L. J. 226, 19 M. L. J 372 · 32 M. 284 5 M. L. T. 351, *Ref* 13 C W. N 1010 : 4 I. C. 17, 31 C. 297.

——such a waiver can be effected not only by acceptance of a subsequent instalment, but also in variety of other ways and it may be inferred from various circumstances. But it must always depend on some definite act or forbearance on the creditor's part. 13 C. W. N. 1010 : 41 I. C 17, 13 C. 297, *Ref.*

——acceptance of part of an overdue instalment does not amount to waiver, as there is still something due and there is still a default Similarly the acceptance of interest alone does not amount to waiver 31 C. 83 : 8 C W 66. (5 C 97, 15 C 502) *Dist.* (1 B 125, 17 B. 555, 20 B. 109, 27 B. 2 12 M. 161), *Ref.*

——acceptance of overdue instalment amounts to waiver. 27 B. 1 F. B., 13 C. W. N. 1010 : 4 I. C. 17.

——waiver is consent to dispense with or forego something to which a person is entitled. 19 C. W. N 1172

——generally limitation runs from the breach, but *it is not so* when there is waiver; waiver may be (1) by accepting overdue debts, (2) by consenting not to sue for such instalment. *19 C. W.* N. 1172.

——acceptance, for long time, of rent at a rate lower than that stipulated in the kabulyat does not amount *to waiver. 60 L C* 86 (C).

——landlord's acceptance of rent at low rate for sometime does not bind him. 20 C. W. N. 347, 680, 16 C. W. N. 242, 496 37 C. 393 : 18 C. W. N. 66 P C.

For waiver of forfeiture and notice to quit, see "*T. P. Act Ss 112 and 113.*"

WILL see "*Hindu Law, will and Mahomedan Law, will*"
WITNESS see "*Evidence Act, Witness*"

Ss 130-137. Transfer of actionable claim—*contd.*

——where a certain person executes a mortgage in favour of another and the latter person transfers the same to another person with the consent of the mortgagor but the instrument of transfer is not attested properly to constitute it a fresh mortgage, the instrument could be treated as a transfer of the earlier mortgage 31 C W N 179 1926 M W. N. 828. 1926 P. C. 129

——s 130 is not exhaustive, prescribing only certain condition for the assignment 90 I C. 111

——the transfer of right to arrears of rent and current dues can be made only by an instrument in writing under this sec. 67 I C 451

——a promissory note can be transferred by an assignment in writing in places where this Act has been extended but it would not render the transferee a "holder in due course." 66 I. C. 501

——sale of immoveable property out of possession is not actionable claim 13 C 297

——the benefit of an executory contract is actionable claim 11 C W N, 566

——the mere right to recover mesne profits or damages for breach of contract, is not transferable. 13 C. W. N. 384: 36 C. 345, 2 C W N 42 · 18 C. W N 450, but when the claim merges in judgment, it can be transferred before assessment 18 C. W. N. 450

——the transfer of a right to arrears of rent and current dues can only be made by an instrument in writing. 1923 P. 165

——the right to arrears of rent purchased by a pleader is an actionable claim. 17 C W. N. 679 17 C. L J. 438: 40 C. 650 F. B

——the mere sale of arrears of rent by a legal practitioner is not invalid 97 I. C. 373 · 1927 Pat 2; 8 Pat. L. T. 201

——a decree is not an actionable claim and hence the transfer of it in favour of a pleader is not invalid. 62 I C. 255: 40 M. L. J. 129 1921 M W N. 98

——s 136 is controlled by sec. 2 sub. cl. (d) and therefore a purchase in execution of a claim under a life insurance policy by a legal practitioner entitles him to claim the sum from the Insurance Company 46 C L J. 225: 1927 cal. 691; 104 I. C. 729. 28 C. 744 *Expl*

——a mukhtear who purchases from an Honorary Magistrate the right to arrear of rent is barred by s. 136 from enforcing his claim in court 4 Pat. 43; 83 I. C. 81: 1925 Pat. 310.

——a pleader is guilty of unprofessional conduct for purchasing actionable claim specially when it is speculative 37 M. 238: 23 M L J 447 17 I. C 544.

——in the case of an assignment of the decree debt, the assignment is not valid as against the debtor until the debtor has in fact notice of the assignment and any payment to the original decree-holder is valid against the assignee if made before notice of assignment 2 Pat. 754.

S. 72. Rights of mortgagee in possession—*contd.*

——a mortgagee in possession can determine the tenancy of a yearly tenant without the consent of the mortgagor. 1927 Bom. 145 : 29 Bom. L R 215 : 100 I. C 1033

——a usufructuary mortgagee can lease the mortgaged property to the mortgagor and can sue him for rent 49 A 658 1927 All. 552 · 101 I C. 516.

S. 73. Charge on proceeds of Revenue sale.

——the moment a mortgaged property is transferred into money by revenue sale, the lien of the mortgagee fastens upon the surplus sale proceeds But when the mortgagor's interest is revested in him by the revenue sale being set aside the mortgagee should again fall back on the security 86 I. C 882 : 1905 Cal 1145

——there is nothing in the sec indicating that in case of mortgage property being sold for revenue the mortgagee is only entitled to proceed against the surplus sale-proceeds and cannot follow the property itself The sec only Governs cases where the law has otherwise provided that the effect of the sale for arrears of rent should nullify a mortgage 1929 Cal. 392 · 113 I C. 904

——where property has been sold in execution of a decree for arrears of rent a mortgagee has a charge upon the surplus sale-

and that charge continues to subsist notwithstanding that the amount is drawn out from Court by the Jt Drs and others The mortgagee in the first instance must see how much he can recover from such Jt Drs and others and to that extent there cannot be a charge on the mortgaged property For any sum beyond that the mortgage decree can be executed in the usual manner. 51 I C 333 (c)

——where a part of the mortgaged property is compulsorily acquired under the Land Acquisition Act, the mortgagee is entitled to an injunction restraining the mortgagor from taking the purchase-money out of the lands of the Land Acquisition Deputy Collector. 5 Pat L J 650 · 59 I C 513 : 2 Pat. L. T 110, 16 A. 78 *Diss.*, (6 M. 344, 6 C L J 745, 10 C. L J 150) *fol*

——where a patni tenure is sold in execution of the last of a series of rent decrees, the charge in respect of the prior rent decree is transferred to the surplus sale proceeds on the principle embodied in this sec. 22 C W N 131 43 I. C 996

S. 74. Right of subsequent mortgagee to pay off prior mortgagee.

Subrogation

——to entitle one to invoke the equitable right of subrogation, he must either occupy the position of a surety of the debt or must have made the payment under an agreement with the debtor or

Subrogation—*contd*

creditor that he should receive and hold an assignment of the debt as security, or he must stand in such a relation to the mortgaged premises that his interest cannot otherwise be adequately protected. 5 C L J 611 . 36 C 193, (10 C. 1035 : 11 I A. 126 **P. C**, 33 C. 1133, 29 I A 9 · 29 C 154, **P C**) *Ref.*

——it is open to the puisne mortgagee making the payment to abandon his lien under the mortgage and bring a simple suit for the recovery of the money A puisne mortgagee will be entitled to reimbursement under s. 69 Contract Act. 54 C. 424 : 101 I. C. 130 : 1927 Cal. 393 ; 45 C L. J. 191

——where the security is otherwise precarious the Court may presume that the intention of the party making the payment was to keep the prior charge alive. 1928 Pat. 195 ; 9 Pat. L. T. 148, 108 I C 95

——subrogation is effected by redemption and unless there is redemption, subrogation cannot take place 5 C. L. J. 611 ; 36 C 193.

——a purchaser of the equity of redemption is entitled to stand in the shoes of a prior incumbrancer where the purchaser has, with the consent of that incumbrancer, partially discharged the liability. 38 A 502, 36 C 193

[illegible] of a property [illegible] up [illegible] he [illegible] the person who is not bound to pay such debt may claim such right, but if the purchaser of equity of redemption is deceived by the act of the mortgagee (by misrepresentation or otherwise) then he can claim such right 20 C W. N 6 1 (9 C. 961, 10 C. 1335, 6 C. W. N. 209 · 29 C 154 · 29 I A 9 4 Bom L. R 238 ; 12 M. L J. 73 **P. C**, 33 C. 527, 16 C. W N 505 19 C. L. J. 200), *Fol.*, 10 C. L. J 364, 31 A 400 ; 14 C W. N 865 **P. C**, 41 C. 137 ; 17 C. W. N. 1143, 6 C L. J. 131. 2 C L J 288

——a mortgagee of undivided share in a property who redeems a prior mortgage on the property is subrogated to the rights of the prior mortgagee and is entitled to enforce his right against the whole property, contribution not being his sole remedy 103 I. C. 703 ; 1927 Pat 379 9 Pat. L T. 313

——to claim the right of subrogation prior debts are to be fully discharged 1928 M. 713 ; 109 I. C. 874 ; F. **B**, 35 M. 183, *fol.* 29 I C 583 *Dist.*

——where there are two mortgages of a single property and a person advances money for the payment of the first mortgage, he cannot claim priority unless the first mortgage is entirely discharged 35 M 183.

——a mortgagee making payment towards the discharge of prior mortgage is entitled to priority over an intermediate mortgagee to the extent of the money advanced. 38 M. 513, 96 I. C 1051 : 1926 All. 744, 1922 P. C. 11 *Ref.*

Subrogation—*contd*

——where a purchaser of property pays off the mortgages on the property but subsequently his purchase is found to be invalid, he is entitled to stand in the shoes of the mortgagee whom he has paid off. 1926 P. C. 109 : 1926 M W. N. 812 97 I. C. 543 31 C. W. N. 538 : 25 A. L. J. 20 P C

of this sec by mortgagor to the mortgagee. 80 *contra.* 1928

——a stranger cannot claim the right of payment of the mortgage-money. 1926 Cal 231

——a person who advances money to pay off a part of the first mortgage cannot have priority over the second mortgage without being either a purchaser or a mortgagee 35 M. 183 10 M. L. T 380. 12 I. C 412

——to sustain a claim for priority under s 74 there must be a complete discharge of the prior debt 8 N L J 157, 95 I C 689, 35 M. 183 *Fol.*, 38 A 502 *Dist*, 36 C 193, 48 I C 779, 41 M. L J. 309

——s. 74 covers independent acts of subsequent mortgagee paying off a prior mortgagee and has no application where the mortgagor of his own volition makes a secret mortgage to pay off a prior mortgage 1925 Mad. 1219 22 L W 238, 9C 961, P C. *Fol*, 34 M. L J 443 *Expl*

——a decision of the question whether a mortgage has been extinguished by payment or not depends upon the intention of the parties 9 C 961 P C

——auction purchaser in execution of a money decree is entitled to subrogation of the rights of mortgagees subject to which the property is sold. 39 C L J 204 P C

r sale on his is entitled to W N. 1047

——when equity of redemption of the mortgagor is vested by purchase in the prior mortgagee, and the prior mortgagor wants to redeem the puisne mortgagee while at the same time the puisne mortgagee sues to redeem the prior mortgagee, the claim of the prior mortgagee to redeem as owner of the equity of redemption will be preferred 47 A. 751 89 I C. 295 1925 All. 804. ... I. C. 193 1925 Cal. 59

without ... follow, the ... 27 16 C. ... 7 Pat. L ... at the ... age has been ... the rights of ...

Subrogation—*contd*

second mortgagee to redeem the first *mortgage* 7 Pat L. T. 788; 5 Pat 513 1926 Pat 337 94 I C 84.

——the rights *acquired* by a puisne mortgagee paying off a prior mortgage d[illegible] [illegible] in execution proceeding [illegible] W. N. 577, 27 A 325, 2 C [illegible] 32 I. A 113, 17 M L J [illegible] 7 M L J. 316, *contra*, 9 M, L J 177, 28 B 153

——*a second mortgagee is entitled to* the sale of the property secured by his mortgage, subject to the rights of the mortgagee even after the sale of the property in execution of a decree on the first mortgage, to which the second mortgagee was not a party 30 C 599 7 C W N 766, **F B**, 11 C W. N. 314, 18 C. 164, **P C**, 8 M. 246 22 C 33, I C L J 337, 350, *contra* 13 A. 232 **F. B**

——a puisne mortgagee is not bound by the decree passed behind his back 18 C 164 **P C**, 21 C 70 **P C**, 30 C. 599 7 C. W. N. 766, **F B** and the purchaser in execution of such decree stands in the shoes of prior mortgagee 21 C 70 **P. C.**, 30 C 593, 8 B 188, 28 B 153, and prior mortgagee becoming such purchaser acquires the right to redeem the subsequent mortgage, 26 M. 484, 28 B. 153

——prior mortgagee purchasing the mortgaged property in execution of his mortgage without making the subsequent mortgagee a party but having notice of his mortgage, cannot sue for possession, but must sue for sale against the subsequent mortgagee within 12 years from the date of notice. 11 C. W. N. 314, 19 A. 541, 21 A 235

——where a right of contribution exists it comes into play only when a payment is made and time runs under Art 132 of the L Act only from that time. 50 A. 569. 1928 All 241. 26 A. L. J. 298

S. 75 Right of mesne mortgagee against prior and subsequent mortgagees.

——right to redeem prior and subsequent mortgagee 1926 Mad 101

——a puisne mortgagee has the right to redeem a prior mortgage, but a prior mortgagee cannot redeem a puisne mortgage without his consent but if he acquires the equity of redemption he will be entitled to redeem the puisne mortgagee. 90 I. C. 410

——where a first mortgagee brings a suit on the mortgage impleading the second mortgagee as party and a decree for sale is passed and the surplus sale-proceeds are withdrawn by the first mortgagee in execution of a decree on a third mortgage, the second mortgagee has a right to recover the amount in satisfaction of his mortgage as the surplus sale-proceeds represent the security 41 C 664 18 C W N 345, 19 C. L. J 134; 16 Bom. L R 63: 21 I. C. 961 **P C**

—where a fourth mortgagee in satisfaction of his decree withdraws the surplus sale-proceeds deposited in court after discharging the second mortgage the third mortgagee cannot sue for the money

S. 75. Right of mesne mortgagee against prior and subsequent mortgagees—*contd.*

as his own but may in equity regard it as part of the security and follow it in the hands of the fourth mortgagee 19 C. W. N. 535 : 19 I. C. 226

——where a puisne mortgagee who has also a prior mortgage is added as a party to a martgage suit, he must set up both the mortgages. But if he is only a prior mortgagee he need not appear. 19 C. W. N 942 26 I C. 673, 39 C 527 *Dist.*

——if the prior mortgagee is in possession as lessee subsequent to the puisne mortgage and if the property is sold for default of payment of revenue and he then purchases it, he does so subject to the burden of the puisne mortgage 5 Pat L J. 492 1 P. L T 711 : 58 I. C. 291 , 1920 Pat 277.

469) *Ref.*

S. 76 Liabilities of mortgagee in possession.

——a mortgagee in possession of immoveable property under a mortgage made before this Act came into force was under the ordinary law then in force bound to pay out of the income of the property, the Govt revenue and such charges of public nature as might accrue due in respect of the properties and be payable by the person in possession of the rents and profits, and was not entitled to charge such payments against the mortgagor in the accounts. 29 C W. N 214 : 46 A 269 22 A L J 284 80 I C. 1019 34 M L T 78 P. C.

——a mortgagee is bound to pay enhanced assessment levied on the property in his possession in the absence of a contract to the contrary 91 I C 943 : 1926 Mad 405

——a mortgagee in possession cannot encroach on the land of the mortgagor during the subsistence of the mortgage and lay any claim to it on the ground that the mortgagor acquiesced in it by silence 87 I C 15 · 1925 All 576 , L R 6 All 252

——a mortgagee in possession is entitled to cut down the trees he planted after entering into possession, unless his act is destructive or permanently injurious to the property. 50 B. 692 1926 Bom. 595 . 28 Bom L. R 1258 . 99 I. C 400.

——where a mortgagee takes possession of mortgaged property with consent of mortgagor according to agreement between the parties the mortgage does not become usufructuary mortgage but the mortgagee's liability arises under s. 76. 25 C L. J 560 , 40 I C 371.

——it is the incident of the duty of the mortgagee to manage the property with ordinary prudence. 91 I C. 943; 1926 Mad. 405

——the mortgagee in possession is bound to account for rents and profits of the land No question of limitation can arise so long as the relation of mortgagor and mortgagee continues 90 I C. 138 : 1925 Mad. 825 · 48 M. L. J. 363.

S 76. Liabilities of mortgagee in possession—*contd.*

——a mortgagee in possession is not liable to pay interest on surplus collection till the date of the institution of the suit for redemption as s. 73 Contract Act does not apply. *80 I. C. 63 : 22 A L J 833* 1924 All. 881

——a mortgage by the lessee creates *privity of estate* and the mortgagee is liable to the lessor on all covenants that run with the land including that of paying rent. *83 I. C. 79 : 1925 Bom 330 . 27 Bom L R. 553*

——mortgagee in possession is *estopped from denying the title of the mortgagor.* *29 I C. 746.*

——mortgagee in possession under an invalid agreement for sale may be *called* upon to account for the rents and profits as if he were the mortgagee *in possession.* *35 C. L. J. 58 : 1922 Cal 114.*

——when the usufructuary mortgagee who was *entitled under* the mortgage to collect rents *only, collected cesses* also he was held liable to account for the profits received *16 C. W. N 137 : 14 C L J. 507 . 11 I. C 713.*

——a mortgagee is to manage the land *in his possession as a* man of ordinary prudence would have managed *if it were his own.* So mortgagee making *bonafide* settlement *of raiyati lands with* tenants is binding on the mortgagor but *in the case of zerati lands* where the owner has the right of khas possession settlement with the tenant *is not valid.* *97 I C. 852 . 1926 P. H. C. C. 310.*

——where the mortgagee in *possession* has kept no accounts it is open to the owner of an interest in *the equity of redemption to* redeem on the footing of paying the balance *left of the mortgage* debt, after debiting the mortgagee with a *fair occupation rent* during his possession and crediting the mortgagee with simple interest on the mortgage debt. *48 C. 22 · 25 C W. N. 241 : 57 I. C. 535 39 M. L. J. 147* P C.

——it is a well accepted [illegible] may be raised again[illegible] account, the Court w[illegible] value of the produce [illegible] principal and interest [illegible]

——a mortgagee must sue for both *principal* and interest [illegible] otherwise he cannot sue *subsequently for the other.* *1919 P. R 69 47 I C 364*

[illegible] mortgagee was placed in possession [illegible] which were fluctuating and [illegible] of the property would be [illegible] off against interest and the balance against the principal, held that the parties did not intend to have their rights fixed on the basis of the figures mentioned in the mortgage deed and the mortgagee was liable to render accounts. *29 C L. J. 434 : 53 I. C. 59*

——no question of limitation arises as between the mortgagors and the mortgagees, when accounts are taken at the time of redemption *27 I C. 989 28 M. L. J. 181.*

S. 76. Liabilities of mortgagee in possession—*contd*

——a mortgagee in possession ought to be charged with interest on the surplus profits received by him 57 I. C. 294.

——mortgagee in possession as lessee, obligations under different aspects. 5 Pat. L. J. 492 : 1920 Pat 277 . 58 I. C. 291

S. 77. Receipts in lieu of interest.

——a contract, that a definite portion of the income of the property mortgaged usufructuarily shall be paid to the mortgagor, is legal and operative. 41 M 959 49 I. C. 291 : 24 M. L. T. 315

——arrears of malikana, due to the mortgagor by the mortgagee in possession, must be deducted from the amount to be paid in a suit for redemption, remedy of the mortgagor is not confined to a separate suit for the arrears of malikana. 46 A. 633 22 A. L. J. 579 : 82 I. C. 25 1924 All. 591.

S 78 Postponement of prior mortgagee

——fraud is not necessary to bring a case under this sec. The words "fraud, misrepresentation or gross negligence," which postpone the prior mortgagee to the subsequent mortgagee under sec. 78, are three different kinds of conduct and not co-extensive. 43 C 1052, 1080, 2 C W. N. 750, *Discussed*, 12 M 424, 429, *contra* 18 M 444.

——when the first mortgagee helped the mortgagor to induce the second mortgagee to advance money by declaring that the property was free from incumbrances, he cannot then turn round and claim priority over that mortgage in his own favour. 15 C W. N. 813 : 13 Bom. L. R. 542 : 14 C L J. 79 11 I C. 503 P C

——where the first mortgagees of two villages did not contest by appeal a decree which erroneously subordinated their rights to those of a second mortgagee with respect to one of the villages mortgaged and they subsequently sued to enforce their entire mortgage against the other village in the hands of the auction-purchasers from the mortgagors, held that the first mortgagees were not precluded from fully enforcing their security against the auction purchasers. 37 A 474 19 C W N 991 22 C L J 165 : 30 I. C. 366 : 1915 M. W. N. 709 P. C

——a plff can put forward, in a suit by himself, the priority which he could claim by way of defence, in the suit against him. 34 A. 102 12 I. C 607.

——where the landlord mortgagee of the holding sues a mortgagee, he is estopped from questioning the validity of the prior mortgage on the ground of non-transferability 33 I C. 112 (C)

S. 79 Mortgage to secure uncertain amount when maximum is expressed.

——s 79 engrafts an exception to the general rule laid down in s 80 and provides that the intermediate mortgagee who has notice of the prior mortgage is postponed in respect of all advances subsequently made on the security of the mortgage, provided it expresses the maximum to be secured thereby and that the maxi-

S 79. Mortgage to secure uncertain amount when maximum is *expressed—contd.*

mum is not exceeded 1 Pat. L. T. 582 : *58 I. C. 489, 16 C. L. J. 394* 17 I C. 927.

——the words of this *sec.* mean that the mortgagees referred to must express a maximum. The words "to secure future advances etc." denominate the *different classes* of mortgages, but to bring them under s. 79 they *must have* common feature of a maximum expressed. 51 C. 86 : 39 C *L. J. 186 : 28 C. W. N* 470 : 33 M. L. T. *395* . 21 A. L. J. 784 : 25 Bom. L R 1279 : *45 M. L. J.* 505 : 21 A. L. J. 784 : *1923 P. C.* 211

S 80. Tacking *abolished.*

——the general rule as provided in this sec. is that a mortgagee making *a subsequent* advance to the mortgagor does not acquire any priority *in respect* of his security for such subsequent advance as against an *intermediate* mortgagee and s 79 engrafts an exception on that *general rule*, 1 Pat. L. T 582 : 1920 Pat. 261 : 58 I C. 489. 16 C. L. J. *394 ; 17 I. C.* 927.

——the words "in the case mentioned in s 78" do not really mean *mortgages* to secure future advances or the balance of a running *account* The word "subsequent" must mean subsequent to the *intermediate* mortgage ; if that is so, then in the sense of the sec an advance when made after another mortgage is granted, becomes a *subsequent* advance, 51 C. 86 : 28 C. W. N. 470 . 39 C. L. J 186 1923 *M. W. N. 609* ; 25 Bom. L. R. 1279.

S. 81 Marshalling securities.

... circumstances, pass 18 ... is mortgage or of ... tgagor to have the ... than those ...

... the second mort ... (2) where the interest ... 23 C. 790, 1916 P. W. ... 265.

——a purchaser of a portion of a mortgaged property has no ... a purchaser and s. 56 ... rchaser 31 C 93, 101

... is to protect the subsequent mortgagee ... satisfy the ... of some other ... tinguishes ... rigage. He ... tgage decree ... rior mortgage ...

S 81. Marshalling securities—*contd*

bse-
the
of
30

——a second mortgagee is not entitled to the benefit of s. 81 if he has notice of the former mortgage. He is entitled to a decree
rplus

and
mort-
gage and again A and B together with another property C were mortgaged to plaintiff, partly in discharge of the first mortgage and then again B was mortgaged to deft, held that the plff. should get a decree on the first mortgage for the remainder due but deft can under s 81 ask the plff. to sell A first and if the deft. would fail to redeem B within the time fixed by the court, the properties would be sold as follows —A first B next and then C, if necessary. 38 I. C. 542 (b).

——this sec. does not entitle the subsequent mortgagee of a portion of a mortgage security purchasing under his decree to set up the plea that the property in the hands of the mortgagor alone is responsible for the payment of the full claim of the prior mortgagee but both of them must proportionately pay the debt 27 A. L. J. 419 : 1929 All. 309, 22 A. 284 *fol.*

S. 82 Contribution.

——the mortgagee is not bound to distribute his debt rateably upon the mortgaged properties. 7 C. L. J. 274, 29 M. 217, 18 C. 320, *Fol.* 10 C L J 150 1 I. C. 264, *Ref.* 30 C 755, 1 C. L. J. 337, 33 C. 613, *Dist*

——but where the mortgaged properties belong to different persons, the mortgagee cannot increase the burden upon some property by releasing others. 33 C. 613 : 10 C. W. N. 551 · 3 C. L. J. 576, 6 C. L. J. 46, 85 I C. 742 1925 Cal 1048, and where the mortgagee
mortgaged properties the
enforce his claims upon
y be allowed. 30 C. 755 :
. 11 C. W. N. 403, 31 M.
by mortgagee his debt
22 B. 304 F. B., 26 C.
. 92, 4 C. L. J. 317 *contra.*
4 C L. J 315 : 34 C. 15.

liable to contribute rateably
contract to the contrary.
38 M. L. T. 410 : 101 I. C.
the value of each property
which it was subject at the
L. J. 193 : 78 I. C. 243, 36 A.
312, *Ref.*

S. 82. Contribution—contd.

aside by being present at and ratifying a sale of a portion of the property to third person and by receiving consideration thereof, it is not open to the plffs. to proceed in their suit on the first mortgage against that portion of the property in the hands of the third parties. 19 C. L. J. 590 : 23 I C 436.

Ss. 83, 84. Deposit in court.

——where a deposit has been made under s 83 of the full amount due under the mortgage, and due notice given and the mortgagee appears in court, but definitely refuses to accept the money, and subsequently mortgagor withdraws it from court, the interest ceased to run from the date of deposit. 44 A. 198, 4 Pat. L. T. 720, 73 I. C. 1053

——service of notice of deposit, duty of Court 35 C. L. J 262. 60 I C. 454 (C).

——notice of deposit without appointing guardian ad litem [illegible] -flective. 44 A. 64, 102, 48 A. [illegible] 6 All. 665, guardian ad litem [illegible] appointed it cannot be said [illegible] was necessary for them to [illegible] ley. 90 I C. 754 : 1915 Mad [illegible] 27 B. 23, 44 A 64, Rel. 30 C 1021 P. C. Dist.

——the mortgagor should after tender keep the money ready for payment. 3 Pat. L. T. 332 : 65 I. C. 666

——where money is deposited by the mortgagor but owing to dispute between the heirs of mortgagee it is not drawn, interest [illegible] gagee [illegible] fer to [illegible] thin [illegible] 104 I C. 570.

——mortgagee remaining in possession after a lawful deposit [illegible] aid after the tender [illegible] repairs and collec- [illegible]

——it is not the practice of the court to require a party to [illegible] from the facts stated in the plaint or [illegible] tender would have been s[illegible] tender would have [illegible] m it was made would have [illegible] 3 : 28 C W. N. 25 : 38 C L J. [illegible]

——an unequivocal refusal of the mortgagee to receive payment [illegible] the mortgagor from the duty of [illegible] interest subse- [illegible] notice and give [illegible] time but for no [illegible]

Ss. 83, 84 Deposit in court—*contd*

fault of the mortgagor, there would be a cessation of interest 1923 A 24 : 70 I. C. 811

——after the mortgagor deposits the money the court must see that notice is served on the mortgagee. The mortgagor is not bound to see that the notice is so served. 60 I. C 454 (C).

——mere agreement to sell in favour of a person does not create any interest in the property and he cannot sue for redemption nor he can deposit money under s 83. 1926 M W. N. 459 : 92 I. C. 715 : 1926 Mad 597.

——the deposit under s 84 is a special kind of tender. Where the mortgagee refuses to accept the amount and thereupon the mortgagor withdraws the amount, his liability to pay interest depends on the question whether, notwithstanding the withdrawal he remained ready and willing to pay throughout. 1926 M W N. 423 : 49 M 609 : 95 I. C. 108, 1926 Mad 601 . 50 M. L J 468.

——where in execution of a redemption decree the mortgagor [illegible] the decree and the [illegible] appeal against the [illegible] the mortgagee ought [illegible] out prejudice to his pending appeal either by arrangement or with the sanction of the court which would be given as a matter of course, and that if he fails to do so and the amount lapses to the Govt the mortgagee must bear the loss 16 C. W. N 793 17 C. L. J. 14 : 16 I. C. 830 : 10 A. L. J 379

——a tender is valid when made to party direct and the pay ment need not be made into court. If it is refused interest will cease to run 1917 M W. N. 308 . 38 I C. 295.

——tender of principal amount only is not valid tender. 33 C. W. N 279 1929 Cal. 304.

——it is only the actual payment of the full mortgage amount into court that makes interest on the mortgage amount cease to run under s 84 and not a mere presentation of a petition under s 83. 29 I. C. 145 . 2 L. W. 408, 55 I. C. 991 : 18 A. L. J 440, 36 A. 139 : 22 I C. 659 : 12 A. L. J. 111.

——when money is deposited under sec. 83 by the mortgagor he cannot object to the mortgagee drawing the same. 22 I. C. 369.

——on receiving a petition under s. 83 the court should give notice to the mortgagee, and it is the mortgagee's duty upon receipt of such notice to state the amount due on his mortgage and his willingness to accept the money deposited in full discharge of that debt and to deposit the [illegible] eive the money. When there i[illegible] the deceased mortgagee interest [illegible] the deposit. 1924 Mad. 559 : 1924 [illegible]

——the money which a mortgagee has paid under sec. 171 B. T. Act, as arrears of rent, cannot be added to the mortgage debt under s 83 though it has priority over the mortgage. 21 C. L. J. 429.

Ss. 83, 84. Deposit in court—*contd.*

—*the deposit* must be unconditional. 14 M. 49, 22 B. 761, 6 A. 399, but it may be made by instalments. 8 C. W. N. 216, 24 A. 461.

—*when there is no direction* that money should be paid to the mortgagee the deposit is not valid, 9 C. W. N 745 P. C, it must *be made to the credit of the mortgagee.* 26 A. 291, 23 M. 510.

—*whole* amount due must be deposited. 16 C. 307 P C, 13 A. 195, 39 M. 579, 16 B. 141, 32 A. 142, 24 A. 461.

—a tender of the greater includes the smaller. 29 C L. J. 256 : 51 I. C. 13

—withdrawal by the agent binds the mortgagee. 36 C. 840 : *10 C. L. J. 1*, *13 C. W. N. 1102*, P. C.

—the court can only compel the mortgagee to deliver up the mortgage deed. 13 M. 316

—interest for the day on which the money is borrowed and on the day on which it is repaid will not be allowed. 8 C. W. N. 216.

—interest ceases from the date of deposit and not from the date of service of notice 30 M. L J. 607.

—a proper tender *if kept good* stops the running of interest. 34 C. 223 : 5 C L. J. 192, 8 C. W. N. 153, otherwise not 1922 Pat 58, *3 Pat. L. T. 332.*

—' deposit in court" in s. 84 contemplates a case of continuing deposit and interest does not cease to run if the mortgagor subsequently withdraws it and tender the same in court before suit 25 I. C. 96 : 16 M. L. T. 131 : 1 L. W 595.

—deposit in court before due date is not valid tender *31 C 183.*

—'certain date' of payment in s. 58, cl. (c) means only the last date, it does not imply that the mortgagor cannot make the tender before that date. 25 I. C. 93

—if the mortgagee makes a demand within term and the mortgagor complies, the mortgagee cannot insist upon payment of interest for the whole term. 19 C. W N. 389 : 42 C. 1146.

—*bona fide* payment to one of the mortgagees is sufficient. 20 M. 461, 36 M. 544, F. B. *contra.* 21 C. L. J. 570, 38 C 342 : 13 C L *J. 3*, 32 A. 164, 25 A. 155.

—if the mortgagor disregarding the notice pays the *whole* amount to one of several mortgagees he cannot get a refund of the amount 24 I. C 88

—payment out of court cannot be recognised in making mortgage decree final. 25 C. L. J. 553 : 21 C. W. N. 920.

—payment may be made before final decree 36 C. 122 : 8 C. L. J. 547.

—a deposit is invalid if made after the institution of the suit by the mortgagee. 48 I. C. 693 · 35 M. L. J. 605, 35 M. 209 : *10 I. C.* 393 : 1911 M. W. N. 126.

—a person denying a tender cannot question its sufficiency or validity. 25 I. C. 93.

—interest accruing due up to the date of deposit should be included. 34 I. C 825 : 30 M. L. J. 607.

Ss. 83, 84 Deposit in court—contd

——time of payment may be extended 36 C 122, 28 B 102, 22 B. 771 22 M 133, 25 M 244, 25 M 310, F. B but not in the case of decree for sale 24 B 301.

——deposit does not *ipso facto* extinguish the mortgage when the mortgagee refuses to accept the deposit 45 A 592

——in case of minor a guardian *ad litem* should be appointed 45 A 273, 21 A L J 39 71 I C 278, it is not enough to apply for the appointment of a guardian 64 I C 907, 19 A L J 893

——there is no valid deposit under s 83 T P. Act, so as to stop running of interest where one of the mortgagees is a minor and no guardian *ad litem* has been appointed for the minor 94 I. C 1; 24 A. L. J 769

——liability of mortgagee in possession after deposit. 44 M L J 534 72 I C 292

S. 85 Or 34 R. 1 Parties to suits for foreclosure, sale and redemption

——under s. 85 all persons interested in the mortgage property [illegible] L. J. 479 P.C. [illegible] part of the [illegible] A 484, see [illegible]

——where a person having a share in the equity of redemption has not been made deft, there should be proportionate decree. The suit is not to be dismissed for defect of parties, 29 C. W. N. 51, 25 C. W. N 594 *Rel*

——when prior mortgagee being made party does not appear after filing written statement and the court does not make any order against him, he is not affected 18 C. W. N. 1013 : 24 I. C. 42.

——a prior mortgagee need not appear unless he has got subsequent mortgage also. 19 C. W. N. 942, 947, 10 C. W. N. 991 P. C., 39 C. 527 : 16 C. W. N. 505. P. C., 35 A. 111.

[illegible]

party and the property is purchased by third person, the puisne mortgagee may sue the prior mortgagee and the purchaser for redemption. 40 M. 77 F. B.

——where a purchaser of equity of redemption is not impleaded as party it is not essential for him first to proceed to get the mortgage sale set aside before he can bring a suit for redemption 1927 Cal. 559 ; 101 I C. 15.

——where the legal representative of [illegible] ased mortgagor [illegible] right in refus- [illegible] a separate suit [illegible] 2

S. 85. Or. 34 R. 1, Parties to suits for foreclosure, sale and redemption—*contd*

——person not claiming under the mortgagor, *i. e* who does not claim the equity of redemption but sets up paramount title, is not necessary party in a mortgage suit. 3 C. L. J. 205 : 33 C. 425, 24 C. L J 303, **P. C.**, 11 C. W. N. 294 : 5 C. L. J. 95 20 C. W. N. 1279, 38 A 488, **P. C.** 23 C. L. J. 587, 21 C. W. N. 177, 12 C. 414 : 12 I. A 171, **P. C.**, 29 M. 217, 30 A. 240, 31 A. 11, but such person, in whose presence the decree is made is bound by the decree. 35 C. 701 : 12 C W. N. 657 : 7 C. L. J. 568 : 6 M. L. T. 255, 22 C. W. N. 533, 24 I A. 10 **P C.**, 29 C. 187 **P. C.**, 25 C. W. N. 192, and cannot ask for a reversal on the ground that the issue was extraneous 33 C. 425 : 3 C. L. J. 205

——a question of paramount title can be investigated in a mortgage suit in certain cases, 38 C. L J. 183, but the court has the discretion to refuse to entertain the plea as the same is foreign to the scope of the suit, 33 C W. N. 659.

——the landlord of non-transferable occupancy holding taking possession of the property by collusion is necessary party. 16 C W. N. 920

——an attaching creditor is a necessary party. 37 M. 418, *contra*. 17 C. W N. 871 : 17 I. C. 432.

——purchaser at auction sale of the right of equity of redemption must be made party, 95 I. C. 904 ; 1926 M. W. N 276

——all the persons interested as plffs. also should be made parties 41 C. 727 : 19 C. L. J. 437.

——non-compliance with Or. 34 r. 1 C. P. C. is not fatal, Or. 1 r. 9. applies to mortgage suit and when a person having a share in the equity of redemption is not made party there should be a decree proportionate to the shares of the persons actually made defts. 29 C. W. N. 51, (25 C. W. N. 594, 30 C. 755 : 7 C. W. N. 723) *Ref.* 35 A. 441 *Diss*

——persons interested in property relinquished by the mortgagee need not be made parties. 28 A. 174 : 2 A. L. J. 630, **F. B.**

——sub-mortgagee suing the mortgagee need not make the original mortgagor a party, 12 C. L. J. 137, but the sub-mortgagee may sue the original mortgagor or realise dues from him 10 C. L. J. 470.

——sub-mortgagee also can sell the right of his mortgage 29 A. 385 **F B.** (18 A. 113, 22 A. 511), *overruled*, 20 M. 35, 9 C. L J. 429, 13 Bom L. R. 90, 15 B 692, 20 B. 519.

——when a necessary party to a suit being made party does not claim all prior rights he becomes estopped. 39. A. 527 **P. C.**, but [illegible] made party and no relief [illegible] need not set it up [illegible] *ntra.* 31 C. 428 24 [illegible]

——where the subsequent usufructuary mortgagee is not made party in the suit by the prior simple mortgagee the auction purchaser in execution of the decree acquires no title against the usufructuary

S. 85. Or. 34. R 1 Parties to suits for foreclosure, sale and redemption—contd

mortgagee and neither the original simple mortgagee nor the pltf could fall back on the original mortgagee after the sale is set aside, 33 C. W N 100 1929 Cal 233

Ss 86 90, 92-94, 96, 97 99, Or 34, rr 1—15 C. P C, Procedure in mortgage suits

Procedure.

——in the case of a mortgage what is a mere combination of a simple mortgage and an usufructuary mortgage, the right to sue under s 68 would give a right to sell under s 67 That is because the statute has elaborately defined the contract in that case The moment one finds that the mortgage is an anomalous mortgage, and that it purports to deal with the question now in point, it is unsafe, to say the least, to rely upon s 67 at all 39 C L. J 209

——when a mortgage is stipulated to be at the outset a simple mortgage and then under certain condition an usufructuary mortgage, its original character as simple mortgage is not lost. 38 C 537 15 C W N 443 13 C L J 584

——equitable mortgage by deposit of title deed, when no maximum is fixed. 39 C. L J 186.

——s 89 does not debar a mortgagee to prove that the description of the property mentioned in the Schedule to the decree is erroneous 39 C L J 222.

——a m[illegible]gagee of chattel is entitled to foreclosure decree like a mortgagee of immoveable property. 42 C 455 : 19 C. W. N. 208 ; 20 C L J 183

——when an order absolute is made *ex-parte* without giving notice to the mortgagor, he has inherent power to set aside the order 32 C 253, F B

——a sale in contravention of s 99 Tr. P. Act (Or 34 r. 1-15 [illegible] [illegible]egular one liable to be avoided [illegible] [illegible]idable. 35 C. 61 . 11 C. W. N. [illegible] 32 1 A. 23 . 1 C. L J. 584 : [illegible], L. J. 71 P. C.

——if the persons claiming to redeem through the Jt. Dr. take no objection before confirmation of the sale, they cannot bring a suit for redemption against the purchaser in execution whether the latter is the D. Hr. or a stranger. 32 I. C. 611 . 32 M. L. J. 525 · 19 M. L T. 121, 37 A. 165 *fol.*

——*decree may be amended when the description is erroneous.* 39 C L J. 222

——no fresh suit will lie by the mortgagor for over-payments made by him. 26 B 661, 30 A. 36, 30 A. 225, 34 C. 223, 31 B 527.

——the scope of a mortgage suit is to cut off the equity of redemption and to bar the rights of the mortgagor and all persons claiming under him. 21 C. W N. 177 : 44 C 425 : 37 I. C. 277 : 27 C. L. J. 212

Procedure—*contd.*

——where the first mortgagee obtains a decree without impleading the puisne mortgagee the puisne mortgagee suing on his mortgage will have to pay only the amount of the decree on the first mortgage and not the amount due under the mortgage deed, with interest at the contract rate. 32 C. L. J. 121 : 55 I. C. 969 : 22 Bom. L. R. 553 : 18 A. L. J. 396 P. C., 40 A. 407 : 45 I. C 793 P. C.

-prelimi- passed . L. T.

——a preliminary decree in a mortgage suit is not capable of execution. 80 I. C. 716 (c).

——an appeal against a preliminary decree after the passing of the final decree is infructuous. 54 C. 328 : 31 C. W. N. 550 : 1927 Cal. 492 : 103 I. C. 538. (40 C L. J. 291, 29 C. W. N. 640) *Rel on*

——but an appeal from a preliminary decree made before the final decree is passed can be heard even after the final decree is passed. So also a second appeal from the first appeal can be heard though a final decree has been passed pending the appeal. 1927 Cal. 559 : *101 I. C* 15.

— ... for sale of the entire ... eived half ... 5. ... oney, form

——in view of the provisions of s. 67 a decree for sale may be made in favour of the mortgagee when the mortgage is an English mortgage 26 C. W. N. 318.

——it is not incumbent on the mortgagee, first of all, to proceed against the moveable property which has, rightly and wrongly, been formally included amongst the mortgaged subjects. 95 I. C. 563.

Priority.

——a mortgagor purchasing the mortgaged property in execution of prior mortgage decree in which the mortgagor and the 2nd mortgagee were made defts. acquires the property subject *to* the 2nd mortgage. 11 C. W. N. 284, 3 C. W N. 323, 17 C. 23 : *16 I. A.* 129 P. C, 5 C. 252, 25 A. 46, 23 C. 397, 5 C. L. R. 227, 5 C. 198 6 I. A. 145 P. C.

——the holder of two independent mortgages over *the same* property, who is not restrained by any covenant, is competent to institute separate suits to obtain separate decrees for sale, *but* he ... nor subject to the first. 33 C. L ... I. C. 963 : *8 Pat* L. T. ... 2 P. L J 118. 33 C

... free of both mort- ... the first mortgage or ... of the decree on the second mortgage and after the payment of the incidental expenses to apply the balance in discharge of the dues on

Priority—*contd.*

the first and second mortgage one after the other. 1927 Pat. 117 98 I. C. 968 : 8 Pat. L T. 255

——a subsequent mortgagee can question the validity of the prior mortgage. 19 C W. N. 24 n.

——when the consideration of the subsequent mortgage is the debt under the first mortgage, it will have priority like the first mortgage. 10 C L J. 150 : 1 I. C. 264, 2 C. L J. 202, 10 C. 1035 : 11 I. A. 126, P. C. 29 C. 154 : 29 I. A 9 P. C.

——the first mortgage-purchaser is entitled to call upon the second mortgage-purchaser to redeem him, and upon failure to do so to get possession. 32 C. 891 1 C. L. J. 371 ; 9 C. W. N. 728 7 C. W. N. 11 *Fol*, 5 C. L. J. 315 : 11 C. W. N. 403, 6 C. L. J. 612 : *12 C. W. N. 107, Ref.*

——priority must be determined not by reference to the dates of the mortgage document but according to the dates of the sales and recovery of possession under them. 26 M. 486.

——when the mortgagee in court-sale purchases the equity of redemption and afterwards the sale is partly held invalid the security is extinguished to that extent. 45 M. L. J. 719 ; 1923 M. W. N. 781.

——a puisne mortgagee discharging two prior mortgages can sue on three mortgages. 1923 Mad. 349 . 70 I C. 286, 4 A. L. J. 349, 6 A. L. J. 549, 69 I. C. 651.

——a sale under the prior mortgage sweeps away the subsequent encumbrances 33 C. L. J. 7.

——suit on prior mortgage without impleading subsequent mortgagee, right of the purchaser of a portion of the mortgaged property in execution sale 41 M. L J. 399, and the position of the puisne mortgagee, 43 A. 204, F. B. and that of purchaser paying up puisne mortgage 43 A. 268.

——a mortgage decree holder can proceed against any of the properties mortgaged to him and no question of apportionment can be raised before the executing court as it should have been raised in the suit itself. 85 I. C. 742 : 1923 Cal. 1048.

[illegible]

——where a subsequent usufructuary mortgagee is dispossessed by the purchaser in execution of the prior simple mortgage decree he may sue the mortgagor for money if there was personal covenant. 63 I. C. 252.

Sale of property subject to prior mortgage.

——a mortgagor purchasing the mortgaged property in execution of prior mortgage decree in which the mortgagor and the 2nd mortgagee were made defts. acquires the property subject to the 2nd mortgage. 11 C. W. N. 284, 3 C. W. N 323, 17 C. 23, 16 I. A. 129

Limitation in mortgage suit—*contd.*

——part payment by mortgagor after transfer of portion of the mortgaged property saves the period against transferee also. 11 C W. N. 107, 9 C. W. N. 868 : 32 C. 1077.

——an aplpication for the recovery of unsatisfied amount under s. 9, Tr. P. Act : Or. 34, r. 6, C. P. C. will be governed by Art. 181 L Act. (12 years), 34 C. 672 : 11 C. W. N. 674 : 6 C. L. J. 119, 33 C. 867, 21 A. 453, 24 I. C. 35.

—ount under Or. 34 fixed by Or. 20, r. 6, N. 145, P C 31 ing from the title when the balance is ascertained to be due)

——a suit on a simple mortgage bond is governed by Art 132 and not Art. 147 which applies to English mortgage only : 11 C W N. 1005 : 6 C. L. J. 379, 30 M. 426 P. C., 14 C. 731. F. B

——when the mortgagee is deprived of the security or possession, limitation for a suit for personal decree is 6 years. 25 C. 450

——a suit by mortgagee to recover sale proceeds drawn by money-decree-holders is governed by Art. 132 L. Act (12 years) 5 C. W. N. 356, 3 C L. J. 52, 31 C. 745

the mortgagee against of redemption, before the to konw of the pursbase on, is maintainable, being . 1, 22 A. 394, 19 A. 373. from the date of notice

——after a conditional decree for sale is passed, the suit as such is at an end ; so application for substitution need not be made within 6 months. 11 C. W. N. 156, 21 C. 818, 22 C. 931.

——it is quite clear that an application for making a conditional decree passed by consent absolute, would be governed by the general Art. 181. 1923 A 29 : 70 I C. 840.

absolute and the determination should be sold first are different.

minary decree final is governed 159 : 1923 Bom. 420 : 73 I C 187

——when a preliminary mortgage decree is appealed against the period of limitation for an application for final decree runs from the date of the decree of the appellate court. 21 A. L. J. 526 : 74 I C 372, 37 C L J. 452 : 1923 Cal 389, 39 A. 641, 40 A. 203, 40 M 714

——when the preliminary mortgage decree was amended by correcting a clerical mistake as to the amount it did not extend the period of limitation. 1923 A. 22 : 69 I. C. 199

——in case of execution of sale deed by receiver appointed by the court executing the mortgage decree, right to apply for personal decree accrues from the date of the execution of the conveyance 21 A. L. J. 37 : 1923 A. 203.

Limitation in mortgage suit—*contd*

——an application for final decree in a redemption suit being stayed by means of an injunction, saves limitation. 1923 M W. N. 670

Money decree for unsatisfied amount.

——a preliminary decree is not a composite decree to proceed against other properties of the J. Dr under Or 34, r. 6, C P. C. 23 C W. N 924

——the original decree should reserve to the mortgagee liberty to apply for a personal decree, 22 A. 404, 31 A. 373, 33 C. 891, 18 C. L. J. 133, 17 C. W N 1039, 31 B. 244, the essential elements have been laid down 16 C L. J. 318

——*a mortgagee cannot after releasing some mortgage property* ask for personal decree 33 C. 890 : 10 C W N. 862. *contra.* 29 A. 369, 28 A. 660, 674, 24 A 606

——mortgage properties must be exhausted before asking for personal decree. 15 C L J 684, 18 C. L. J. 133, 18 C W. N. 1039.

——an instalment personal decree may be passed. 15 C. W N 1083.

——if some property is lost in claim under Or. 21 r. 100, the mortgagee cannot claim compensation under sec 47 C. P C. 25 C. W. N. 756

——under s 90 T. P. Act (Or 34, r. 6, C. P. C) it is not a condition precedent to the making of a personal decree for the balance of the mortgage money that the mortgaged properties should have been sold and the proceeds found insufficient to satisfy the debt In a decree for sale it is open to the court to provide that if the proceeds of the sale are not sufficient to cover the amount of the mortgage debt together with interest the deft. shall pay the balance personally 23 C. W. N. 490 : 29 C L. J 443 : 21 Bom L. R 589 : 49 I C. 620 P. C.

Rights of mortgagee on the change of Mortgaged Property :—

——the rights of the mortgagee are not destroyed by the mere transmutation of the subject-matter of the security. 10 C. L. J 150 when the property is converted into money under the Land Acquisition proceedings mortgagee's lien will follow the compensation *money.* 6 C L. J. 745

——when some of the mortgaged property is purchased by the mortgagee himself in execution of a rent-decree, the charge on such property is extinguished and transferred to the balance of sale proceeds 8 C. W. N. 332, 3 C. L. J. 52.

——this principle applies whenever the mortgage lien is in jeopardy. 9 C. W. N. 117, 24 C. 746, 15 C. 546.

——when mortgaged property is converted into money the mortgage-decree must be modified. 19 C. W. N. 537.

——a second mortgagee may sue for the surplus sale proceeds of the first mortgage in the hands of the person who is both first and third mortgagee as surplus sale proceeds represent the security

Rights of mortgagee on the change of mortgaged property —*contd.*

Limitation is 12 years (Art 132) and not six years (Art 120). 18 C W. N. 345 : 41 C. 654 : 19 C. L. J. 132 : 16 Bom. L R. 80 : 1914 M. W. N. 38 : 21 I. C. 961 : 26 M. L. J. 243 : 12 A. L. J. 82, P. C appeal from 33 C. 92 : 9 C W. M. 989.

——but one co-mortgagee cannot sue the other for the refund of money erroneously paid to him by the Collector. 21 A 137.

——subsequent mortgagee must get a decree before proceeding against surplus sale-proceeds 19 C. W. N. 535, 32 C 92 *Ref.*

——mortgagee is entitled to follow the estate alloted to the share of the mortgagor on partition 20 C. 533, 21 W R 233 P. C, 24 A. 483 : 22 A. W. N. 137.

——where in the case of mortgage of an undivided share a clause was inserted in the bond that after partition the whole of the property alloted to the lady shall be substituted for the property mortgaged and the effect of the clause was to quadruple the amount of the property mortgaged, the stipulation would be operative 19 C. W N. 162 : 1915 M. W. N. 387 : 27 M. L J. 13 P. C.

For other cases see "*s. 73 of this Act.*"

Ss. 91. Redemption.

——there is nothing in s. 60 to debar the owner of a part of the [illegible]

——a partial owner can redeem the whole mortgage. [illegible] 84 I. C 293 : [illegible] N 128, 5 C W. N 83 *Diss.*, (22 M. 209, 5 B 24). *Fol*, 84 I. C 293 : 6 Pat. L. T. 237 : 1925 Pat 57, 82 I. C. 943 : 1925 Mad. 351.

——a person who is entitled to a portion of the equity of redemption is not *necessarily* entitled to redeem the whole 38 M 310.

——a mortgagor has a right to redeem a usufructuary mortgage and get possession of the mortgaged property without paying off a prior simple mortgage. 44 M 301 : 28 M. L. T 234 : 61 I. C 612.

——the proper valuation in redemption suit is the amount admitted by the mortgagor-plff. and not set up by the mortgagee deft. 37 M. 420.

——a purchaser *pendente-lite* from the mortgagor can redeem. 26 C 966 : 4 C. W. N 317.

——a sub-mortgagee may redeem. 27 A 472, 20 M. 35, 2 A. L. J. 609.

——a permanent lessee can redeem. 29 A. 679, but a raiyat cannot redeem. 5 C. W. N. 91 n.

——an attaching creditor of the mortgagor may redeem 17 C. W. N. 871, 6 C. W. N. 57, 25 A. 446, 26 A. 72, 23 A. 467. 37 M. 418, 89 I. C. 446.

S. 91. Redemption—*contd*

——when prior mortgagee does not make puisne mortgagee a party and the property is purchased by a third person, the puisne mortgagee may sue the prior mortgagee and the purchaser for redemption 40 M. 77. F. B

——puisne mortgagee is not bound by the decree in which he is not party. 28 C L J. 188 P C

——a prior mortgagee made party to suit may redeem. 14 C. W. N 672.

——a mere right of maintenance cannot give a right of redemption 18 A 253, 22 A 191 P C

——conditions constituting clog on redemption are invalid. 80 I C 944: L. R 5 A 542. 1925 All. 34, 47 A. 582: 1925 All. 427 87 I C. 477

——conditions which prevent or impede the right of redemption even after redemption, if such conditions are entered into at the time when a mortgage is made, must be taken to be a clog on the equity of redemption 47 A. 582 · 87 I. C. 477: 1925 All. 427.

——period of redemption being 50 years it was held to be a clog. 1925 Cal. 105

——s. 60 is imperative and no mortgagor could lose his right to redeem even in the case of an anomalous mortgage 82 I. C. 809: 1925 Mad. 366, 42 M. L. J. 584

——the word interest in sec. 91, cl. (b) is very wide 19 M. 151, 27 A 472.

——third person purchaser of mortgaged property applying to be made deft and plff. objecting, redemption can be claimed by the former in defence to a subsequent suit for possession by the plff. 28 C. L. J. 256.

——a person having raiyati interest only cannot redeem. 5 C. W. N. 83.

ortgage decree impedes is contray to Or. 34, he absence of specific is illegal. 3 Pat. 829:

is likely to nullify the clog on redemption. 80 : 28 C. W. N. 79: 20 A.

S. 91. Redemption—*contd.*

L J. 476 : 30 M. L. T. 220 : 24 Bom L R. 695 : 44 A. 185 P. C. 18 C. W. N. 586 : 36 A. 195 : 19 C. L. J. 477 : 15 M. L. T. 339. 16 Bom. L. R. 344 P. C.

——a mortgage cannot be redeemed before term 80 I. C. 728 (A).

——where nothing more than a period is specified the onus lies on the mortgagor to prove that he can redeem before that period. 72 I. C 931.

——partial redemption. 44 A. 708.

——right of redemption put off under certain circumstances 28 C. W N. 79.

——the general principle as to redemption and foreclosure is that in the absence of any stipulation, express or implied, the right to [illegible] co-extensive and this principle [illegible] 273 (c), 5 B. 22, 8 A. 95, 29 A. [illegible] 75, 28 Punj L. R 150 : 100 I. C.

——where under the terms of a mortgage, if the amount was not paid at a certain time the right of the mortgagor to redeem would be suspended for a further fixed period, the provision offended against the statutory right of redemption conferred by s 60 and hence was of no effect 44 A. 185 : 35 C. L J. 468 : 24 Bom L R. 695 : 68 I. C. 853 P. C.

——where the mortgagee by his own act of purchase of one of the mortgaged properties has split up the integrity of the mortgage, any person interested in the share of the mortgaged property may redeem that share by payment of the proportionate amount of the balance of the mortgage debt. 5 Pat L T. 312 : 75 I. C 821 : 1925 Pat. 31, 48 A. 171 : 24 A. L. J 88 : 1926 All 46.

[illegible] is broken, a martgagor who [illegible] can redeem his own part [illegible] 20 A L J. 258, 1925 [illegible] C 866.

——where a mortgagee gives up or releases any person interested in the equity of redemption in respect of portion of the mortgaged properties, or where such release is caused by conduct, there ought to be an apportionment of the mortgage debt and the mortgagee cannot recover more than what falls to the share of the properties not released 85 I C. 742 : 1925 Cal. 1048.

——simple and usufructuary mortgage on the same day, tacking 65 I. C. 819 : 1922 A. 41.

——jurisdiction in redemption suit depends on the amount ultimately found to be due. 28 C. W. N. 710.

——mortgagee in possession is bound to restore the mortgaged property when redemption takes place. 63 I. C. 114, and liability of the mortgage should be determined in the redemption suit. 23 Bom L. R. 979

——when by stipulation in the mortgage deed the mortgagor is given the option of suing for the whole of the mortgage money in default of payment of interest annually, the mortgagee is not bound

S. 91. Redemption—*contd.*

to do so and may sue at his option after the expiry of the period fixed for redemption 63 I C. 477

——the mortgagee has perfect right to insist upon mortgagor to appoint a manager in whom the mortgagee has confidence and the mortgagee is not liable for any default or waste or mismanagement 25 C. W. N 265 28 M. L T 351 **P C**

——a mortgagee is not a trustee except in a very special and modified sense. A mortgagee may renew a lease for himself which a trustee cannot. 62 I. C 692 (c)

——where a usufructuary mortgagee commits a breach of contract by making a default in payment of rent and the holding is sold for arrears of rent and the mortgagee purchases the same, the mortgagor's right to redeem is not affected thereby 25 A L. J 658 : 103 I C. 370, (20 B 492, 21 B 296) *Rel on*

——a purchaser of the mortgaged premises, not under a covenant to pay, who pays off incumbrances on the property, is also entitled to the benefit of the securities, the purchase may afterwards be set aside. 1922 Pat. 331

——in a suit by the puisne mortgagee for redemption of prior mortgage he must prove due execution of his mortgage deed though the mortgagor admits it 96 I C 775 1926 All 725

S. 95. Charge of one of several co-mortgagors who redeems

——co-mortgagor making the payment has a charge on the mortgaged properties. 11 C L J 226 14 C W N 617.

——where one of several mortgagors redeems a mortgage, the other mortgagors can bring a suit for rdemption against him 20 A L J. 611 1922 A. 410

es assignee of
r his suit for
in the mort-
57 I. C 868

——s 95 applies also to a case where property is not in the hands of the mortgagee and so is incapable of being transferred to the person releasing the security. 3 Pat L J 490 5 P L W. 144 46 I C. 479

——where one of several mortgagors redeems the mortgaged property and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors for the proportionate expenses properly incurred in so redeeming and obtaining possession but he is not entitled to interest on such expenses unless he has given expenses notice thereof. 49 B 591 88 I C 658 1925 Bom. 484 27 Bom. L R. 629.

——when one of the several mortgagors redeems the whole mortgage he acquires a charge on the share of his co-mortgagors for his proportion of the expenses properly incurred in redeeming the property and the purchaser of a portion of the mortgaged property is in the same position. 21 C L J. 104 : 21 I. C 780.

Ss. 100-104 Charges.

——charge cannot be enforced against a *bona-fide* purchaser *of property for value* without notice but a mortgagee can always follow the property. 42 C. 625; 21 C. L. J. 177, 33 C. 985; 12 C. W. N 819, distinction between charge and mortgage shown. 35 C. 837: 7 C. L J 492; 12 C. W. N. 849, 33 C. 985; 4 C. L. J 213, 31 M. 337, 1 C. W. N. 81, 26 C. 78, 32 C. 723. 16 C W. N. 1075, 20 C. W. N. 989 P. C.

——a charge which does not amount to a mortgage can be enforced against a subsequent transferee for value without notice *of the charge*. The position is not affected by s. 40. 22 A L J. 887 1925 All. 60.

——the charge of landlord for rent does not come under this sec. 22 C. W. N 131.

——an arbitrator for the partition of a property can *create a charge* upon the properties allotted to one of the parties *for the* payment of certain amount to the other party. 24 A. L J 649: 96 I C 39: 1926 All. 527.

——if attestation is necessary to create a charge 66 I C. 554.

——it must be effectual immediately. 67 I. C. 939

——where a usufructuary mortgage deed contained the provision that if the mortgagee were in any way dispossessed *from the mortgaged property* he will be entitled to realise his *dues from the mortgagor's one anna share in some other property*, the provision created a charge though it could be enforced only on the happening of contingency. 1928 Pat 587. 9 Pat. L. T. 743: 110 I. C. 526.

——creation of charge is a question of *intention*. 23 C W N. 226

——co-mortgagor *making* the payment has a charge on *the* mortgaged properties. 14 C. W. N. 617; 11 C. L. J. 226

——an invalid mortgage cannot be a charge. 9 C W N. 697, 20 C W N 989; 25 C. L. J. 115: 18 Bom L. R 862 P. C.

——making an annuity a charge on a property *if offends* the rule against perpetuity. 29 C. L. J. 551: 23 C. W. N. 549

——*procedure in case there is both charge* and *mortgage of* the same property. 25 C. L. J. 354.

——the costs awarded to the mortgagee in a *redemption suit* is a charge on the mortgaged property and if the mortgagor pltf does not deposit it within the time fixed he is not entitled to the possession of the property. 94 I C. 872: 24 A L. J. 424: 48 A. 425: 1926 All. 424.

——the revenue paid by the mortgagee is a charge on the mortgaged property. 1 P. L. T. 225: 57 I. C. 653.

——a Hindu widow has no charge of maintenance *under this sec* 22 M L T. 386: 42 I. C. 975.

——where the Hindu widow by way of compromise with the reversioner surrendered the property in favour of the *latter but she* was to receive certain sums annually as *maintenance from the* income of the property, it was a charge on the property. 16 C. W. N 69: 14 C. L. J. 303: 11 I. C. 301.

Ss 100-104. Charges—*contd.*

——there is a presumption that a person intends to keep alive a security when it is for his benefit to do so. 36 C L J. 186 64 I. C 266

——cases of keeping alive mortgages and charges 20 A. L. J. 596; 44 A. 659, 24 Bom L. R 720 1922 Bom 211, 1922 Pat. 171, 4 Pat. L. T 525; 75 I. C. 305, 70 I. C 912, 1923 M. 349 70 I. C 296, 10 O. L. J 112, 73 I. C 704, 45 M. L J. 693, 19 C W. N. 200 · 20 I. C. 864, 16 C. W N. 505, 39 C 527 15 C L J. 411 P. C

——where a new mortgage taken in supersession of the old mortgage proves invalid the mortgagee has a right to fall back on the old mortgage. 39 A 178, 21 C. W N 765 25 C. L. J 316 · 39 I C 343 15 A. L J 223 P C., 35 A. 211 : 17 C L J 555, 17 C. W N 853 P C

——where some villages were granted by the talukdar for the maintenance of junior member and the talukdar undertook to pay the Govt revenue, held that the obligation to pay the revenue was personal and no charge was created on the estate 24 C W. N 929 28 M. L T. 319 1920 M. W N 447 P. C

——where under a document executed by a person in whose favour a lady released her claim to certain property, the lady was to get an annuity from the said property to be recovered by suit if necessary, held that the annuity was made a charge on the share even though there was no specification of the property. 40 I. C. 865 (c)

——a mere covenant not to alienate property is insufficient to create a charge. 19 I C. 478 1913 M W N. 337.

——the special provisions of T. P Act relating to attestation of mortgage deeds and the method of proving them are not applicable to the deeds creating charges 1921 M. W. N. 472 66 I C. 554 14 L W 99.

——owner of property paying off a prior mortgage, purchase of a portion of property,—subrogation 28 C W N 1025 · 39 C L J. 204 26 Bom. L R 204 79 I C 592 P C

——where a borrower agrees to pay the lender a fixed amount as commission on the gross returns of his business in perpetuity, even after the repayment of the debt, and the lender is entitled under certain circumstance to recover his amount out of the machinery and properties belonging to the borrower, it is a charge. 28 Bom. L. R 939 1926 Bom 495.

——the procedure mentioned in s 103 is consequent upon the deposit and not precedent to it 50 A. 655 1928 All 311: 108 I C. 570. 26 A L J 394

Distinction between mortgage and charge.

——the test to find out whether a zuripishgi is a mortgage or lease is to find out whether there is a secured debt and a right of redemption. 3 Pat L T. 797 : 68 I C 394.

——a mortgage does, whereas a charge does not, involve a transfer of an interest in specific immoveable property : a mortgage

Distinction between mortgage and charge—contd.

can follow the mortgaged property in the hands of a transferee whereas a charge can be enforced against transferee, only if it is shown that the has taken with notice of the charge. 33 C. 985: 1 C. L. J. 219, 35 C. 837: 12 C. W. N. 849: 7 C. L. J. 492, 10 B. 519 13 B 90, 20 B. 408, F. B., 1 Pat. 787.

——where the document does not contain any word such as 'hypothecate' or 'mortgage' but prohibits transfer until payment, it is disputed whether it is a charge or a mortgage 37 A 201

——where there is both charge and mortgage of the same property the procedure to be adopted is to get a decree of charge upon the property. 25 C. L. J. 354: 22 C. 813, 859, 903, Fol.

——co-mortgagor paying off mortgage debt, has a charge upon the share of other for his share of debt, 14 C. W. N. 361.

——a stranger who pays off the mortgage stands in the shoes of mortgagee and can enforce sale of the property. 40 B 646: 35 I. C. 794: 18 Bom. L. R. 700, 44 I. C. 726: 1918 Pat. 76, 10 C. 1035 P. C

——mortgage not validly executed does not create a charge. 20 C. W. N. 959 P. C.

——charge only secures payment out of the property while mortgage creats an interest in the property. A person holding a charge cannot follow the *bona fide* purchaser for value without notice but a mortgagee can 42 C. 625: 19 C. W. N. 37: 21 C. L. J. 177: 27 I. C. 261.

——a charge in the nature of a mortgage cannot be created by implication. 40 C. 514: 18 I. C. 80.

——a charge not amounting to mortgage operates against *bona-fide* purchaser without notice. 47 A. 90: 1925 All 60, 85 I. C. 855: 47 M. L. J. 622.

S. 105. Lease defined.

[illegible] governed by the T. P. Act unless [illegible] ease is that the object of which [illegible] 3: 98 I. C. 92. [illegible] nd was shown as a bagan in the [illegible] to show that it was used for [illegible] N. 282: 1927 Cal. 279: 100 I. C. 614.

——the word *raiyati* does not necessarily indicate a jote within the meaning of the B. T. Act 31 C. W. N. 282: 100 I. C. 614: 1927, Cal. 297.

——the T. P. Act uses the word *lease* not merely for *interests* which can be created only by registered instrument but for *all interests* of the character defined in this sec. 54 C. 815: 31 C. W. N. 973. 1927 Cal. 725: 104 I. C. 484.

——in case of lease there is transfer of interest where as in case of license there is no such transfer although the licensee acquires a right to occupy the land. The stall-holder and other persons attending a *mella* for selling articles of merchants are licensees and not tenants. 35 C. 82; 11 C. W. N. 1053, 5 C. L. J. 342: F. B 17

S. 105. Lease defined—*contd.*

C. W. N 166, 7 C. L J. 152, 29 M 152, 48 M. 368 86 I. C 688 . 48 M. L. J. 161 **F B.**

——there is no such thing as tenancy by sufferance in India ·69 I C 504 (C).

——where a *mirasdar* permitted a person to occupy a certain [illegible] he was a licensee

23 B 397.

[illegible] grant lease does

——whether any given words import a lease or an inchoate agreement is one of construction and intention 17 C 686 **P C.**

——the leasehold property being destroyed the lease becomes void. 17 M 98, 7 I. C 201, 19 C W N 1019

——a lease for an immoral object is void 9 B L. R (Ap) 37, 18 W. R 445.

——possession under a void lease is that of a trespasser 25 M 507, 9 C. W N. 292, 27 B 505.

——a kabuliat by one on behalf of others is binding against others 16 C. L J 271

——a patta not delivered is not operative. 24 C W. N 28 n

——a registered kabulyat signed by the lessee and accepted by the lessor is sufficient to constitute a lease. 39 C. 1016 : 16 C W. N 606 15 C L J. 665, 14 C W. N 73 *Dist* 21 M L J 202 **F. B.** *contra* 30 M. 322, 26 A 368, 27 A 136 The tenant may be sued at least for the use and occupation of land, 31 A 276

——a registered kabulyat executed by the lessee and accepted by the owner of the premises is not sufficient to bestow title upon the lessee and cannot be considered as a lease 46 A 303 78 I C 934 : 1925 All 514 (39 C 1316, 31 A 276, 27 A. 137) *Ref*

——the existence of the kabuliyat without a lease will not enable the executant of the former to use the contents thereof to the prejudice of the landlord and for his own benefit The landlord can rely on the kabuliyat to prove the undertaking of the executant 15 A L. J 317 37 I. C. 395, (26 A. 368 27 A. 136, 27 A 462, 27 A. 1901 *fol* 31 A. 276 **F B.** *Ref contra* 35 M 95 **F. B**

——a *kabulyat* by one on behalf of himself and others is binding against all. 6 C L. J 271

——*kabulyat* which is only an undertaking by the prospective tenant to take the tenancy is not a lease When the executant of the kabuliyat never obtained possession and the tenancy never commenced, he cannot recover possession on the basis of the *Kabuliyat.* 10 C L J 555 . 14 C. W. N 73 ; 2 I C 992

——where no lease is executed by the owner of premises a *kabuliyat* does not confer on the executant of it the right of a lessee. 104 I. C 410, 46 A. 303 *fol*

——where a *kabuliyat* read as a whole is good evidence that the tenancy was raiyati and not a tenure, the mere fact that the person who executed the *kabuliyat* did not belong to the cultivating

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S. 105. Lease defined.

——prima facie all leases are governed by the T. P. Act unless exempted by it. An agricultural lease is that the object of which is agricultural or allied. 1927 All 78: 98 I. C. 93.

——the mere fact that the land was shown as a bagan in the record of rights is not sufficient to show that it was used for horticultural purposes 31 C. W. N. 282: 1927 Cal. 279: 100 I C. 614.

——the word *raiyati* does not necessarily indicate a jote within the meaning of the B. T. Act 31 C. W. N. 282: 100 I. C 614: 1927. Cal. 297.

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——where no lease is executed by the owner of premises a *kabuliyat* does not confer on the executant of it the right of a lessee 104 I C 410, 46 A. 303 *fol*

——where a *kabuliyat* read as a whole is good evidence that the tenancy was raiyati and not a tenure the mere fact that the person who executed the *kabuliyat* did not belong to the cultivating

S. 106. Duration of leases—*contd.*

deemed to be holding on a monthly tenancy. 27 C. W. N. 159 : 36 C. L. J. 48.

——on the expiration of the term of an agricultural lease the tenancy becomes a tenancy from year to year 1923 Pat. 122 : 71 I. C. 1023.

——reserving yearly rent does not necessarily create tenancy from year to year. 6 Pat L. T. 577 : 85 I. C. 77 : 1925 Pat. 256.

——when the tenancy is regulated by the Bengali year a six months' notice calculated according to Bengali calendar is good 11 C. W. N. 1124, 22 C. L J. 78, 27 C. 570 ; 4 C. W. N. 210.

——presumption of yearly tenancy from the rent being paid yearly does not apply to the case of *lodgings* 19 C. W. N. 525 : 20 C. L. J. 448, 20 C L J. 455, 51 I. C. 44 (c), 50 I. C 918, (11 C. W N. 1124) *Ref.*

——a lease of immoveable property securing an annual rent will be deemed to be a lease from month to month when the contract has not been put into writing and registered. 41 C. 403 . 20 C W. N 1005 : 33 I. C. 899

——when the land is let for [illegible] gricultural or manufac- [illegible], the tenant is only a [illegible] annually. 11 C. W. N [illegible] C. L. J. 443 · 24 I C 183, 30 C 883.

——a lease for *bishabari* is a lease for month to month. 13 C. W. N. 513 : 9 C. L. J. 362, so also a lease held over 32 C. 123 : 8 C. W. N. 901, 19 C. W. N. 489 : 20 C. L. J. 455.

——a lease where no time is fixed is ordinarily deemed to be one from year to year. 30 C. 20

——where the lessee of a house agrees to vacate the same whenever wanted s 106 cannot be made applicable and no *notice* to quit is necessary. 1924 All 726, 110 I. C. 398 · 1928 Mad. 687, 1924 All. 726 *fol.* 9 M. L. T. 198 *approved*, 2 M. 346 *dist.* 34 C 57 *const.*

——where a lease reserved a yearly rent which was *payable* according to monthly instalments and the tenant *held over for* a considerable number of years, the tenancy could be presumed to be a yearly tenancy. 23 C. W N 641 : 29 C. L J. 394 : 51 I C. 415

——where a tenant took a lease for 10 years from the *mutwali* [illegible] d it was found that the [illegible] ver *of the trustees*, the [illegible], holding on a monthly [illegible] *925 Cal 130.*

——burden of proof lies on the person who claims permanent right 12 W. R 6 P. C 4 C. W. N. 119 n., but it *may be shifted by* long possession., 6 C. W. N. 105, 11 C. L R 476, 20 W. R 421, 3 C. W. N. 763.

——a grant of land for building purposes is presumed to *be* perpetual. 27 C. 570 23 W. R. 399, 32 C. 648, 21 A. 496 P. C. 26 C 914, 12 W. R. 495, 3 C. W. N. 255. 6 C. W. N. 134, 21 A. 496 P. C.

S. 106. Duration of leases—*contd.*

for upward 60 years, is by permanency. 15 B 647, 25 om time to time and erection V. N 846, 28 C. 738, 8 C W

——in order that the presumption of permanency may be drawn e tenancy is unknown and built without objection C. W N 567 15 C L. J

For other cases, see "*Permanent Tenancy*"

Notice

——a notice must be reasonable 17 C. W. N. 1023.

——fifteen days' notice means 15 clear days 28 C 118 8 C L. J. 34 10 C W N. 841 29 C 203 · 5 C. W N 69 : 20 C L J. 455.

27

ly

22 B. 241 *Fol.*

——a notice is valid if it is signed by the Ammukhtear of the landlord 19 C W N. 489 : 20 C L J 455 · 26 I C. 962

——addressee may be described as a trespasser 7 C L J. 107

——notice may be served by post 15 C 681 : 4 C W. N 572, 28 C. 118, 6 C W N 132

——if the notice is refused, ignorance of its contents cannot be pleaded. 17 C W N 1073, 6 C W. N 132, 15 C 681.

——the presumption that a notice sent by post was duly served is not conclusive. 7 C. L J 251

——in the absence of contract or local usage the lessee may transfer his interest and the transferee is entitled to notice. 5 C. L. J. 205.

——where in a case of joint tenants there is a tender or delivery of the notice to quit to the heads of their respective families the service is sufficient. 37 C L J 478 122 Cal 692

ce to quit bound by be addres- s. 106 (i),

of notice

N. 489 : 20 C. L. J. 455.

4 F B., 17 C W N.

tender or delivery.

23 C. W. N. 600

——fifteen days means clear fifteen days. 19 C. W. N. 459

S. 106. Duration of leases—*contd.*

deemed to be holding on a monthly tenancy. 27 C. W. N. 159 3 C. L. J. 48.

——on the expiration of the term of an agricultural lease the tenancy becomes a tenancy *from year to year.* 1923 Pat 122 71 I. C. 1023

——reserving yearly rent does not necessarily create tenancy *from year to year.* 6 Pat L. T. 577 : 85 I. C. 77 : 1925 Pat. 256

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——a lease of immoveable property securing an annual rent will be deemed to be a lease *from month to month* when the contract has not been put into writing and registered 41 C. 403 : 20 C. W. N. 1005 ; 33 I. C. 899.

——when the land is let for other than agricultural or manufacturing purposes without a written lease, the tenant is only a monthly tenant although the rent is payable annually. 11 C. W. N. 1124 20 C. W. N. 1005, 19 C. W. N. 525 : 20 C. L. J. 443 : 24 I. C. 185, 30 C. 883.

——a lease for *bashabari* is a lease for month to month 13 C. W. N. 513 : 9 C. L. J. 362, so also a lease held over. 32 C. 125 : 8 C. W. N. 901, 19 C. W. N. 489 : 20 C. L. J. 455.

——a lease where no time is fixed is ordinarily deemed to be one from year to year. 30 C. 20.

——where the lessee of a house agrees to vacate the same whenever wanted s. 106 cannot be made applicable and no *notice to quit is necessary* 1924 All 726, 110 I. C. 393 : 1928 *Mad.* 687. 1924 All. 726 *fol.* 9 M. L. T. 198 *approved,* 2 M. 316 *dist.* 34 C. 57 *cons.*

——where a *lease* reserved a yearly rent which was *payable* according to monthly instalments and the tenant held over *for a* considerable number of years, the tenancy could be *presumed to be* a yearly tenancy. 23 C. W. N. 641 : 29 C. L. J. 394, 51 I. C. 415

——where a tenant took a lease for 10 years from the *mutwali* [illegible] and it was found that the [illegible] of the trustees, the [illegible] holding on a *monthly* [illegible] 25 Cal 130

——*burden of proof lies on* the person who claims *permanent* right. 12 W. R. 6 P. C. 4 C. W. N. 119 n., but it may be *shifted* by long possession., 6 C. W. N. 105, 11 C. L. R. 476, 20 W. R. 431, 3 C. W. N. 763.

——a grant of land for building purposes is presumed to be perpetual. 27 C. 570 23 W. R. 399, 32 C. 648, 21 A. 496 P. C. 26 C. 904, 12 W. R. 495, 3 C. W. N. 255 6 C. W. N. 134, 21 A. 496 P. C.

S 106. Duration of leases—*contd.*

——[illegible] for upward 60 years, is by [illegible] permanency 15 B 647, 25 [illegible] om time to time and erection [illegible] W. N 846, 28 C 738, 8 C. W.

——in order that the presumption of permanency may be drawn it must be established that the origin of the tenancy is unknown and that substantial *pucca* structures must be built without objection raised by the landlord 29 C W. N 138, 16 C W. N 567 15 C L. J. 220, 32 C. L J. 85

For other cases, see "*Permanent Tenancy*"

Notice.

——[illegible] be reasonable 17 C W N 1022

——a notice is valid if it is signed by the Ammukhtear of the landlord 19 C W. N. 489 · 20 C L J. 455 · 26 I C. 962

——addressee may be described as a trespasser 7 C L J 107.

——notice may be served by post 15 C 681 4 C W. N 572, 28 C. 118, 6 C W N. 132

——if the notice is refused ignorance of its contents cannot be pleaded. 17 C W N. 1073, 6 C W N. 132, 15 C 681.

——the presumption that a notice sent by post was duly served is not conclusive 7 C. L J 251.

——in the absence of contract or local usage the lessee may transfer his interest and the transferee is entitled to notice 5 C L J 205

——where in a case of joint tenants there is a tender or delivery of the notice to quit to the heads of their respective families the service is sufficient 37 C L J 478 . 1223 Cal 682

——when there were several joint tenants and no notice to quit was addressed to one of them [illegible] not bound by [illegible] must be addressed [illegible] in s. 106 (i).

——[illegible] of notice is inclu[illegible] N. 489 : 20 C. L J. [illegible] 74 F. B , 17 C. W

[illegible] tender or [illegible]

——fifteen days means clear fifteen days. 19 C. W. N. 119

S. 108. Rights and liabilities of lessor and lessee—contd.

—*the obligation* of the lessor to deliver possession to the lessee is absolute. 25 M. 597.

—when the lessee is to get rent, giving of notice to the tenants by the *lessor requiring* them to attorn and pay rents to the lessee is *sufficient delivery*. 33 M. 102.

—*where* the lessor is reluctant to take possession he is liable to pay rent to the *lessor*. *33 M. 499.*

—*the landlord* is not bound to put the recalcitrant tenant into possession before suing *for rent* *9 C. L. J. 595*

—*when* the trespasser acts under the instruction of landlord the latter *is not* entitled to get *rent*. *25 I. C. 812.*

—*the lessor cannot* during the pendency of the lease, let the demised property to a tenant. *2 P. L. J. 713.*

—*the landlord is* entitled to special damages where a tenant holds *over, either for* breach of contract to yield possession or for possession. 50 C. 667.

—no clause in s. 108 entitles the lessee to call upon the lessor *to repair* the property. 38 C. L. J. 177 : 72 I. C. 98 : 1923 Cal 524.

—on a breach of quiet enjoyment the lessee is entitled to *recover* damages 21 B. 175.

—s 108 cl. (c) of the T. P. Act secures for the lessee the benefit *of an unqualified* covenant for quiet enjoyment. 36 C. L. J. 28.

—*suspension* of rent only follows eviction. 9 C. W. N. 871.

—where a lessee holding over without the consent of the *landlord* is dispossessed by a person claiming under landlord he *cannot* sue for declaration of title based on previous possession. 4 *Pat L. T. 696.*

—where a tenant holds over on payment of rent he must be *deemed to be a* tenant from year to year or month to month *according to the object* for which the property was leased. 38 *C. L. J. 177.* 1923 Pat. 54

—where the tenant holds over, the landlord is *entitled to special* damages either for breach of contract to yield possession or for possession. 83 I. C. 757 : 1924 Cal. 240 : 50 C. 667.

—when the lessee is evicted *from* land by the lessor the *latter is* not entitled to rent. 24 C. 296, 304, 28 C. 188, 9 C. L. J. 578, 13 *C. W. N. 853*, but it does not extend to eviction by stranger. *11 C. L. J* 585 or the Government. 33 C W. N. 106 : 49 C. L. J. 252 : 1929 *Cal. 272*, nor to eviction by another lessee. 34 C. 191

—there will be suspension of rent when it is *unascertained or* disputed. 27 M. 143 P. C.

—the lessee is entitled to abatement of rent for *decrease in* area. 21 C. 1005, 1016 P. C., *12 C. W. N. 767.*

—if the tenant has encroached upon dry land and made it part of his tenancy, he *is bound* to give up those *lands* at the determination of the lease. 42 C L J 276 : 1925 Cal 1114.

S. 108. Rights and liabilities of lessor and lessee—*contd.*

——this Act imposes no obligation on the landlord to repair, rather it imposes a qualified obligation on the tenant by s. 108 (m) to repair. 51 B 274 1927 Bom. 115. 101 I. C. 210. 29 Bom. L. R 78.

——a lessor is not bound to make structural repairs during the continuance of the lease, either by any law or equity. The lessee can avoid the lease but cannot claim any damages. 2 C. W. N 34.

—— expenses of repairs are in the nature of payment to landlord. 12 C. L. J 351. 6 I C 131

——lessee can deduct from rent, expenses of only those repairs which the landlord was bound to execute 3 A L J. 134 A. W. N. (1906) 56.

buildings be erected I. C 86

ınd do not B R. 595,

ɔvicted on 27 M 211.

——a permanent tenant is entitled to cut down trees. 38 B. 716 16 Bom L. R 595

the law on the subject as prudence. 37 C. 815 : 12

——a lessee may transfer 5 C. L J 205, 30 M 410

——but a lessor is not bound to recognise lessee's transferee. 1925 Cal 423.

——a lease for a definite term for general purposes is heritable and when the conduct of the parties shows it to be transferable, it must be treated as such 19 C L. J. 448 · 25 I. C. 530, 6 W. R. 48 P. C *Ref*

——leases from year to year before the Tr. P. Act are not transferable 20 C W N. 322, 4 C W N 574, 2 C. W. N 122, 32 C. 10, 23. 9 C. W N 895, 7 C. L. J 106.

——but the liability of the lessee does not cease. 22 C. 494. 12 C. W. N 724, mortgagees with possession from lessees are not liable for rent. 32 M. L J 442 40 M 1211, the transferee is not liable for

S. 108. Rights and liabilities of lessor and lessee—*contd*

rent but the leased property is liable. 4 C. W. N. 590, 14 C. W N. 331 : 32 C. 683, 31 B. 159.

——permanent leases for purposes of habitation created before the passing of the T. P. Act are not transferable. 29 C. W. N 429 : 84 I. C 28 ; 1924 Cal. 1012 ; 39 C. L. J. 585.

——where a lessee assigns his lease his own liability to pay rent is not extinguished. The lessor has a remedy for realising rent both against the lessee and against the assignee but he cannot take out one execution, but this principle does not apply to agricultural lands or to the B. T. Act. 79 I. C. 557 (c).

——a lessee by assignment does not escape personal liability on the covenant of the lease. 88 I C. 79 : 27 Bom. L R. 553 : 1925. Bom 330.

——s 108 clearly contemplates that a lessee should not be responsible for the consequences of fire unless he has taken such responsibility by his covenant. 51 M. 994 : 1928 Mad 1140 - 55 M. L J 663

S. 109. Rights of lessor's transferee.

——a lessor cannot eject the lessee from a part only of the ... n part of the demised ... cause from such part ... on that part 42 M

——the words "transferee of any interest" in this sec include lessee. 53 I. C. 865.

——when a landlord sues a person as trespasser and the latter sets up a transfer from a tenant he must prove the tenancy and also the validity of the trans...

... or acquiesc... , 1 Pat L. J. 253

S. 110. Exclusion of day on which term commences

——unless otherwise provided in the lease, a lease takes effect from the date of its execution. 22 C. W. N. 190 ; 50 I. C. 177.

S 111. Determination of lease

Cl (d) Merger.

... of the lessee ... at the same ... 8 I. C. 495 :

——apart from status a tenure does not necessarily merge in the proprietory right upon the union of the two interests Under s. 111 cl (d) there must be a union of the entire interest of the lessor and the lessee 1922 Cal. 284 : 65 I. C. 469, 18 C W. N. 860, 29 C. L. J. 427 *Ref.*

Cl. (d) Merger—*contd.*

——this sec does not say anything about intention and when an owner of property purchases subsequently certain lease-hold rights the latter are merged in his ownership 89 I. C. 780 · 1925. Nag. 406

——this sec. applies to leases created prior to the passing of this Act, when the superior and lease-hold interests vest in the same person subsequent to the Act 23 I C 612 (c).

S. 111. Cls (e) & (f) Surrender.

——an implied condition of surrender of a lease by operation of law is that a new lease should be a valid one, where the new lease does not pass an interest according to the contract the acceptance of it will not operate as a surrender of the former lease 71 I. C. 976 (c), 32 C 51, 32 C 41, 34 C 904 *Ref.*

——when the lessee surrenders the lease, under-leases or other interests created by the lessee are not extinguished as is the case when the lease is forfeited 21 C W N 117 24 C. L J. 40, 34 I. C. 833

——no writing is necessary to surrender a tenancy, unless the original lease is registered in which case registered surrender is necessary 63 I C 483 (c), 53 I C 17 (c).

——surrender for the consideration of arrears of rent is valid. 53 I. C 17 (c)

Cl. (g) Forfeiture

——usufructuary mortgage of non-transferable occupancy hold-
i [illegible] ount to forfeiture.
[illegible] *Ref*
[illegible] to non-agricultural
[illegible] C 1054, 28 Bom.
L. R. 527

——mere non-payment of rent is not forfeiture To constitute forfeiture denial of landlord's title must be unequivocal and unambiguous 35 A 145, 9 C. W. N. 928 2 C L J 389

——denial must be in clear and unmistakeable terms; when a tenant disputes the terms of the tenancy, setting up terms more favourable to himself, but does not deny the title of the landlord, there is no forfeiture. 23 C W N 889, P C, 20 B 354, F B, 17 M 218, 27 M 23

——a permanent tenure is liable to forfeiture on the ground of disclaimer of landlord's title, to constitute a disclaimer it must be renunciation by a party of his character as tenant by setting up title in third person or by claiming title in himself 26 C. L J 261

——when the *gomosta* of a landlord sues for rent saying that [illegible]

nor denying the title of the person under whom a non-occupancy

Cl. (g) forfeiture—contd.

raiyat holds is one of the grounds of forfeiture under s 44 B. T. Act I C W N 158

——denial of pltff.'s title in the written statement *does not* operate as forfeiture. 9 C. W. N. 928 : 2 C. L. J. 389.

——there is no disclaimer of the relationship of *landlord* and tenant where in a suit for rent, the tenant merely puts the landlord to the proof of his alleged title 9 C. W. N. 928 : 2 C. L. J. 389, 32 C W N 391 1928 Cal 312.

——mere denial of landlord's title is not sufficient to determine the tenancy unless *it is followed by some* overt act on the part of the lessor showing *an intention* to determine the lease. 47 A. 348 : 86 I C 174 1925 All 346 . 23 A. L. J. 49, 45 C 469 *Ref*

——a denial of the title of the assignee of the landlord does not work as *forfeiture*, nor the denial of execution of a kobulyat operates as such 96 I C 1056 : 1926 Cal. 1205.

——denial of landlords' title by the tenant setting up title in the third person and his malafide conduct constitute *forfeiture*. 32 C W N 391

——when the denial of the tenant of the *landlord's* title is given effect to by the court, it operates as *forfeiture* and the landlord is entitled to khas possession 3 C. L. J 201, 34 C. 922, 14 C W. N. 339, 35 C 807 7 C L J 483.

——it is only in case of tenant being inducted on the land by a landlord that the tenant cannot deny the title of the landlord at the inception of the tenancy. But where the pltf becomes the landlord by derivative title the tenant may without *incurring* any forfeiture to his landlord put him to the proof of his title. Courts ... relief on the ground of ... have been

... ainst party

... between a ... been recog-

nised in this Act which is supposed to have given effect to the existing law in the country. 1 Pat. 363 : 1922 Pat. 528.

Cl (h) Notice to quit.

——notice to quit before the end *of the year of* the tenancy is bad. 29 C 203 6 C. W. N 69

——where the lease was not determined by a notice to quit a tenant who took his right under the decree was given by the H C. 3 months' time to remove the buildings erected *by* him. 19 C W N. 361 . 23 I C 762

S. 112 Waiver of forfeiture.

... after forfeiture from *the* lessee with 1923 Cal 663.

of condition against

I. C 273 (c)

S. 112. Waiver of forfeiture—*contd.*

——claim of rent subsequent to the default in payment which gave rise to the cause of action for ejectment operates as waiver of the right to eject. 42 I C. 614 (o)

——acceptance of rent accruing due before forfeiture does not operate as waiver. 22 C. L. J. 546 : 33 I. C. 331.

——subsequent recognition may estop the landlord, 17 B 736 as well as the tenant, 13 M. L. J 429, and there may be estoppel by acquiescence. 28 C 738, 21 A. 496 P. C, 7 C W N. 130, 16 W R 97, 6 B L R 92, 6 C. W. N. 134

——whether the acceptance of an overdue instalment operates as waiver of the delay in payment is to be determined on the circumstances of each case. 23 I C 391

S. 113 Waiver of notice to quit.

——where rent is accepted after the notice to quit whether before or after a suit has been instituted, the landlord thereby shows an intention to treat the lease as subsisting. 43 C L. J 272 94 I C 156 : 1926 Cal 763.

——the doctrine of waiver of notice to quit does not apply where the landlord treats the tenant as a tenant from year to year and the tenant asserts a permanent tenancy 8 Pat L T. 633 1927 Pat 305 102 I C 821 1925 Pat. 357 6 Pat. L. T 98 *Ref*

S. 114. Relief against forfeiture for non-payment of rent.

[illegible] be given where rent is not [illegible] share when the lease was [illegible] family and the plff. being [illegible]lord's right 85 I. C 964

S. 115. Effect of surrender and forfeiture on under-leases.

——a mere repudation of the lessor's title by the lessee will not operate as forfeiture against the assignee of the lessee's interest. 42 B 731 · 20 Bom L R 830 · 47 I C 635

——an implied surrender is more analogous to the case of a forfeiture than to the case of a surrender and therefore extinguishes the rights of person deriving the title through the tenants 14 N L R 107 : 46 I C 244.

S. 116. Effect of holdingover.

——this sec is self contained 49 I C. 974 (c)

——"an agreement to the contrary" within this sec. means an agreement as to terms of the holding over 19 C. W N 489 20 C. L J 455; 26 I. C 962

——on the expiration of the term of an agricultural lease the tenancy becomes a tenancy from year to year 1923 Pat 122. 71 I. C. 1023.

——when the lease expires and the deft sets up new holding over, he must prove that. 24 C. W. N. 103 n

S 116 Effect of holding-over—*contd.*

—a lessee holding after the expiry of the term is, without the express or implied consent of the landlord, only a trespasser. 6 Pat L T 142, 4 Pat L T 695

—a tenant on sufferance is a person who entered by a lawful demise or title, and after that has ceased, wrongfully continues in possession without the consent or dissent of the person next entitled. 1927 Pat 305 102 I C. 821: 8 Pat L T. 633.

—this sec has no reference to the position of the heirs or assignees of the original lessee, it only contemplates the position of the lessee himself who remains in possession after the determination of the lease If the lessor or his legal representative accepts rent from the lessee or under-lessee or otherwise assents to his continuing in possession, the lease is in the absence of an agreement t the contrary renewed from year to year or for month to mont according to the purposes for which the property is leased 88 I C 387 6 P L T 98 1905 Pat 357 affirmed by the P C in Pat 649 109 I C 663 30 Bom L. R 1361: 32 C. W N. 897 48 C L J 69 1928 P. C 146

—the intention of this section is that the lessee holding ove with the landlord's mere consent has still a lease but only fron month to month If at the expiry of the original lease the persor who continues in occupation is not the lessee but his representativ or assignee there is nothing in this section to enable the lessor by mere consent to convert such representative into a monthly tenant Such a person, in the absence of agreement, is a trespasser, bu where the original tenant holds over with the consent of the land lord his interest is assignable. 54 C 813, 31 C W. N 973: 10 I C 454 1927 Cal. 725

—assent to hold over is not itself sufficient to create yearly tenancy 84 I C 586. 4 Pat 139 · 6 Pat. L. T. 12.

—the option of giving an assent which will convert the holding over into a tenancy is one that is conferred on the lessor and not on the lessee 48 B. 341: 80 I. C. 507, 31 M. 163, *Ref.* 94 I C 308 1926 M W. N 236 1926 Mad. 566

—where a tenant holds over after the expiry of the lease on payment of rent he must be deemed to be a tenant from year to year or from month to month according to the object of the tenancy. 38 C L J 177 72 I C 98; 1923 Cal 524, 19 C W. N. 525: 20 C L J 448 24 I C. 183, 1923 Pat 54. 1923 P. 201: 4 P. L T. 193.

—when after the expiry of a lease the lessee holds over he must be considered to hold on the terms stipulated in the lease 97 I C 412: 1926 Cal 1239.

—where certain homestead land within the municipal area was held by the tenant after the expiry of the term of the lease it was a case of holding over and the tenant can be asked to quit only on due notice. 31 C. W. N. 282: 100 I C 614: 1927 Cal. 279 47 C L J 27.

See other cases under the heading "holding over" B. T. Act.

S. 117 Exemption of leases for agricultural purposes

——a liberal interpretation should be given to the words of this sec, 4 Pat 404 : 6 Pat. L. T 331 : 86 I. C 597 1925 Pat 421.

——a lease of land for growing *casuarina* trees to be used as fuel is a lease for agricultural purposes within s 117. 45 M 710 *43 M. L J 191 : 1922 Mad 351 70 I C 657, 24 M. L. J. 13 C* L. J. 318 *Ref.*

——a lease of tank for preservation or rearing of fish, is not an agricultural lease 8 C W N 804.

——in the case of a lease of zerait lands as well as lands settled with raiyats where the lease contemplates direct cultivation of the former by the tenants the lease is for agricultural purpose 6 Pat L. T 331 · 4 Pat. 404 86 I. C 597 : 1925 Pat. 421

——the letting out of agricultural land need not be by a document only, it may be by oral agreement or conduct of parties. 69 I C. 57, 1923 Cal 432 (c)

——unless the primary object of the lease is cultivation or agriculture a lease cannot be called a lease for agricultural purposes 24 A L. J 489 . 48 A 385 1926 All 432 95 I. C. 1048

——a tenancy providing for the collection of money rent is not an agricultural lease 33 C W N 865 **P C.**

——the general rights between the lessor and lessee as laid down in English Law govern cases not falling within this Act unless the B T Act contains anything to the contrary 53 I C. 545.

Ss 118-121 Exchange

——an exchange implies an interchange of property with another and except in so far as the price may not be payable in money, the rights and obligation attaching to an exchange are analogous to those of sale so far as the parties are concerned 46 A. 359 76 I. C 495 . 22 A L J 292 · 1924 All 390.

——where some of the co-owners possessing an undivided share in several properties took by arrangement a specific property in lieu of their shares in all the properties, it was not an exchange within [illegible] ition which [illegible] 5 C 210 [illegible] Lah 456

[illegible] 119 do not exclude the opera- [illegible] exchange stands on the same [illegible] I C 819

[illegible] is exchanged for land worth Rs 500 as well as cash Rs 500 the transaction is exchange and not sale 86 I. C 266 1925 Lah 326 7 Lah L. J 18

——In case of Hindu joint family if any property is alloted to the share of a stranger a registered instrument is required 90 I. C. 131 · 1925 Mad 1174 : 49 M. L J 150

——the grant of an easement is not a transfer of ownership, consequently where a small strip of land below Rs. 100 in value was given in exchange for a grant of an easement right, no registered document was necessary. *1926 Mad 548 · 92 I. C 672*

Ss. 122-129. Gifts—*contd*

the donee or of any person authorised to hold them on his behalf. 67 I. C 451

——releasing a security without any consideration though may be said to be a gift it does not come under Chap VII, of the T. P. Act which deals only with gifts of tangible property. 42 C. L. J. 582 · 1926 Cal. 170.

—a gift of a house can be made ... locument

to which
Law as
egislature
the Act.
I 69 : 29

Ss. 130-137. Transfer of actionable claim

——in the absence of a valid notice of assignment under s. 131 Tr. P Act, a suit by an assignee of an actionable claim is not maintainable To attract the operation of the exception in s 130 there must be a strict compliance with the requirements of s. 131. 41 C. L. J 176 · 1923 Cal 719 27 C W N 733

——in order that the exception in s 130 T P Act. may be ... requirements

ce with the

926 Cal. 447
other chose
assignment

of chose in action, must be made by writing under the Indian Law, signed by either the transferor or his duly authorised agent, but no particular words are necessary An order for payment of money is not the same thing as an assignment of the debt but a direction in writing to pay the amount due on an instrument endorsed on such instruments by the payee, coupled with delivery of the instrument so endorsed to the person to whom payment is directed is a valid assignment within s 130 42 C L J. 43 89 I. C 735

——the benefit of the contract to resell the property to the vendor at a particular time is transferable 30 C W N 850 51 M 533 48 C. L. J 125 : 30 Bom. L R 1379 26 A. L J 1211 1928 P C. 174 109 I C. 765 P C

——in construing ss 130 and 131 it must be remembered that they contain a very special scheme which must be regarded as a whole in itself. 41 C L J 176 1923 Cal 719 · 27 C W N 733.

——where the assignment of the debt consists merely of a letter from assignor to the assignee and another letter from the assignor to the debtor intended to be notice under s. 130 and where the letter of assignment not proved to be stamped is lost, no secondary evidence can be given of the transfer. 87 I. C. 382 : 1925 Mad. 753 : 1925 M. W. N 180, 29 M. 49 P. C. *Ref*

Ss 130-137. Transfer of actionable claim—contd.

——where a certain person executes a mortgage in favour of *another* and the latter person transfers the same to another person with the consent of the mortgagor but the instrument of transfer is not attested properly to constitute it a fresh mortgage, the instrument could be treated as a transfer of the earlier mortgage 31 C W N 179 ; 1926 M. W. N. 828 ; 1926 P. C 129

——s. 130 is not exhaustive, prescribing only certain condition for the assignment 90 I. C. 111.

——the transfer of right to arrears of rent and current dues can be made only by an instrument in writing under this sec 67 I C. 451.

——a promissory note can be transferred by an assignment in writing in places where this Act has been extended but it would not render the transferee a "holder in due course." 66 I. C. 301

——sale of immoveable property out of possession is not actionable claim 13 C 297.

——the benefit of an executory contract is actionable claim 11 C. W. N. 566.

——the mere right to recover mesne profits or damages for breach of contract, is not transferable. 13 C. W. N. 554 ; 36 C 345, 2 C. W. N. 42 ; 18 C. W. N. 450, but when the claim merges in judgement, it can be transferred before assessment. 18 C. W. N. 450.

——the transfer of a right to arrears of rent and current dues can only be made by an instrument in writing. 1923 P. 165.

——the right to arrears of rent purchased by a pleader is an actionable claim. 17 C. W. N. 679 : 17 C. L. J. 455 : 40 C. 653 F B

——the mere sale of arrears of rent by a legal practitioner is not invalid. 97 I. C. 373 : 1927 Pat. 2 : 8 Pat. L. T. 201.

——a decree is not an actionable claim and hence the transfer of it in favour of a pleader is not invalid. 62 I. C. 255 : 41 M. L. J. 129 : 1921 M. W. N. 98.

——s. 136 is controlled by sec. 2 sub. cl. (d) and therefore a purchase in execution of a claim under a life insurance policy by a legal practitioner entitles him to claim the sum from the Insurance Company. 46 C L. J. 225 : 1927 cal. 691 : 104 I. C. 729. 25 C. 711 *Expl.*

——a mukhtear who purchases from an Honorary Magistrate the right to arrear of rent is barred by s. 136 from enforcing his claim in court. 4 Pat. 45 : 83 I. C. 81 : 1925 Pat. 312.

——a pleader is guilty of unprofessional conduct for purchasing actionable claim specially when it is speculative 57 M. 258 : 23 M L. J. 447 : 17 I. C. 544.

——in the case of an assignment of the decree debt, the assignment is not valid as against the debtor until the debtor has in fact notice of the assignment and any payment to the original decree-holder is valid against the assignee if made before notice of assignment. 1 Pat. 7[illegible]

Ss. 130-137. Transfer of actionable claim—*contd*

——under the Contract Act, s. 108 and this Act, s. 137 there is now a statutory recognition of a delivery-order as a document of title and under it the transferee acquires a title to goods. 38 C. 127 : 10 I C 859.

TREES *See* "*B. T. Act s. 23*"

USE AND OCCUPATION *see* "*B T. Act. rent and rent suit*"

VALUATION *see*, "*Jurisdiction*"

USURIOUS LOANS ACT (X OF 1918.).

S 2.

——the Act does not apply to mortgage deeds executed before the commencement of the Act. 1927 Nag 338 104 I C 191.

S. 3.

——in order to bring the case within the statute it must be proved that the settled rate of interest is unusual and therefore excessive. The stipulation to pay interest at 12 p c p. a. is not unusual or excessive 1927 Lah 158 : 8 Lah 205 99 I. C. 822 : 28 Punj. L R. 483, 1927 Lah. 621 . 103 I C. 531.

103 I. C. 531,

——a contract to pay interest at the end of the year and in the event of default to pay compound interest at the same rate, cannot be said to be unreasonable or unconscionable and this sec does not apply 1927 Lah 153 99 I. C 822 : 28 Punj. L R. 483 8 Lab. 205

——where a suit is not based on any series of transactions but [illegible] proviso to this sec.

[illegible] Court may proceed [illegible] cl. (d). It is unnecessary in such a case to consider whether the lender was in a position to dominate the will of the borrower. 107 I. C 742 (c), 1928 Oudh. 396 F. B

——stipulation to pay interest of 12 p c. with yearly rests is not unfair if there is no evidence that the rate of interest prevailing at the time was lower. 33 C. W. N. 388

VOID AND VOIDABLE.

——where a deed is void it need not be set aside. 17 C L J 233

——a deft. can by his defence avoid a transfer which is voidable only under s 53 T. P Act 16 C. W. N. 717 : 15 C L. J. 649 14 I. C. 715

WAIVER.

——what is waiver, 19 C. W. N. 1172, 23 C. L. J. 82, 6 C. L. J. 62, 19 C. W. N. 882 : 21 C. L. J 557.

Waiver—*contd.*

——it is a mixed question of law and fact. *4 C. L. J. 198*, 14 C. L. J. 346, 13 C. L. J. 192.

——irregularity can be waived but illegality cannot be waived 24 C. W. N. 791, if it can be waived it is irregularity and not nullity. 27 C. W. N. 765.

——receipt of rent of prior period after the service of notice to eject under sec. 49, B. T. Act, does not amount to waiver. 37 C. L. J. 548

——payment and acceptance of overdue instalments of a mortgage bond constituted a waiver and the mortgagee was entitled to recover the subsequent instalments. 27 C W. N. 893, 7 W. R. 21 F. B, 15 C. 502 *fol.* 31 C. 83 : 8 C W. N. 66, *Dist.* 25 W. R. 278, 24 C 281 *Ref.*

——mere abstinence on the part of the creditor from bringing a suit for the recovery of the whole amount on the failure of payment of the specified instalment, does not amount to waiver. 13 C. W. N. 1004 : 36 C. 394 : 9 C L. J. 226, 19 M. L. J. 372 : 32 M 284 5 M. L. T. 351, *Ref* 13 C. W. N. 1010 : 4 I. C 17, 31 C. 297

——such a waiver can be effected not only by acceptance of a subsequent instalment, but also in variety of other ways and it may be inferred from various circumstances But it must always depend on some definite act or forbearance on the creditor's part. 13 C. W. N. 1010 : 41 I. C. 17, 13 C. 297, *Ref.*

——acceptance of part of an overdue instalment does not amount to waiver, as there is still something due and there is still a default. Similarly the acceptance of interest alone does not amount to waiver 31 C. 83 : 8 C. W. 66. (5 C. 97, 15 C 502) *Dist.* (1 B. 125, 17 B. 555, 20 B. 109, 27 B. 2 12 M. 161), *Ref.*

[illegible] instalment amounts to waiver. 27 B.

[illegible] with or forego something to [illegible] I 1172.

[illegible] om the breach, but it is not so [illegible] be (1) by accepting overdue [illegible] for such instalment 19 C. W N. 1142.

——acceptance, for long time, of rent at a rate lower than that stipulated in the kabulyat does not amount to waiver. 60 L C 86 (C).

——landlord's acceptance of rent at low rate for sometime does [illegible] 20 C. W. N. 347 680 16 C. W. N. 242, 496 37 C. 393 :

[illegible] see "*T. P. Act Se 112 and*

WILL see "*Hindu Law, will and Mahomedan Law, will*"
WITNESS see "*Evidence Act, Witness*"